



**N**ational  
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**C**ouncil

**ISSUES OF FAIRNESS AND JUSTICE  
IN ALTERNATIVE DISPUTE  
RESOLUTION**

**DISCUSSION PAPER**

**CANBERRA  
NOVEMBER 1997**

**NATIONAL ALTERNATIVE DISPUTE RESOLUTION  
ADVISORY COUNCIL**

**ISSUES OF FAIRNESS AND JUSTICE IN  
ALTERNATIVE DISPUTE RESOLUTION**

**DISCUSSION PAPER**

**Canberra**

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## **PUBLIC CONSULTATION**

The National Alternative Dispute Resolution Advisory Council (NADRAC) is seeking public comment on:

- The issues raised and the suggestions canvassed in this Discussion Paper;  
and
- Any issues, concerns or suggestions relevant to the debate, not directly covered or not covered in the Discussion Paper.

Persons and organisations who wish to make submissions or submit comments on the issues raised and the suggestions made in this Discussion Paper are asked to do so in writing making reference, where applicable, to relevant Chapter and paragraph numbers.

All submissions received by the Council will be considered to be public documents and may be made publicly available unless there are reasons for confidentiality. If you would like your submission, or any part of it, to be treated as confidential please advise the Council and state your reasons for seeking such confidentiality. You should be aware that confidential material may have to be released under the *Freedom of Information Act 1982*.

The closing date for submissions is 27 March 1998.

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## **THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL**

NADRAC is an independent advisory council charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.

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## **DIVERSITY COMMITTEE TERMS OF REFERENCE**

The Discussion Paper was developed by NADRAC's Diversity Committee. It is reflective of the Committee's terms of reference which, in turn, are reflective of the Charter presented to the Council by the Commonwealth Attorney-General.

### NADRAC Charter

In addition to the Attorney-General referring particular issues to the Council from time to time for consideration and report, the Charter provides that the Council may make recommendations of its own motion to the Attorney-General on matters relevant to its Charter.

In accordance with its Charter, the issues on which NADRAC is required to advise the Attorney-General include:

- . minimum standards for the provision of alternative dispute resolution (ADR) services; and
- . the suitability of ADR processes for particular client groups and for particular types of disputes.

### Committee Terms of Reference

The **Diversity Committee** was established by the Council to consider these issues. According to its terms of reference, the Committee is charged with the task of considering:

- . areas of difference between client groups which can affect the fairness and justice of ADR procedures and outcomes;
- . factors within particular dispute resolution processes which can affect the fairness, justice and suitability of those processes, for particular client groups and disputes; and
- . appropriate standards for the provision of ADR services given the diversity of client needs and ADR processes.

In performing its functions, the Committee is required to consult broadly with ADR organisations, service providers and practitioners, courts and tribunals, government,

the legal profession, educational institutions, business, industry, consumer groups and community organisations, as well as the Family Law Council and the Family Services Council if appropriate.

*Members of the Diversity Committee*

The members of the Diversity Committee who developed the Discussion Paper were:

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# OVERVIEW

## INTRODUCTION

1. Alternative dispute resolution (ADR) procedures have the potential significantly to reduce the costs and delays associated with traditional court proceedings.
2. As Australians seek less formal means of dispute resolution and governments attempt to contain the costs of the formal court system, the size of the ADR sector is expanding significantly and will continue to do so. ADR procedures are already being used by a wide range of Federal courts and tribunals and other organisations operating in the Federal arena. At the State level, ADR is also being used more frequently.
3. Increasingly also, in the commercial area, the influence of ADR is extending beyond the handling of individual disputes, to areas such as client complaints, employee grievances, enterprise bargaining, industrial relations, contract formation, management policy, industry self-regulation, joint ventures and long-term business relationships. In the commercial context, the emphasis is, increasingly, upon dispute prevention, management and resolution. In this sense ADR has moved beyond being an alternative to the formal justice system or to arbitration.<sup>1</sup>
4. ADR can assist at many levels. In a range of transitional and potentially critical situations, for example, facilitated negotiation<sup>2</sup> may help in the identification of issues and in the development of options.
5. In response to the growing use of ADR in this country, NADRAC was established in October 1995 to provide the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.

## RATIONALE

6. An increased awareness of the need for an adjunct to the formal justice system such as ADR to cater better for a range of user groups is reflected in various reports. These include, for example, the Australian Law Reform Commission (ALRC) report *Equality before the Law*; the first and second reports of the Senate Standing Committee on Legal and Constitutional Affairs, the 'Cost of Justice: First Report, Foundations for Reform' (1993) and the 'Cost of Justice: Second Report, Checks and Imbalances' (1993) and the Access to Justice Advisory Committee's 'Access to Justice Report'.

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<sup>1</sup> Jennifer David, *Dispute Resolution in the 21st Century*, 1995, page 1.

<sup>2</sup> A definition of facilitated negotiation appears in Appendix A to the Discussion Paper.

7. These reports have suggested a range of remedial actions, including, in some instances, greater use of alternative processes of dispute resolution. Because of their relative informality and the greater variety of approaches and solutions which may be adopted, ADR procedures are often regarded as especially suitable for use by those groups who may be considered ill-served by the formal justice system.

8. With the growing reliance on ADR, there is a corresponding and urgent need to ensure that ADR processes are capable of providing fair and appropriate outcomes for all user groups in Australia.

## **OBJECTIVES**

9. The objectives of this Discussion Paper are to examine:

- Areas of difference between user groups which affect the fairness and justice of ADR procedures and outcomes;
- Factors within particular ADR processes which can affect the fairness, justice and suitability of those processes for particular user groups and disputes; and
- Appropriate standards for the provision of ADR services in the context of the diversity of user needs and ADR processes.

10. Seven key social factors and potential user groups are identified for consideration in the Discussion Paper. They are:

- Gender - Alternative Dispute Resolution for Women and Men
- Minority Cultural Groups in Australian Society
- Age - Moving through the Life Cycle and Dispute Resolution
- People with Disabilities and Alternative Dispute Resolution
- Minority Sexual Preferences - Lesbians and Gay Men
- Geographic Location - Rural and Remote Communities
- Socio-economic Power Differences - Individuals and Bodies (incorporated and unincorporated).

11. Importantly, the various user groups can be more or less identifiable or cohesive. Individuals may well identify or be associated with a range of user groups. Moreover, the social factors at work in Australian society frequently intersect in complex ways and present cumulative challenges for policy formulation with respect to ADR and professional practice.

12. In its scope and emphasis, the Discussion Paper traverses areas previously afforded only limited consideration and with respect to which little has been written

to date that is directly relevant. It is an area ripe for investigation; for the affirmation and expansion of such checks and balances as already exist; and for the development of new strategies and applications.

13. The aim of the Discussion Paper is to promote increased interest, debate and consideration in this area on the part of ADR service providers and users. In the longer term, following on from this initial work by NADRAC, it is hoped that fairer ADR procedures and outcomes will emerge for all Australians.

## **STRUCTURE**

14. The Discussion Paper has three parts:

### **PART I: CONCEPTS AND DEFINITIONS**

Chapter I provides a general overview of concepts of fairness and justice in dispute resolution proceedings in terms of the needs of particular client groups. It focuses upon:

- The relationship between ADR and the formal justice system;
- The impact upon disputes of disputants' identity and intersections of identity;
- Fairness and justice in procedure and outcome;
- Public accountability;
- Bias;
- Power imbalance in ADR; and
- The concept of equality in ADR.

In Chapter 2, key elements of dispute resolution processes are identified and examined with reference to NADRAC's ADR Definitions Paper.

### **PART II: USER GROUPS**

Chapters 3 - 9 explore aspects of identity relating to members of each user group; assess the advantages of ADR for members of those groups; identify barriers to fairness and justice in the provision of ADR for group members and propose strategies at both the general program provider and the individual ADR dispute

resolver levels for maximising the advantages and minimising the disadvantages of ADR for the members of each group.

### **PART III: RECOMMENDATIONS FOR POLICY MAKERS AND GUIDELINES FOR PRACTITIONERS**

Having regard to the issues raised in preceding chapters, Chapter 10 of the Discussion Paper makes a number of suggestions for policy makers. A set of draft guidelines (based on concepts of fairness, user needs and interests) is suggested to underpin standards for the provision of ADR services to those user groups who are less able or empowered to access and participate effectively in ADR.

## **ISSUES ON WHICH COMMENTS, SUGGESTIONS AND INFORMATION ARE SOUGHT**

1. This Discussion Paper addresses areas previously afforded only limited consideration and with respect to which little has been written to date. Accordingly, although a number of issues are specifically raised in the Discussion Paper for consideration and comment, **the intention is not to limit comment or to confine suggestions to those issues. Readers are encouraged to comment and provide information on any other issues raised or not raised in the Discussion Paper.**
  
2. As it has not been possible to canvass views directly with members of the seven user groups under consideration, **accounts and practical examples of the barriers to the provision of fair and just ADR services and examples of situations in which ADR has been helpful to members of these groups would be extremely useful. If it is not possible for you to comment on the entire Discussion Paper, comments on a particular Chapter or Chapters would be most welcome.**

### **PART I: CONCEPTS AND DEFINITIONS**

3. The following questions are asked and information sought.

#### **Chapter 1: Fairness, Justice and ADR**

##### *Paragraph 1.43*

- To what extent should dispute resolvers intervene to ensure fair and just outcomes and by whose or what standards?
- Are guidelines needed for dispute resolvers on questions of fairness, neutrality and the use of dispute resolver power?
- Are guidelines needed to assist dispute resolvers in determining when they should terminate a dispute resolution process?

##### *Paragraph 1.49*

- How might the problem of privatisation be resolved without placing too great a burden upon dispute resolvers?

## **Chapter 2: Key Elements of Alternative Dispute Resolution**

### *Paragraph 2.32*

- What external resources are used in the resolution of disputes?
- In what circumstances are they used?
- What benefits and problems arise from their use?

### *Paragraph 2.49*

- What methods can dispute resolvers legitimately use to create and maintain equal bargaining power between participants in mediation (or other ADR processes) without compromising neutrality?

## **PART II: USER GROUPS**

### **Chapters 3 - 9**

4. In each Chapter comments, suggestions and information are sought on:

- **The barriers to fairness and justice in ADR for each of the user groups identified in the Chapter.**
- **The strategies set out in each Chapter for addressing these barriers.**

5. In Chapters 3, 4, 5, 6, 8 and 9, it is also asked whether the suggestions made in Chapter 1 (paragraph 1.49) are adequate responses to privatisation concerns in disputes involving issues relevant to aspects of identity under consideration in those Chapters? Related questions appear in Chapter 7.

6. The following questions are also asked and information sought:

### **Chapter 3: Gender - Alternative Dispute Resolution for Women and Men**

#### *Paragraph 3.15*

- Further information is sought with respect to the changing social roles and the difficulties and discrimination which may be encountered by men.

#### *Paragraph 3.40*

- What difficulties do women confront in the ADR negotiation process?

#### *Paragraph 3.66*

- Do men experience gender bias in ADR proceedings?

#### *Paragraph 3.68*

- Are men comfortable with the ADR negotiation process?
- Do men feel more comfortable talking about some issues than about others?
- What other forms of gendered power imbalance are experienced by men?
- Are there gender issues of concern to men which are/may effectively be concealed by ADR?

### **Chapter 4: Minority Cultural Groups in Australian Society**

#### *Paragraph 4.09*

- NADRAC would be grateful for information, comments and suggestions about the cultural minority groups that it has not been possible to consider specifically in this Chapter.

#### *Paragraph 4.32*

- What other forms of systemic cultural bias may ADR processes and proceedings give rise to for members of cultural minority groups?

#### *Paragraph 4.76*

- Is co-mediation used in some cross-cultural disputes?

- Does it assist in redressing power imbalances and bias?
- In terms of the availability of dispute resolvers from minority cultural groups, is co-mediation a realistic option in many disputes?

*Paragraph 4.86*

- What other training methods or initiatives have proved or might prove useful in disputes involving members of cultural minorities?

*Paragraph 4.98*

- In dealing with cross-cultural disputes, how might dispute resolvers best achieve a 'level playing field' for members of one group without attracting negative responses from members of other groups?

*Paragraph 4.100*

- Do interpreters need training to acquaint them with ADR processes?
- Is training needed for dispute resolvers in the use of interpreters?

*Paragraph 4.104*

- What sorts of barriers do members of cultural minority groups encounter in accessing ADR services and information?
- How is information about ADR currently distributed to members of minority cultural groups and how might this be improved?

## **Chapter 5: Age - Moving Through the Life Cycle and Dispute Resolution**

*Paragraph 5.69*

- What other barriers are there to fairness and justice in ADR for children?

*Paragraph 5.76*

- What other barriers are there to fairness and justice in ADR for adolescents?

*Paragraph 5.88*

- What other barriers are there to fairness and justice in ADR for elderly adults?

*Paragraph 5.97*

- Do advocates act in the best interests of children and/or members of other age groups?
- Do they assist in redressing power imbalances between the participants?

## **Chapter 6: People with Disabilities and Alternative Dispute Resolution**

*Paragraph 6.65*

- How do power imbalances commonly manifest themselves for people with disabilities?

*Paragraph 6.72*

- Are there any other ways in which the creative skills of dispute resolvers might be developed to enable appropriate changes to be made to procedures?

*Paragraph 6.75*

- Information is sought as to the sorts of accommodations which dispute resolution service providers find it difficult to respond to, and of the approach that is/might be adopted in such circumstances.

*Paragraph 6.81*

- Would a disabilities awareness program be a useful response to the possibility of stereotyping and individual bias?
- What accessible resources can dispute resolvers call upon to educate themselves about attitudes and stereotypes with respect to disability?

*Paragraph 6.88*

- Where advocates are used in ADR proceedings, are they representing the best interests of people with disabilities?
- Would advocates benefit from training to acquaint them with the aims and objectives of ADR procedures?
- Do dispute resolvers need training in the use of advocates?

- What other methods of responding to power imbalance can be used or accessed by dispute resolvers?

## **Chapter 7: Minority Sexual Preferences - Lesbians and Gay Men**

### *Paragraph 7.02*

- Information would be welcome on the experiences of transsexuals and bisexuals in the area of dispute resolution. Further information would also be welcome with respect to lesbians, gay men and dispute resolution.

### *Paragraph 7.51*

- Are there circumstances in which it might be in the broader public interest to bring disputes involving members of sexual minorities to the attention of the public?
- Would privacy, perhaps one of the greatest attractions of ADR for lesbians and gay men, be put at risk if measures such as those suggested in Chapter 1 (Fairness, Justice and ADR) (paragraph 1.49) were adopted?

## **Chapter 8: Geographic Location - Rural and Remote Communities**

### *Paragraph 8.19*

- Are there any other types of disputes not mentioned here which are characteristic of rural and remote areas or which raise particular issues because of the location of the participants?

### *Paragraph 8.25*

- To what extent is ADR presently used in rural and remote areas?
- What dispute resolution processes are used and for which disputes? What expansions/developments in the use of ADR would be possible or desirable?

### *Paragraph 8.57*

- Suggestions are sought as to how a 'back-up' information service could be developed, and the sorts of information and expertise to which it should provide access.

## **Chapter 9: Socio-economic Power Difference - Business and Individuals**

### *Paragraph 9.12*

- Given the likely power imbalances, in disputes between large corporations and customers can ADR result in agreements that are in the best interests of both participants?

### *Paragraph 9.32*

- What are the ethical obligations of a dispute resolver in situations such as this?
- How do they differ from those of a legal representative for a party?

### *Paragraph 9.37*

- What sources of funding for effective participation are/should be available?
- If the Government or a socio-economically stronger participant mandates ADR, should they be obliged to pay for measures to promote effective participation by the other participant(s)?

## **PART III: RECOMMENDATIONS FOR POLICY MAKERS AND GUIDELINES FOR PRACTITIONERS**

### **Chapter 10: Towards Recommendations for Policy Makers and Guidelines for Practitioners**

#### *Paragraph 10.56*

- Comment is sought on the policy recommendations and practitioner guidelines set out in this Chapter, and upon the more specific conclusions drawn and suggestions made in Chapters 3 - 9 of the Discussion Paper.



## **PART 1: CONCEPTS AND DEFINITIONS**



## **CHAPTER 1**

### **FAIRNESS AND JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION**

#### **INTRODUCTION**

1.01 Most of us have conflict in our daily lives at one time or another, but not many of those conflicts become disputes and only a small proportion of those disputes are taken to third parties for resolution. When we do decide to seek assistance in the resolution of a dispute, there is a range of dispute resolution mechanisms available to us of which the formal justice system and alternative dispute resolution are but two examples.

1.02 In quantitative terms, the courts have been outstripped by tribunals, alternative dispute resolution (ADR) or other dispute resolution mechanisms. Additionally, many disputes do not raise legal issues, or are too small or too personal to litigate. Increasingly also, ADR is seen, not as an alternative to the formal justice system, but as a dispute resolution system in its own right. Both systems are important and both need to be fostered. A choice of different systems of dispute resolution is important. This is particularly so in the commercial area where ADR is, increasingly, part of an overall dispute management process in which disputes are regarded as constructive events, and in which the emphasis is upon dispute prevention, management and resolution quite apart from the formal justice system.

1.03 Despite these developments, litigation remains the dominant method of dispute resolution in Australia. Whilst most disputes are resolved without going anywhere near a court, many disputes are resolved “in the shadow of the law”. They may be resolved on the basis of legal rules or understandings about the law (either informed or uninformed); on expectations about what will happen if the dispute is taken to court; or in reaction to the law, because of a desire to avoid the consequences of going to court. Litigation and the formal justice system thus exert a more or less powerful influence over the decisions people make about many disputes and over other forms of dispute resolution.

## **Safeguards - The Formal Justice System**

1.04 Whilst litigation has many problems as a dispute resolution mechanism, it nevertheless contains many safeguards of fairness and justice. Power imbalances between the participants can be ameliorated by legal representation. Procedural and evidentiary rules ensure that each person has a chance to present their case and to challenge the arguments and evidence of the other person. There are enforceable procedures which ensure that each person has access to relevant evidence so that the dispute is decided on the basis of appropriate disclosure of information. There is a well qualified and respected third party decision maker who evaluates the evidence and arguments of the parties and who makes a decision according to established principles. The process of litigation is open and observable and decisions are subject to appeal.

1.05 The protections offered by litigation may be uncertain. Formal justice is expensive and access may depend on the capacity of the parties to pay for it. Further, the protections provided by the formal justice system make it expensive and slow.

## **RELATIONSHIP BETWEEN ADR AND THE FORMAL JUSTICE SYSTEM**

1.06 ADR continues to be turned to by many in response to the problems of the formal justice system, especially its problems of expense and delay. Two claimed advantages of ADR are speed and cheapness, although ADR is only cheaper and quicker if it is successful. An ADR process which fails may increase delay and cost, depending on the circumstances. Other advantages claimed for ADR include greater flexibility, increased participant control of both process and outcome, confidentiality and benefits to ongoing relationships.

1.07 By embracing the advantages of ADR however, there is a danger that the participants may lose some of the safeguards available to them under the formal justice system. For example, in ADR processes such as mediation, procedural fairness may be maintained, but there is no third party decision maker who decides what is a just outcome. The participants must decide this for themselves. Without an “umpire” the participants may come to an agreement which is significantly outside community norms. It could be argued that departing from community norms is acceptable if that is what the participants wish to do. However, the problem with giving control to the participants rather than a third party decision maker, is that the agreement may do grave injustice to one of the participants, or fail to take into account the interests of vulnerable third parties or of matters of public interest.

1.08 ADR has become more accepted and readily available as a method of dealing with disputes, and one of the challenges for this new area of endeavour is to develop understandings of the ways in which ADR can ensure fair and acceptable outcomes.

1.09 At its best ADR should provide sensitive, adaptable methods of dispute resolution which can respond to the needs of the participants both in terms of the process by which they achieve an agreement and the nature of the agreement they reach. It should be able to provide fair agreements consistent with the best interests of all Australians, whatever their identity and in whatever situation they find themselves.

### **Suitability of ADR for Non-dominant Groups**

1.10 ADR is often seen as particularly suitable for members of non-dominant groups. It is sometimes claimed that the formal justice system does not always cater adequately for their needs. ADR can be more flexible and adaptable to the needs of disputants. Participants in ADR can agree to apply their own values to their dispute, rather than legal rules that may not seem appropriate. ADR can involve processes and outcomes which are different from those under the formal justice system but which better meet the participants' needs and interests. ADR has significant potential, therefore.

1.11 However, ADR does not automatically have these capacities. It may have great potential, but its potential will only be realised by ADR providers understanding the needs of their users and making accommodations sensitive to those needs. If ADR providers do not understand the needs of those who approach them to resolve their disputes, they cannot provide a service which will help to ensure fair procedures and outcomes.

1.12 Little has been written about the needs of marginalised and less powerful groups in ADR. However, service providers recognise a compelling need for information in this area. Work on gender issues in family mediation has raised many important issues for mediators. The use of ADR in disputes over Native Title and in the context of race discrimination have pointed up the significance of race and culture in ADR. However, whilst there is some literature which ADR providers can use to assist in their practice and their education and training, there are other areas where little exists to assist the reflective practitioner.

1.13 This Discussion Paper seeks to raise a number of issues for discussion. These include the ways in which understanding about diversity in ADR may be developed and the needs of disputing parties may be better understood. It is hoped that the Discussion Paper will inspire debate and discussion amongst ADR practitioners and provoke thoughts and comments from practitioners, from members of the groups under discussion and others.

### **FAIRNESS AND JUSTICE AND ADR**

1.14 In this first chapter we explain our thinking about a number of issues which are important in providing fair and just methods of resolving disputes for all

Australians. We first look at identity and explain what we mean by identity and the complex issues it raises. We also consider what we mean by fairness and justice in this context as well as examining the important topics of public accountability, equality, bias and power imbalance.

## **Identity and the Intersections of Identity**

1.15 Our identities have a powerful effect on the way we react to disputes, the choices we make about how to handle them, and our chances of resolving them fairly and in accommodation of our needs. What do we mean by identity? Everyone has an identity - for example, we all have a gender, a race, a sexuality. We are urban dwellers or country people. We are old or young, able bodied or we have a disability. Aspects of our identities may be apparent to most (gender); to some (sexuality) or to no-one (some sorts of disability). How does our identity affect us as disputants?

1.16 Suppose a citizen is detrimentally and, they believe, unfairly affected by a decision of a government department. If they are an articulate, middle class, professional person they may employ various strategies to deal with the injustice. They may access professional networks to find useful information about the way in which such government decisions are taken. They may protest at a higher level in the department. They may attempt to negotiate a change of the decision. If this fails, they may take legal advice, perhaps take legal action and even commence court proceedings.

1.17 However, if the citizen is a recent immigrant to Australia, for whom English is a second language and who originated from a country in which state bureaucracies are intransigent except to those who are well connected, there may be many obstacles to their having the unfair decision reviewed. Such a citizen may well decide to “lump it”, and accept the decision without protest, believing (perhaps falsely) that their chances of having it reviewed are negligible. For a range of reasons stemming from experiences in their country of origin, and their experiences as immigrants in this country, they may decide that to attempt to have the decision reviewed would be a fruitless exercise. Even if they do decide to take action, they may find negotiating a change difficult because of the challenges of language and an unfamiliar culture. They are also likely to find accessing legal advice more challenging, and be less willing to commence litigation.

1.18 Both of these citizens could, by one route or another, find themselves trying to resolve their dispute in ADR, for example, in mediation. Their identities are also likely to affect their participation in mediation. There are likely to be differences in their capacity to understand the mediation process, articulate their position and needs and assert their interests. Their sense of their own entitlement - that their views count for something and that they deserve a fair and unbiased process - is also likely to be significantly different and may lead the less powerful to bargain for less and to settle for less.

1.19 Of course, our articulate middle class disputant will not always have the advantage in the resolution of a dispute. The advantage depends on the situation. Transported to a newly acquired hobby farm and in dispute with a neighbour about burning off paddocks, the city professional may find him or herself considerably disempowered.

#### Identity and ADR dispute resolvers

1.20 If ADR is to provide a fair process and fair outcomes, it is important that dispute resolvers understand the impact of identity on the dispute resolution process, and that they take it into account when making decisions. For example, when deciding if a dispute is suitable for ADR or how to compensate for power imbalance between participants in ADR, issues of identity may be of great importance. Responding appropriately to the identity of disputants does not, of course, mean that ADR practitioners should respond on the basis of stereotypes about particular groups. Dispute resolvers must pay careful attention to the needs of the individuals with whom they work, rather than responding on the basis of assumptions about the characteristics of members of groups to which disputants belong.

#### Intersections of Identity

1.21 Responding appropriately also means taking into account the intersections of identity. A range of aspects of identity go to make up who we are. We cannot be separated out into the components of our identity and have each aspect dealt with separately. Some Aboriginal women, for example, have taken issue with white feminists' emphasis on gender, pointing out that, for them, race is the most powerful determinant of their daily experiences.

1.22 To give another example of intersections of identity, in 1986 the High Court heard the case of two Vietnamese women who alleged that they had been discriminated against by the Postal Commission.<sup>3</sup> The women wanted permanent employment with the Commission and to get it they had to have a medical test. They both failed the test, because it applied height and weight requirements that they could not meet. They could not comply because those height and weight charts were constructed on the model of Caucasian males and they were Vietnamese females. The two women complained of discrimination. Because of various problems with the legislation they could only complain of discrimination on the ground of their gender. Their height and weight was a function of both their gender and their race but the law could only take account of their gender.

1.23 Men who have disabilities report that they are often seen differently to men who are able bodied. Able bodied males are assumed to need to have emotional and

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<sup>3</sup> *Dao v Australian Postal Commission* (1987) EOC 92-193

sexual relationships. Men with disabilities say that they are often perceived as 'sexless'. People with disabilities who live in rural or remote areas often face additional difficulties to those who live in urban areas. They may also face problems of comparative poverty.

1.24 In this Discussion Paper we have tried to point out some of the intersections of identity. We welcome further examples. If providers of ADR are to make reasonable accommodations to the needs of users of ADR, they need to understand the complexities of the challenges faced by all users of their services.

### **Fairness and justice in procedure and outcome**

1.25 Some people have argued that the term 'justice' should not be used in relation to ADR. They feel that 'justice' should be used only to refer to the procedures and outcomes of the formal justice system. ADR may involve a departure from justice in the sense that what is agreed in an ADR procedure may differ - sometimes quite substantially - from what would have been decided by a court. Indeed, the accommodation of non-legal principles is a prime advantage of ADR.

1.26 However, according to their dictionary definitions, the words 'justice' and 'fairness' are essentially interchangeable. They are used in this sense in this Discussion Paper.

#### *What is procedural fairness?*

1.27 Many discussions about fairness in ADR focus entirely or substantially on process and procedure. This is because ADR is perceived to be an alternative procedure to litigation. People are being offered a way to resolve the same disputes they might have taken to litigation - but using different procedures. Not surprisingly, given that ADR in its present form is new and must justify its place, much time has been taken up in elaborating the procedural advantages of ADR over those of litigation.

1.28 Examples of such advantages are the control over procedures by the participants and their ability to be 'heard' and to participate in developing the outcome. In litigation, control is likely to be given over to lawyers. Lawyers are experts - but their clients may feel that the expert takes over. Clients may feel that the dispute is out of their hands, and is being taken in directions they may not endorse. They may be asked to choose between directions all of which they find unsuitable or which do not suit their needs. ADR is seen as having the advantage that the participants can make their own decisions about how they deal with their dispute, can do it at their own pace and according to their own understandings of what the dispute is about. Even if the alternative process involves a third party

decision maker (as arbitration does for example<sup>4</sup>), the participants can choose the identity of the arbitrator, decide if they want legal representatives to present arguments to the arbitrator, or decide which issues to submit to arbitration.

1.29 Many other illustrations could be chosen of the claimed procedural advantages of ADR. Procedural issues may be fairly described as the preoccupation of ADR providers and they have directed much attention to what is a fair process. Some of the factors that they might emphasise in defining a fair process are:

- The participants make a free and informed choice to enter. This means, amongst other things, that the participants understand the nature of the process and what will be required of them when they participate. It means that there is no threat, compulsion or coercion to enter or stay in the process.
- All parties have the capacity to participate effectively.
- The parties are able to raise all of the issues which are important to them, and to put their point of view fully.
- The parties hear the other side and can question and challenge what the other participant says if they need to do so.
- A balance of power between the parties.
- Access to all relevant information.
- Access to the support and advice needed by the parties.
- Any third party who is involved in the process is unbiased, and that lack of bias is apparent.
- A fair outcome, that is, an outcome determined by the participants.
- Referral to other resources if the process cannot provide a fair or just outcome or does not in fact do so.

1.30 There is no neat separation between fairness and justice of procedure and fairness and justice of outcome. An unfair procedure is highly unlikely to produce a fair outcome. Good, effective procedural rules and practices are there to ensure that a fair outcome is achieved. For example, there are procedures in litigation and ADR which are designed to ensure that decisions are taken on the basis of all the relevant information. A decision taken without relevant information may be unfair. For

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<sup>4</sup> A definition of 'arbitration' appears in Appendix A to this Discussion Paper.

example, if property is shared between the parties to a marriage or business partners, and assets have been concealed by one of the parties, the result will not be fair.

### Fair and just outcomes

1.31 It is necessary that there be fairness in relation both to process and outcome. One is not enough. For example, where mediation or conciliation was first used between Aboriginal and non-Aboriginal peoples it was praised because it provided the Aboriginal people with the opportunity to speak out to people who previously had not been prepared to listen. However, important though this opportunity may be, it is surely not enough if the opportunity to speak and be listened to is all that ADR provides. If the issues in dispute were not resolved fairly and justly - if the Aboriginal people were not truly heard and their reasonable complaints responded to appropriately - then the dispute resolution mechanisms can reasonably be said to have failed.

1.32 The fulfilment of three levels of interest has usefully been said to be necessary to the achievement of a fair and just outcome.<sup>5</sup> They are:

- Substantive interest: the tangible requirements such as money and time which are a major focus of the ADR negotiating process;
- Procedural interest: the way the participants discuss their interests and the manner in which the bargaining outcome is implemented;
- Psychological interest: the emotional and relationship needs that a disputant has both during and as a result of the negotiations. For example, disputants want to be respected and not degraded by the other party during the negotiations.

1.33 For the participants, their view of their substantive interests may be shaped by many factors, including:

- The likely outcome under the law;
- The view of the majority of the community (however that view is to be ascertained);
- The view of various groups or minorities in the community (although there may not be homogeneity within a group);
- Their shared values and beliefs; and

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<sup>5</sup> Christopher W Moore, The Mediation Process - Practical Strategies for Resolving Conflict, Jossey - Bass Publishers, 1991, page 37.

- Their individual values and beliefs.

1.34 In the context of the formal justice system the law decides what is just and appropriate. Not everyone shares the values which are embodied in the law. However, it provides an objective standard with regard to rights, entitlements and obligations which most people accept, for a variety of reasons.

1.35 In contrast, as noted, using ADR allows the participants to depart from the law's idea of fairness and justice, and to agree according to their own needs, values and wishes. For example:

A woman after separation may wish to maintain a good relationship between the children who reside with her and their father. She may wish to accede to her ex-husband's request to accept less property than she could get if she negotiated hard or litigated. She may do this freely after full legal advice because there is sufficient property, she has the earning capacity to allow her a comfortable lifestyle and she has no wish to engage in conflict with her ex-partner because she fears it will affect the relationship between the father and the children.

Two gay men after a relationship breakdown may both believe that litigating in the Supreme Court for property division on the basis of equitable principles will not properly reflect the nature of their relationship, nor produce an outcome which adequately compensates one of them who made non-financial contributions to the relationship. They may use mediation to agree that one will pay the other a lump sum of money and maintenance for a period which will allow the recipient to complete a qualification.

1.36 Both examples are of cases where an agreement reached in ADR produces results somewhat different from those the law would provide. However, the differences are not startling, and the results probably do not depart markedly from community ideas of fairness. Many people would be likely to find these agreements fair.

1.37 There will, no doubt, be other situations however, where departure from community standards in an agreement is unfair or unjust. What if the wife in the example above, (who wishes to agree to less property than she may otherwise be entitled) has not had legal advice, does not have enough money to maintain herself and the children in a comfortable lifestyle, and her anticipation of a good relationship between the children and their father are based on her irrational hopes of reform of a self centred sociopath?

1.38 If ADR processes produce an unfair result, a disputant may subsequently go to litigation. Then the parties and the taxpayer must pay for both the ADR and the litigation. However, their willingness or capacity to litigate may be limited by a number of factors. They may not have the emotional or financial resources to do so;

they may not have access to information and advice which would let them know that the result was unfair or unjust; they may feel (rightly or wrongly) that their chances in the formal justice system would not be good; they may know that the formal justice system will not provide them with what they need.

### Involvement of Dispute Resolver in Achieving Fairness of Outcome

1.39 Opinions are not unanimous as to when, and to what extent a dispute resolver should step in to avoid what most people would regard as a patently unfair outcome. The generally accepted view is that, beyond assisting a fair outcome by ensuring the procedural fairness of the process, the role of the dispute resolver is limited.

1.40 According to this view, the dispute resolver's responsibility is to ensure that the participants:

*'... understand their choice and to explore with them their enlightened self interest, but not to impose ... values upon them.'*<sup>6</sup>

1.41 On the other hand, however, the 'Standards of Practice for Lawyer Mediators in Family Disputes' adopted by the American Bar Association in 1984 provide that a mediator:

*'... should be concerned with fairness ... (and) has an obligation to avoid an unreasonable result'.*

1.42 Similarly, Queensland Community Justice Program Guidelines stipulate that the mediator has a responsibility to the participants to reach a fair and equitable settlement. In disputes involving issues of public as well as private interest, it has also been said that dispute resolvers have a broader responsibility.<sup>7</sup> In environmental disputes, for example, it has been suggested that dispute resolvers have a responsibility towards the general public and future users for the preservation of their dwindling resources.

1.43 The effect of this wider view of the responsibility of dispute resolvers is, of course, to shift the focus of interest from the parties themselves to the dispute resolver. Arguably, this may seriously undermine general concepts of ADR as an empowering process for the participants to a dispute in which they themselves assume the primary responsibility for reaching an agreement. It would also seem to undermine principles of third party neutrality<sup>8</sup> requiring that the dispute resolver be more sensitive to community standards and needs than the participants themselves,

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<sup>6</sup> Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns', (1990) 2 Journal of Dispute Resolution, quoting from Patton, 'A Brief Outline of the Mediation Process', (Jan 14, 1982), (unpublished paper held by the author), page 347.

<sup>7</sup> Judith Maute, op cit note 6.

<sup>8</sup> Neutrality is discussed in the following Chapter of the Discussion Paper.

and that they can recognise what most people would regard as a patently unfair agreement. This may not always be the case.

***To what extent should dispute resolvers intervene to ensure fair and just outcomes and by whose or what standards?***

***Are guidelines needed for dispute resolvers on questions of fairness, neutrality and the use of dispute resolver power?***

***Are guidelines needed to assist dispute resolvers in determining when they should terminate a dispute resolution process?***

## **Public Accountability**

1.44 In some situations, where the law is inadequate or where people wish to depart from legal constraints, the flexibility of ADR may be an advantage to individual disputants. On the other hand, where agreements are entered into which are unfair or exploiting of members of minorities, it may be a serious problem. Matters are dealt with behind closed doors and society as a whole is not afforded the opportunity to respond. Legal precedents are not allowed to evolve. Increasingly, ADR is being prescribed by Government as a means of resolving a range of disputes, many of which, for example, discrimination, may raise issues of public concern and interest.

1.45 In contrast, litigation has a number of advantages where issues of public concern and interest are involved as a result of its public nature as a method of resolving disputes. Disputes are resolved in a forum which is open and accessible to the public and courts carefully consider making decisions to exclude the public or to restrict the publication of information arising from court proceedings. Decisions of courts are reported where they contain important issues of law. Decisions are recorded and are appealable. The law is developed in important respects through precedent.

1.46 It is argued that some disputes are of such public importance that they should be dealt with openly and subject to public comment and that ADR is inappropriate in such circumstances. Disputes which reveal that there is a systemic problem may be concealed from public attention and others may suffer harm because they are not alerted to the problem. It is necessary to remember, however, that this difficulty is present in litigation also. Even where court proceedings are commenced, disputes are frequently settled. Where terms of settlement preclude publicity, issues may be effectively privatised.

1.47 Although one solution for ADR might be to refuse to accept disputes involving issues of public importance, it might not always be possible for people to turn to the formal justice system. This might mean, effectively, that they would be denied any form of recourse in their dispute. Moreover, this would only solve half

the problem. In many cases, it is not the individual case, but the trend reflected in a series of cases, that is a matter of public concern.

1.48 Another solution might be to consider ways in which the ADR movement can be made more accountable. It has been said in this regard that:

*'More annual reports are needed where agencies analyse outcomes, and the measures could be usefully compared with results from courts and other systems. More research is also needed to monitor success rates, costs, outcomes and satisfaction levels of parties. Private does not have to mean secret or lacking accountability. More independent research would go a long way to dealing with some of the concerns that some commentators have in this area. In addition, ADR practitioners could consider how they evaluate their work and if it can be submitted to independent scrutiny.'*<sup>9</sup>

1.49 Within the limits of confidentiality, agencies could produce information about the amount and nature of their work and the issues raised by that work. Perhaps, each dispute resolution agency could also establish a register of matters resolved by way of ADR, similar to that used by the courts. This would provide a resource for dispute resolution providers and would encourage a feeling for precedent. Additionally, in disputes involving public interest issues, some central record keeping body could be informed. This could be reported upon annually to the Commonwealth Attorney-General, Commonwealth and State Law Reform Commissions or Social Welfare bodies.

***How might the problem of privatisation be resolved without placing too great a burden upon dispute resolvers?***

## **Bias**

1.50 Bias is a factor which is just as likely to occur in ADR as anywhere else. If unchecked, it can seriously affect the fairness and justice of the proceedings and the level of user satisfaction with outcomes. For the purposes of this Discussion Paper, three types of bias have been identified:

### *Personal Bias in the ADR Service Provider*

1.51 This may be actual or perceived.

#### *Actual Bias*

Actual bias arises directly, albeit unconsciously, from our own socialisation and related prejudices. To encourage fairness in ADR proceedings, it is essential that dispute resolvers are conscious of their own 'point of view', and its possible impact upon the mediation or other ADR process. As reflected in comments made by

<sup>9</sup> Francis Reagan, 'Dilemmas of Dispute Resolution Policy', (1997) vol 8(1) Australian Dispute Resolution Journal, page 5 at page 15.

Justice Elizabeth Evatt in September 1993 with respect to the obligations of judges in this regard:

*'... all of us... are asked to be much more aware of where we come from in our society, what is our culture, our class background, our race background - all our values. We are asked to know where we stand, where we are located in our society...'*<sup>10</sup>

1.52 In practical terms, what is required is even-handedness and objectivity towards the participants in terms of the negotiation process, and an avoidance of any display of favouritism towards one or other party. Personal bias can be passive as well as active. An example of passive bias might be where, in support of a preferred participant or outcome, a third party fails to redress power imbalances, or problems of access or information.

#### *Perceived Bias*

1.53 As the name suggests, perceived bias is an impression of favouritism arising in the eye of the beholder. It may be triggered by a range of things - for example, words, expressions, the obvious aspects of identity of the ADR provider, signals inadvertently given or favours extended. Though more subtle than actual bias, it may be just as destructive of the trust between the dispute resolver and the participants. Members of more dominant or 'mainstream' sections of society may perceive bias because they may feel more entitled to have their views and perspectives recognised and implemented. People from minority groups may perceive bias as an inevitable element of their marginalised position in society.

#### Systemic Bias

1.54 Systemic bias is well described in the excerpt following from a Canadian sex discrimination case:

*'Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women just can't do the job.'*<sup>11</sup>

1.55 Systemic bias can exist at several levels. In the formal justice system, it may be found, firstly, in the substance of the law itself, either directly, or indirectly where laws, which appear neutral on their face, impact unfavourably and

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<sup>10</sup> Closing Session, International Conference of Women Judges, Wellington, New Zealand, September 1993.

<sup>11</sup> *Action Travail des Femmes v Canadian National Railway Co* [1987] 1 SCR 1114 at 1139.

disproportionately in practice upon different groups. Secondly, it may exist at the procedural level, favouring certain aspects of identity over others.

#### *Substantive Bias*

1.56 Substantive bias may be direct or indirect. Claims of substantive bias which have been made in the area of gender, for example, include the failure of law to take account of women's work in the home; difficulties in providing legal protection for women who are the target of violence; and failure to consider the disparate impact of seemingly neutral rules on women.<sup>12</sup>

1.57 An illustration of indirect bias is the unequal value ascribed to work in the home and in the work place under the *Family Law Act 1975* or the NSW *De Facto Relationships Act 1984* or with respect to accident compensation.

1.58 In so far as it can facilitate understanding of different value positions and assist conflicting participants to work out viable solutions, ADR may, at least in theory, provide a means of achieving outcomes free from substantive systemic bias. Agreements may be negotiated, for example, which do reflect the true value of women's unpaid work around the home, or which provide custody to a father in circumstances where this would be unlikely under the formal justice system.

#### *Procedural Bias*

1.59 This includes tendencies of dispute resolution processes to empower or disempower people and to favour one participant over another. For example, where one of the parties to a mediation is an articulate, English speaking, well educated television journalist, the emphasis upon direct face-to-face negotiations in mediation will give that person a considerable advantage over an elderly unemployed person whose first language is not English. Unless this imbalance, an admittedly extreme one, is recognised by the dispute resolver and addressed, neither the process nor the outcome are likely to be fair or just.

### **Power imbalance and fairness in ADR**

1.60 Power is one of the issues about which mediators and other ADR practitioners have been most concerned. Their concerns arise because, in most ADR mechanisms, there is no third party decision maker. The parties must negotiate with each other. If the process and the outcome is to be fair, all parties must have the willingness and capacity to negotiate and there must be rough parity of power between the parties. The identity of the participants in mediation may have a very significant impact on their capacity to negotiate effectively for their own needs and interests. Where power imbalances are not sufficiently addressed, one party may dominate the outcome to the extent that only their needs and interests are sufficiently met.

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<sup>12</sup> See generally in this regard ALRC Report 69, *Equality Before the Law* and R Graycar and J Morgan, *The Hidden Gender of the Law*, Federation Press, Sydney, 1990.

1.61 If we say that there must be rough parity of power between the participants, at least sufficient that both have the capacity to negotiate a fair resolution of their dispute, what do we mean by power in this context?

1.62 Power is not readily quantifiable. People do not have more or less power as a bucket is more or less full. A mediator cannot compensate for power imbalance by pouring a little more into the bucket of a disempowered participant in mediation. Power is much more complex than this. One of the sources of power is identity. Society accords social value to certain groups. Members of those groups therefore may be said to have power. We accord social value to a white, male doctor, for example and such a person may well find that they are more advantaged in negotiation than is a female Aboriginal health worker.

1.63 Power may also be acquired through education, acquisition of wealth, through social networks and in many other ways. Power also varies with context. In her community, the Aboriginal health worker may be a respected elder with much power. In negotiating with his adolescent daughter about whether she may wear purple velvet lace up workers boots to her grandmother's house, the doctor may feel that his professional status benefits him not at all. Very few people are powerful in all situations and all of us are powerful in some situations and relationships. Our power may also change over time as our knowledge, skills and resources increase or diminish.

1.64 An individual can also have power and be unwilling to use it. For example, the manager of a large business may have the power to put a small supplier out of business, simply by litigating a dispute and thus requiring that the supplier incur costs that they cannot support. However the manager may decide that they will not litigate, but will use ADR. The manager may value a long term relationship with the supplier because the supplier has unique access to sources of desirable commodities for example. A person with power may also be unable to use it. They may be so emotionally affected by the dispute, or by other events in their lives, that they become depressed and lack capacity to negotiate effectively.

1.65 Although certain groups in society are accorded power, it would be a mistake for dispute resolvers to make assumptions about power based on stereotypes about those social groups. Power is a complex, shifting phenomenon, variable according to context. It cannot be diagnosed and taken into account by making simple assumptions based on membership of social groups. Nevertheless, identity should not be ignored in considering power in mediation. It is an important dynamic which, if ignored, can result in injustice or unfairness.

## The Concept of Equality in ADR

### Formal Equality

1.66 The idea of equality is a very important one in our thinking about justice and fairness. One approach to equality has been called formal equality. Formal equality involves treating everyone equally. The idea is that if all people are treated equally, fairness and justice will be achieved. However, this is not necessarily the case. If people who are unequal are treated equally, the result will be inequality.

1.67 There is no equality, for example, if someone who is sight impaired is asked, unaided, to fill out a loan application in the same way as someone who is not sight impaired.

1.68 The same sorts of problems can arise in resolving disputes. If people who go to mediation, for example, are not equal in their capacity to utilise ADR and there is a great power imbalance between them, the outcome is unlikely to be fair or just. Even if the mediator treats both with strict impartiality, the result may be unjust. Take the example of a commercial mediation where there are two participants to a dispute. One of the participants in the mediation is an intelligent, articulate professional representative of a large corporation with access to great resources of money and advice. The other is the owner of a small business with no professional support or advice and a talent for hard manual work rather than talk. These differences of personal style may turn into positive or negative attributes in the context of ADR. Treating people as equals when they are in dispute may still result in an unfair agreement.

1.69 The Family Court expressed it in the following way:

*'To say that the doctrine of equality before the law requires that all people receive equal treatment is superficially correct. However, that is no more than the starting point of an examination of equality.'*

*'Perhaps the principle is better expressed by saying that all people should be treated with equal respect. By recognising that this represents the essential content of equality, one realises that equal justice is not always achieved through the identical treatment of individuals. In many cases, superficially identical treatment has a disparate impact on individuals; the same law or the same conduct may have the effect of respecting the essential humanity of certain persons while ignoring or undermining that of others. Equality and discrimination cannot be measured at a superficial level ...'*

*'What emerges once the concept of equality or equal justice is examined in any real sense, is the recognition that it simply cannot be equated with identical treatment. One cannot use what has become known as "formal equality" as the sole test of the presence of equality or the absence of discrimination.'*<sup>13</sup>

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<sup>13</sup> Per Fogarty, Kay and O'Ryan JJ, *B and R and the Separate Representative* (1995) FLC 92-636.

## Substantive Equality

1.70 Substantive equality - equality of result - requires that unequals be treated unequally, that those who are underprivileged, oppressed, comparatively powerless, are provided with what they need to enable them to participate equally and to achieve a fair and just outcome. Of course, in order to achieve real equality, the existence of the underprivileged, the lack of power or the oppression must be recognised. It must be compensated in ways which are appropriate and empowering. Knowing how to provide justice and fairness to disempowered people requires that their view of the problem be listened to. If the powerful simply provide what *they* think the disempowered need, deserve, or are entitled to, they may provide something which is quite inappropriate.

1.71 To draw a sporting analogy, in many sports, accommodations are made for the various skill levels and capacities of individual sportspeople. To ensure a fair and an entertaining competition, participants are frequently graded according to their ability, age, or, in the case of sports such as boxing, their weight. In ADR however, participants cannot be graded in this way. Inevitably, some people will be less well equipped, whether financially, intellectually, in their communication skills or in terms of the information available to them, for example, than others. To the extent that it requires participants to negotiate directly with each other, ADR places particular demands upon participants. Sometimes, it may be necessary for a dispute resolver to actively intervene to ensure, for instance, that both parties have all the relevant information, that they have adequate childcare care facilities, that the proceedings take place at a time and place that is suitable to both parties or that an advocate or an interpreter is available. Unless these sorts of accommodations are made, a mutually satisfactory outcome that is capable of meeting the legitimate substantive and psychological needs of both participants is unlikely to eventuate.

1.72 A significant problem with substantive equality is that, unless the powerful recognise that the creation of a level playing field requires that the other side needs to be given more help, they will protest that what is happening is unjust - it is unequal. And, indeed, they are experiencing unequal treatment - but it is designed to produce substantive equality. There are, of course, many situations where the comparatively powerful do not recognise that others lack power and privilege. They may fail to recognise it for many reasons. Recognising it is not in their interests - they benefit from the continued pretence that formal equality is all that is needed. They may feel that they have earned their privilege and not want to give it up for real equality. They may not understand the experience or world view of people who are different or less fortunate than themselves. They may simply not see the unfairness because they are accustomed to seeing their privilege as normal.

1.73 Equality in the context of liberal democracies, often means equality of treatment. The judicial recognition of substantive equality needs to be recognised also in ADR if fairness is to be achieved. As Chief Justice Brennan said in one case:

*'Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life.'*<sup>14</sup>

**And Justice Gaudron pointed out that:**

*'Perhaps the most significant legal development in the past 25 years has been the acceptance, both as a practical matter and as a matter of legal theory, that formal or formalistic equality is not true equality. Rather, more recent legal analysis accepts that, where difference exists, identical treatment compounds underlying inequality and produces further injustice.'*<sup>15</sup>

**1.74 Some ADR practitioners believe that it is their task to redress social inequalities. Others have argued that unless dispute resolvers address substantive equality, they are entrenching those inequalities.**

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<sup>14</sup> Gerhardy and Brown (1985) EOC 92-123.

<sup>15</sup> 'Equality Before the Law with Particular Reference to Aborigines', (1993) 1 The Judicial Review 81.

## **CHAPTER 2**

### **KEY ELEMENTS OF ALTERNATIVE DISPUTE RESOLUTION**

#### **INTRODUCTION**

2.01 As previously stated, the aim of this Discussion Paper is to consider:

- Areas of difference between user groups which affect the fairness and justice of ADR procedures and outcomes;
- Factors within particular ADR processes which can affect the fairness, justice and suitability of those processes for particular user groups and disputes; and
- Appropriate standards for the provision of ADR services in the context of the diversity of user needs and ADR processes.

2.02 In order to meet this objective, a strong focus is required on the constituent elements of each ADR process. The range of ADR processes is considerable and growing. For the purposes of the Discussion Paper, it has been decided to concentrate largely upon two of the most familiar and widely used areas of ADR, mediation and conciliation.

2.03 To extend consideration significantly beyond these two processes would be beyond the current resources of NADRAC. Nonetheless, many of the observations made in the Discussion Paper are broadly relevant to all forms of ADR.

#### **THE CONTEXT**

2.04 Facilitative processes involve the provision of assistance by a third party in the management of a dispute resolution process. Generally, in facilitative processes, the third party has no advisory or determinative role on the content of the dispute or

its outcome. Mediation, conciliation and facilitation may be described as facilitative processes.

2.05 ADR processes may also be advisory and determinative. Advisory processes involve a third party investigating the dispute, providing advice as to the facts of the dispute and sometimes, advising on possible, probable and desirable outcomes and means of achieving them. Investigations, expert appraisal, case appraisal, case presentation, mini-trial and dispute counselling fall within this group.

2.06 Determinative processes involve a third party investigating a dispute and making a determination as to its resolution which is potentially enforceable. Adjudication is an example of an internally enforceable process falling within this group. Examples of externally enforceable processes include arbitration, expert determination, fast-track arbitration and private judging. Processes which are not enforceable include fact finding, determinative case appraisal and early neutral evaluation.

2.07 In its 'ADR Definitions Paper'<sup>16</sup> (the Definitions Paper), NADRAC seeks to define key ADR processes within these three categories.

## THE DEFINITIONS

2.08 In general usage the terms 'mediation' and 'conciliation' are used to cover a huge and overlapping range of processes. They differ moreover from State to State. In order to assist effective communication in this area, NADRAC has developed the following benchmark definitions.

### Mediation

2.09 In the Definitions Paper, 'mediation' is defined generally as:

**'..... a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcomes of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.'**

2.10 Descriptors may be added to the general definition to describe particular sorts of mediation processes. These include: therapeutic mediation, community mediation, co-mediation, shuttle mediation, victim offender mediation and expert mediation. Mediation may also be described by the addition of descriptors referring

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<sup>16</sup> March 1997.

to the agency within which mediation is undertaken (for example, Community Justice Centre or Family Court).

### Conciliation

2.11 According to the general definition in the NADRAC Definitions Paper, conciliation:

**‘..... is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach an agreement.’**

2.12 Statutory conciliation is a process arising from a complaint under a statute. Its elements are identical to those contained in the general definition of conciliation except that the neutral third party encourages the participants to reach an agreement which ‘accords with the requirements of the statute’. In this sense, it is a more restricted process.

2.13 The general term conciliation may be further defined by the addition of one or more of the descriptors given for mediation: therapeutic, community, co-, shuttle, victim offender or expert. As with mediation, descriptors may also be added referring to the agency within which conciliation is undertaken (for example, the Commonwealth Human Rights and Equal Opportunity Commission).

2.14 Definitions of these and other forms of ADR referred to in the Discussion Paper may be found in Appendix A.<sup>17</sup>

## **THE ESSENTIAL ELEMENTS**

2.15 As suggested by the two definitions, mediation and conciliation possess a number of common elements. Some of these relate primarily to the responsibilities

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<sup>17</sup> NADRAC recognises, of course, that in practice, there may be some departures from these definitions. Accordingly, general references to particular ADR processes in this Discussion Paper are intended to embrace all ADR practices.

of the mediator or the conciliator, some to the participants to the dispute, and others, to the nature of the process itself.

## **The Process**

2.16 Possibly, the most important general elements of mediation and conciliation in the context of this Discussion Paper are their consensual nature, their confidentiality, the neutral role of the third party and the flexibility of the procedures used.

### *Consensus*

2.17 A consensual as distinct from an adversarial approach is an essential element of both mediation and conciliation. As discussed in more detail below, in both processes, with the assistance of a neutral third party, the mediator or the conciliator, the participants 'endeavour to reach agreement' or make recommendations. This consensual approach presupposes the capacity for a particular sort of interaction between the participants to a dispute.

### *Confidentiality*

2.18 There are two levels of confidentiality in mediation and conciliation proceedings. The first of these concerns disclosures by the person during mediation or conciliation proceedings. Third parties have an obligation in this regard to ensure that information which they receive in confidence, in private session with a participant, is confidential and should not be revealed to the other participant in the proceedings.

2.19 The second relates to disclosures outside the mediation or conciliation proceedings. This may occur if one of the participants proceeds to litigation and seeks to compel the third party to give evidence relating to confidential disclosures made by the other party. Further, public policy may require confidentiality to be breached in a situation, for example, where there is a threat to commit an offence, or where there is danger to a third party.

2.20 The boundaries of confidentiality are uncertain in Australia and there is no uniform legislation in the area. This is an important consideration as in some cases, the success of a mediation or a conciliation process may very much depend upon its confidentiality. Although some professional mediation service advisers and professional associations such as the Law Institute of Victoria and the Law Society of NSW urge or require third parties to have the participants sign contracts before the start of mediation, prohibiting the disclosure of confidential information, the validity of such contracts has not been tested. The most simple and effective way of protecting confidentiality is probably by way of statute.<sup>18</sup>

### *Third Part Neutrality*

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<sup>18</sup> H Astor and C Chinkin, 'Dispute Resolution in Australia', (Butterworths, Sydney), page 233.

2.21 The neutrality of the third party, (the mediator or conciliator), in the proceedings is generally regarded as meaning neutrality in terms of content and outcomes.

2.22 In the sense in which it is used in the Definitions Paper, 'neutrality' encompasses freedom from what has been referred to by one writer as 'situational'<sup>19</sup> and 'personal' bias. The first of these refers to the third party's background and the relationship which he or she has with the disputing parties. It covers such matters as the absence of prior contact between one or both participants and the absence of prior knowledge about the particular dispute and disinterest in the outcome. In the second sense, already referred to in Chapter 1, it means impartiality, in a more immediate sense, even-handedness and objectivity towards the participants in terms of the negotiation process, and an avoidance of any display of favouritism towards one or other participant.

2.23 Notwithstanding their neutral role in mediation proceedings (see above definition) third parties may sometimes direct the proceedings in more subtle ways of which the participants may be unaware. For instance, without actually supporting a preferred outcome through evaluative analysis or suggestion, they may do so indirectly by: failing to redress power imbalances between the participants; phrasing questions in inappropriate or biased terms; allowing the participants greater time to consider certain questions; and being more facilitative during the ensuing discussions of those questions by the participants.

2.24 The role of conciliators is usually regarded as more proactive than that of mediators in so far as they may 'give expert advice on the likely settlement terms, and may actively encourage the participants to reach agreement' and they may have to uphold a particular value system (see definition, above). As one writer has expressed it:

*'Strictly speaking, mediation is the least intrusive form of dispute resolution in which the mediator allows the parties themselves to determine the parameters of debate, the mode of discourse and the nature of the outcome. ...'*

*'Whilst the conciliator is supposed to exercise a neutral role in the process of conciliation, he or she may be expected to shape the direction of the process to a greater degree than is the case with mediation.'*<sup>20</sup>

2.25 Whilst elements of situational bias may sometimes be waived by one or both parties without fundamentally altering the nature of the ADR process, impartiality cannot be waived without doing so.

### *Flexibility*

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<sup>19</sup> Andrew Zilinskas, 'The Training of Mediators - Why Is It Necessary?', (1995) Australian Dispute Resolution Journal, page 58 at page 65.

<sup>20</sup> Margaret Thornton, 'Equivocations of Conciliation', (1989) vol 52(1) Modern Law Review, page 733 at 734.

2.26 According to both definitions, the dispute resolver ‘may advise on or determine the process of mediation (or conciliation) whereby resolution is attempted’. This is reflective of the fact that both processes are flexible and capable of adaptation to satisfy particular requirements.

2.27 In terms of ensuring the fairness and justice of mediation and conciliation proceedings and outcomes, this is a very significant feature. Indeed, it is critical to many of the suggestions made in this Discussion Paper. For non-dominant and marginalised peoples, the ability of a sensitive and skilled ADR provider to bend and shape ADR procedures to fit the particular needs of the participants is one of its greatest advantages. It is the feature of ADR which throws it into stark relief against the comparatively inflexible procedures of the formal justice system.

2.28 Providing principles of fairness and justice are not compromised, the flexibility of ADR means that very little is sacrosanct. For example, for members of some groups the confidentiality of ADR proceedings may be highly prized. For others it may be neither practicable nor desired (for some Indigenous Australians, for example). The flexibility of the process means, however, that both these positions may be able to be equally accommodated.

2.29 In practice, in both the design of the dispute resolution system and in the delivery by ADR dispute resolvers of mediation and conciliation services, a great number of choices are consciously or unconsciously made about matters of process and procedure.

2.30 The following are examples of the design issues which might be addressed:

- Participation of parties’ legal representatives or other advisers in the process;
- Private meetings with individual participants during the process;
- Sole or co-mediation;
- Professional knowledge of the dispute resolver in area of dispute;
- Separate initial assessment of suitability of the ADR process for each person;
- Whether to deal with all, or only limited, substantive issues;
- Whether the goal is an interim, final or legally binding agreement;
- How to deal with relationship and emotional issues;
- Whether the process should be single or multi-session;
- The formality of the process;
- How much data collection/disclosure is required and enforced;
- Writing up of the agreement and of the decisions reached;
- The stage in the dispute at which ADR is provided ( for example, before litigation is commenced);
- Whether participation is voluntary or mandatory and what indirect pressures to participate should be brought to bear on the participants;
- Training and experience of mediators; and

- Whether both participants have the authority to negotiate.

2.31 Within the boundaries of the dispute resolution system with which they are working, individual dispute resolvers may have more or less discretion as to the procedural modifications which they can make in individual cases. Some of the decisions may be left to the third party dispute resolver. Others may fall within the area of responsibility of the ADR provider bodies which employ them.

2.32 In some circumstances, redressing inequalities requires access to resources outside mediation itself. Examples are access to interpreters or legal or financial advice.

***What external resources are used in the resolution of disputes?***

***In what circumstances are they used?***

***What benefits and problems arise from their use?***

### **The Participants**

2.33 In both definitions, a willingness to cooperate in the negotiation process is implicit.

2.34 Common elements relevant to the role of the participants in the negotiations include:

- Identification and communication of disputed issues (a genuine agreement is one which has met the needs of both participants to some extent. If needs are not stated, they are far less likely to be met);
- Development of options ;
- Consideration of alternatives; and
- Endeavouring to reach an agreement.

Related elements include:

- Listening to and understanding the other person's issues, concerns, hopes, fears, needs and requirements (if not directly, then with the assistance of the dispute resolver);
- Assessing with the assistance of the dispute resolver what further information is needed to enable both participants to clarify the issues and generate options;
- Obtaining and understanding the legal, financial and other advice necessary to negotiate, make a proposal, decide on a solution and make a decision about a proposal;

- Carrying out and adhering to arrangements detailed in an agreement and, if necessary, taking the steps required to make the agreement legally binding. A degree of trust on the part of all the participants is required here.

### *Capacity*

2.35 Implicit in the above is an ability on the part of the parties to a dispute to do certain things. They must, for example, be able to:

- Speak;
- Hear
- Observe.
- Reason;
- Sustain a logical argument;
- Remember;
- Concentrate;
- Understand;
- Negotiate; and
- Communicate.

2.36 As mentioned in Chapter 7 of this Discussion Paper, (People with Disabilities and Alternative Dispute Resolution), some or all of these things may present difficulties for some people with disabilities. They may also present difficulties for persons without disabilities in particular contexts or situations.

### *Equality Between the Parties*

2.37 Substantive equality between the parties to the dispute is also an important element.

2.38 As discussed in Chapter 1 and subsequent Chapters however, aspects of a person's identity may prevent them from participating on a full and equal basis in ADR proceedings. In some cases accommodations can be made to their needs. In others, a person may be affected to such an extent that it will not be possible to resolve a dispute consensually and the fairness of the dispute resolution proceedings may be placed in jeopardy.

2.39 For instance, without the assistance of an interpreter, people whose first language is not English may find the requirement of face to face communication (standard in most mediation and conciliation proceedings) puts them at a significant disadvantage in a process that relies on oral negotiation. In such circumstances, these people are likely to experience difficulty both in understanding the position of the other person and in putting their own position. As mentioned in Chapter 4 (Minority Cultural Groups in Australian Society), in some cases, because of cultural

differences in communication styles, participants may misinterpret aspects of the negotiation style of the other person, or may themselves be misinterpreted.

2.40 In other cases, communication may not be a problem. However, because they are unable to afford legal or other advice (or do not know how to obtain it), one person may be much less informed and have much less appreciation of the issues involved in a dispute and of their rights. Negotiations which take place in these circumstances may be to the disadvantage of that person and to the considerable advantage of the person who can afford and access information and advice.

2.41 In these sorts of situations, there is said to be a power imbalance between the participants. The danger of power imbalance has been adverted to in Chapter 1. Power imbalance may be invoked by a range of other conditions, for example:

- Dysfunction (through the effects of drugs, alcohol, depression etc);
- Fear of being harmed/reprisal/distrust;
- Fear of hurting others;
- Guilt;
- Fear of conflict;
- Emotional distress;
- Interactional pattern with other people (dominant/submissive);
- Level and range of knowledge (financial, legal);

2.42 In some circumstances, where neither person can afford to access information and advice, both may be hampered in their negotiations and may not consider options which could be of benefit to them.

### **The Third Party**

2.43 As reflected in the respective definitions, mediation and conciliation both:

- Require that the third party assist the participants to the dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement;
- Require neutrality on the part of the third party; and
- Permit the mediator or conciliator to advise on or determine the process of mediation or conciliation whereby resolution is attempted.

*Developing Options, Considering Alternatives and Endeavouring to reach agreement*

2.44 To develop options, third parties must elicit an awareness on the part of the participants of the need for alternatives from which to choose, disengage participants from adherence to unacceptable positions and generate and use strategies to develop options for agreement. Having done this, they must also assist the participants to formulate a settlement agreement that meets the needs and interests of both parties. The degree to which those needs and interests are met will determine the strength of the agreement. A strong agreement will substantially satisfy the substantive, procedural and psychological requirements of the participants.

#### *Issues of Neutrality and Assistance*

2.45 The interaction of these elements is complex. On the one hand, the dispute resolver is required to 'assist the parties' and 'advise on or determine the process of mediation or conciliation', and on the other, they are required to remain neutral.

2.46 This interaction is reflected in the concern canvassed in this Discussion Paper on the one hand, for an absence of personal bias, and on the other, in the role of the dispute resolver in confronting procedural systemic bias, and in minimising the power imbalance between the participants.

2.47 Broadly, the approach taken in the Discussion Paper is that, in some instances, dispute resolvers must intervene in order to ensure that power imbalances are addressed, procedural fairness maintained and fair and just outcomes encouraged. In promoting substantive equality between the participants, encouraging user satisfaction in the process and, relatedly, increasing the likelihood of user satisfaction with the outcome, it is submitted that such intervention is not jeopardising the neutrality of the dispute resolver. As noted, in the previous Chapter, if the assistance provided by the third party extends beyond ensuring procedural fairness and substantive equality between the participants, it may impinge upon the predominant rights of the participants with respect to outcomes.

2.48 Clearly, there is an equilibrium which must be struck. In some cases this is readily apparent. Where, for example, one of the participants cannot understand or speak English well enough to participate in the proceedings, obviously there would be no question as to the fairness and justice of securing an interpreter for that participant. Similarly, where a disabled person is unable to communicate effectively, it seems clear that the assistance of an advocate to speak on behalf of that person would be both fair and acceptable to most disputants.

2.49 In other cases, the balance may be less apparent. What is permissible where a person is apparently capable of participating in the proceedings but, by reason of their close relationship with a care-giver for example, finds it difficult to negotiate with that person, and seeks the assistance of an advocate? Similarly, where one of the parties to a dispute cannot afford to employ a lawyer to attend the proceedings with them, should the other party also be denied this assistance?

**What methods can dispute resolvers legitimately use to create and maintain equal bargaining power between participants in mediation (or other ADR processes) without compromising neutrality?**

2.50 Whilst it has been noted that, to ensure the quality of the negotiations and of the eventual outcome, stronger participants often welcome the involvement of a third party in power balancing,<sup>21</sup> because they have lost their 'edge' in the proceedings, they may equally, construe the intervention of the dispute resolvers as bias in favour of the other participant.

2.51 To overcome the mistrust of more powerful participants, prior education for potential ADR users, focussing on the consensual non-adversarial nature of ADR and explaining the meaning of substantive equality is likely to achieve a more effective outcome for both parties. The benefits of encouraging a mutually acceptable settlement which will be likely to be complied with by both participants could also be adverted to.

Other Issues

2.52 In order to assist the parties to a dispute, dispute resolvers need to possess a thorough understanding of, and sensitivity to their needs and the parameters of the dispute. An appreciation of the potential of ADR, including the range of ADR processes available and the variations of particular processes is also essential.

2.53 Additionally, dispute resolvers need to have a general theoretical understanding about how conflict arises and how disputes escalate and to be able to apply this understanding in given cases.

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<sup>21</sup> J Wall, 'Mediation: An Analysis Review and Proposed Research', (1981) vol 25(1) Journal of Conflict Resolution, 157.



## **PART II: USER GROUPS**



## **CHAPTER 3**

### **GENDER - ALTERNATIVE DISPUTE RESOLUTION FOR WOMEN AND MEN**

#### **INTRODUCTION**

3.01 This Chapter examines the effect of gender on our satisfaction with alternative dispute resolution proceedings and outcomes. The focus is upon the extent to which gender differences are accommodated within dispute resolution systems and gender-related considerations are capable of influencing the outcomes of dispute resolution proceedings.

3.02 Much more has been written in this area about the experiences of women than about those of men. This imbalance, is, necessarily, reflected in the content of this Chapter. **It is very much hoped, however, that in response to the questions which have been asked below, information will be obtained that will enable the information gaps to be filled, and strategies developed in response to any unfairness that may be found to exist for men in ADR.**

#### **THE GENERAL IMPACT OF GENDER**

3.03 Gender affects us generally because it defines or has a profound effect upon social roles. Our gender is something we are born with. Its implications are also imposed upon us to a large degree, by the society in which we happen to live. Australian societal views about what is possible, or appropriate, for men and women have changed over the last twenty years and are still changing. Gender creates conflict and difficulty where there are disputes concerning those roles. It becomes an issue where men and women are disadvantaged or subjected to prejudice and discrimination because of their gender. As reflected below, women still suffer these difficulties more often than men.

## **Women**

3.04 As a result of changes over the last twenty years, the career horizons of women are less constrained than formerly. Women are also moving into areas of employment previously sparsely populated by them. More women are involved in paid employment than ever before<sup>22</sup> and, correspondingly, the caring roles of women are changing. For example, many children are being looked after, often for extended periods, in child care centres and after-school care programs.

3.05 Stereotyped views about the proper social role, capacity, ability and behaviour of women can, however, still lead to many consequences such as disadvantage in employment, career progression, access to justice and education.

3.06 As reflected in figures contained in the 1995/96 Annual Report of the Human Rights and Equal Opportunity Commission, approximately four times as many complaints are lodged under the *Sex Discrimination Act 1984* by women than by men. During that financial year, the largest number of complaints were lodged in the areas of sex discrimination and sexual harassment, whilst the greatest areas of complaint were employment and the provision of goods and services. Private enterprise was the largest respondent (43% of complaints) whilst the number of individual men as respondents declined from 21% for the previous reporting period to 14%.<sup>23</sup>

3.07 Australia still has a very strongly gender-segregated work force. In the legal profession, there is a comparative lack of women in positions of influence or in the more well paid areas, and women are still significantly under-represented in Parliament. Of the 28 Ministers in the current Federal Government, only 4 are women and only 1 of the 16 Cabinet Ministers is a woman. On the other hand however, in the 1992 Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia, '*Half Way to Equal*', the House of Representatives Standing Committee on Legal and Constitutional Affairs, observed that more women are becoming involved in local government than in Federal or State Politics. Similarly, the numbers of women in small business are also increasing. In 1994 -95, 40% of the people employed in small business in Australia were women.<sup>24</sup>

3.08 It has also been reported that although women represent 26% of all Australian managers, this figure diminishes at higher levels of the corporate structure to under 5% of Senior Executives or Board Directors.<sup>25</sup> This pattern is also reflected in a 1996 study of the composition of the boards of Australia's top 100 listed companies which found that only 4% of the directors of these companies were

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<sup>22</sup> ABS *Yearbook Australia 1997*: the participation rate of women in the workforce has risen from about 20% 50 years ago to about 53% today.

<sup>23</sup> Page 90 of the Report.

<sup>24</sup> ABS *Yearbook Australia 1997*, page 327.

<sup>25</sup> '*Enterprising Nation: Reviewing Australia's Managers to meet the Challenge of the Asia Pacific Century*', Report of the Industry Task Force on Leadership and Management Skills AGPS, Canberra, 1995.

women.<sup>26</sup> According to the International Labour Organisation, Australia has the lowest percentage of women in management in the industrialised world.<sup>27</sup> Women are also under represented as union officials<sup>28</sup> and despite their increasing involvement in small business, it would seem that only about 10% of the major decision makers in small business in Australia are women.<sup>29</sup>

**3.09** Notwithstanding its reputation for being progressive in this regard, still only a comparatively small percentage of Senior Executive Service Officers in the Australia Public Service (APS) are women. In June 1993, for instance, the percentage was only 14.9, although some 47 percent of positions in the APS were held by women. Furthermore:

*'Differences between agencies in the proportion of female SES officers gives rise to suspicions about patterns of implicit or explicit discrimination...'*

*'... the patterns tend to suggest that women do best (in terms currently of getting into the SES) in the 'softer' areas of government.'<sup>30</sup>*

**3.10** It has also been claimed that male culture still pervades many work environments and work practices. For instance:

*'Why is not a primary goal of micro-economic reform the complete transformation of the male culture that surrounds work at every level, be it on the shop floor, in middle management or in the boardroom? It is everything - such as hours of work, both formal and informal, and the out-of-hours networking that is so powerful in obtaining promotion. It is the travel requirements of some jobs and the inability to see the need to invest, for example, in video-conferencing'*

*'... It is the continuity of employment being a criterion for success, for a person to be judged on their loyalty or their work ethic, and residential training courses that go for three months ....'<sup>31</sup>*

**3.11** Generally, the more senior the level of employment, the less likely it is that flexible arrangements like part-time work will be available.

**3.12** Additionally, in spite of formal equality in the areas of equal pay and equal opportunity in education and employment, women's earnings are still generally

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<sup>26</sup> G P Stapleton and J J Lawrence, 'Corporate Governance in the Top 100', Research Report, Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996.

<sup>27</sup> Leonie Still, 'Where to from Here? The Managerial Women in Transition', (Business and Professional Publishing, Chatswood, 1993), page 26 cf Rachel Gibson, 'Boardroom Role of Women', *The Age*, 22 November 1995, page 20

<sup>28</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia, 'Half Way to Equal', April 1992, page 165.

<sup>29</sup> Australian Bureau of Statistics *Year Book Australia 1997*, page 333.

<sup>30</sup> Ross Clare, 'Women Tipping the Gender Balance', (1994) vol 8(5) *Directions in Government*, page 30 at pages 30, 31.

<sup>31</sup> Anna Booth, 'The Glass Ceiling - Recognising that it is a Problem', April 1994 (76) *Canberra Bulletin of Public Administration*, page 133.

lower than those of men,<sup>32</sup> they are more likely to be dependent upon others for support and they may also find the obtaining of credit more complex than it is for men

## **Men**

3.13 As noted, there is comparatively little specifically written about the disadvantages of men in Australian society as a result of their gender. On the basis of the foregoing, however, it is possible to say that men are less likely to be discriminated against on the basis of gender than women, they continue to dominate many key areas of employment and their earnings remain higher, on average, than those of women.

3.14 In terms of their social role, there is evidence to suggest that men's involvement in caring for children has substantially increased, although their involvement in household duties remains very similar to what it was some twenty odd years ago.

3.15 In some areas of employment, barriers of self perception may also exist. Both women and men may consider, for example, that child care, primary school teaching and librarianship are unsuitable careers for a man. All these areas are areas in which women tend to dominate and into which it may be more difficult for men to gain access and career advancement. Men are reluctant to seek, and may find it more difficult to gain access to part-time work .

***Further information is sought with respect to the changing social roles and the difficulties and discriminations which may be encountered by men.***

## **GENDER AND DISPUTE RESOLUTION**

### **Disputes in which Gender may be a Factor**

3.16 To the extent that men and women are involved in disputes, gender is always a factor. However, it is obviously a more important element in some disputes than in others.

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<sup>32</sup> In May 1995 the highest weekly earnings for full-time adult employees were recorded in the following major occupations: Managers and administrators (males \$978.70, females \$749.50); Professionals (males \$809.40, females \$613.80) and Para-professionals (males \$778.40, females \$574.00). In May 1995, females in the private sector earned 80.2% on average of their male counterparts' total weekly earnings. In the public sector, female employees received 89.9% of total male earnings. ABS Yearbook Australia 1997, page 124.



## Discrimination

3.17 Gender issues may form the subject matter of some disputes. For example, disputes about sex or pregnancy discrimination and sexual harassment raise issues of gender directly. Conciliation is the predominant way in which it is sought to resolve such disputes.<sup>33</sup>

## Family Disputes

3.18 Many men and women are likely to become involved in family disputes. Indeed, family disputes are the disputes in which we are all most likely to become involved in our lives. Many of us will become involved in such disputes on more than one occasion. For instance, someone who is involved in divorce proceedings as a child may later themselves be divorced. Some family disputes, such as disputes over custody of children, involve issues where gendered social roles may be very important.

## Other

3.19 Cases concerning the duties of company directors, quantum of damages, inheritance and unconscionability in contracts may raise issues of gender.

3.20 Additionally, gendered social roles are pervasive, and gendered assumptions are present in a broad range of disputes. Gender can have a significant impact upon the quality and choice of dispute resolution services. There may be gender prejudice in the service itself or it may manifest itself in the attitudes and responses of service providers. It may also arise by way of those characteristics of service users attributable, at least in part, to community attitudes and responses to gender.

## **Advantages of ADR for Women and Men**

3.21 Men and women may take up the option of ADR for a range of reasons, many of them not at all associated with the pursuit of the most desirable outcomes. Certainly, cost and time considerations persuade many to opt for ADR over the formal justice system. The increasingly limited availability of legal aid funding may also have this result. It has been suggested that women choose mediation because it provides a less formal way of resolving disputes which provides dialogue whereas men opt for it because they believe they will achieve a better outcome in mediation than in court.

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<sup>33</sup> According the 1994/95 Annual Report of the Human Rights and Equal Opportunity Commission, in the period 1 July 1995 to 30 June 1996 conciliation was used to settle 34% of the complaints made under the *Sex Discrimination Act 1984*.

3.22 ADR techniques are often seen as particularly appropriate to disputes characterised as ‘interpersonal disputes’ or disputes involving ‘ongoing family relationships’ where the non-adversarial nature of ADR processes is considered an advantage in the maintenance of ongoing relationships. As a result, such disputes are often referred for mediation. Since its inception, the Family Court has emphasised alternatives to litigation in the resolution of family disputes. There are also specialist mediation services dealing with interpersonal disputes such as Relationships Australia, and the Community Justice Centres (NSW), which provide a service for the resolution of minor civil and criminal disputes. Further, ADR processes such as mediation have found favour with government and court administrators. There is strong pressure to save money in the formal justice system, and mediation is considered an effective and caring way of achieving this.

3.23 For women in particular, ADR may seem to provide an attractive option to the formal justice system, which has been criticised for systemic bias against women, both in terms of its outcomes and its procedures. In terms of direct substantive bias, there are a decreasing number of laws and decisions which discriminate against women directly. However, the problem which has been most recently identified is that the law, in its structure and content, may not take into account the reality of women’s lives. In addition to the examples given in Chapter 1, hidden gender bias may be a problem in less obvious areas such as tort, tax, company law and industrial law.<sup>34</sup>

3.24 For men also, there may be perceptions of bias in the formal justice system. Some men may believe, for example, that it is more difficult for a father to convince the court that it is ‘in their best interests’ that he be awarded custody of his children.

3.25 As noted in Chapter 1, in so far as it can facilitate understanding of different value positions and assist conflicting parties to work out viable solutions, ADR may, at least in theory, provide a means of achieving outcomes free from substantive systemic bias. Agreements may be negotiated, for example, which reflect the true value of women’s unpaid work around the home, or which provide for significant involvement of fathers in parenting children after divorce.

### **Gender and Barriers to Fairness in ADR**

3.26 Despite the apparent advantages, ADR may not provide the perfect solution in all instances. Some of the possible danger areas are set out below.

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<sup>34</sup> See generally in this regard, R Graycar & J Morgan, *The Hidden Gender of the Law*, Federation Press, Sydney, 1990.

## **Women**

### Bias

#### *Personal Bias*

3.27 We are all influenced, at least unconsciously, by a range of personal considerations arising from aspects of our own identities such as our gender; our social derivations; our race and our socio-economic status. In particular, because being male or female is one of the aspects of all our identities, we may be much more likely to make assumptions about others, whether of our own gender or not, on this basis. These assumptions may not necessarily be accurate.

3.28 The problem of gendered bias against women has been recognised and responded to by the formal justice system in recent times. As a result of greater awareness of gender issues in the last few years for example, the Australian Institute of Judicial Administration (AIJA) has been provided with Government funds for the development and conduct of gender awareness programs for the judiciary. Funding has also been provided to the Family Court of Australia and the Administrative Appeals Tribunal for professional development programs focussing on issues such as gender, ethnicity and cultural awareness. Individual bias is difficult to eradicate completely however.

3.29 Individual attitudes to gender are, potentially, just as likely in ADR dispute resolvers as they are within the formal justice system.

#### *Perceived Bias*

3.30 Perceptions of bias may also be a barrier. For example, a woman may presume an understanding between a male mediator and the other participant to a dispute, also a male, which does not exist. Despite the fact that it is unfounded, such a misconception can be nonetheless damaging to the trust between the participants and the dispute resolver which is an important element of ADR. It cannot be concluded, however, that a woman will always want a female mediator. In one English study of mediation, several women wanted or were grateful for a male mediator. Some felt protected by the presence of a male mediator. Others criticised female mediators for allowing their husbands to take over the process.<sup>35</sup>

3.31 Particularly in family disputes, one or other of the parties is likely to be a 'repeat player' in the process which will give that person a 'power advantage' in subsequent ADR proceedings. The risk of perceived bias may be heightened in such circumstances.

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<sup>35</sup> Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes*, Clarendon Press, Oxford, 1988, pages 64-71.

### Stereotyping

3.32 Stereotypically, women may be expected to be passive, compliant, uncompetitive and caring. If a woman does not comply with this image, and is assertive and competitive in pursuing her interests, she may attract negative criticism which may be just as debilitating as the stereotype image itself.

3.33 As with any identifiable group, there may be a tendency on the part of ADR service provider agencies, dispute resolvers and the parties themselves to stereotype women rather than to regard them as individuals. Such stereotypes may be unconscious. Gendered social roles and expectations are so accepted that many people are unaware of their pervasiveness. The existence of such roles is not, of course, a problem. Problems arise when women (or men) are detrimentally affected by them.

### Power Imbalance

3.34 Although gender will not necessarily determine the power balance between the participants in ADR, it is, nonetheless, a very important element.

### Communication Style

3.35 ADR processes like mediation are often praised for their accessibility, their lack of formality, and their ability to give the participants greater control over the content of their dispute. However, they also make demands upon their users - for instance, requiring them to meet with the person with whom they are in dispute to assert their needs in relation to that person and to negotiate an agreement.

3.36 In the negotiations that are an integral part of ADR, it may be that, women do not perform as well as men or vice versa.

3.37 It has been said in this regard that:

*'There are significant differences in the way men and women are likely to approach negotiation and the styles they use in search of an agreement.'*<sup>36</sup>

3.38 In terms of communication style, it has been said that assertions by women are qualified through the use of tag questions and modifiers, and that they are more deferential, more relational in argument and indirect than men. Overall, it is suggested that:

*'... women's modes of discourse do not signal influence. Women's speech is more conforming and less powerful. Women talk less and are easily interrupted, while*

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<sup>36</sup> Deborah M Kolb and Gloria G Colidge, 'Her Place at the Table: A Consideration of Gender Issues in Negotiation', *Program of Negotiation*, Working Paper Series, 88-5, October 1988, Harvard Law School. See also, Kathy Mack, 'ADR and Access to Justice for Women', (1995) *Adelaide Law Review*, page 123 at page 131.

*they in turn are less likely to interrupt. In mixed groups, they adopt a deferential posture and are less likely openly to advocate their positions. At the same time, there is a proclivity to be too revealing and to talk too much about their attitudes, beliefs and concerns.*<sup>37</sup>

**3.39** Having regard to the fact that the process of negotiation would seem to require the participants to be able to communicate their interests and objectives clearly and authoritatively, it has been suggested that:

*... a deferential, self-effacing, and qualified style may be a significant detriment.*<sup>38</sup>

**3.40** It is concluded that:

*... formal negotiation, conceived as a context in which conflict and competition are important, may not be a comfortable place for many women,*<sup>39</sup>

and that whilst some women may assume a more dominant style for the purpose of negotiations, others may not, and may find their strengths impaired in such a context.<sup>39</sup>

### **What difficulties do women confront in the ADR negotiation process?**

#### *Presentation and Belief*

**3.41** It is also said that women are not afforded the same degree of credibility that men enjoy. The credibility gap has been said to be so entrenched that, when it occurs, it is unintended and therefore, hard to identify and understand.<sup>40</sup>

#### *Violence*

**3.42** The most damaging gendered power imbalances are likely to arise in situations where there is violence or threatened violence or abuse.

**3.43** Submissions to the Australian Law Reform Commission's reference on 'Equality Before the Law', found male violence against women to be:

*... a problem of national proportions affecting many thousands of women throughout Australia.*<sup>41</sup>

<sup>37</sup> Kolb and Colidge, *ibid*, page 21.

<sup>38</sup> *Ibid*, page 22.

<sup>39</sup> *Ibid*, page 4.

<sup>40</sup> Mack, *op cit* note 36, page 129.

<sup>41</sup> Australian Law Reform Commission Report No 67, Interim, 'Equality before the Law: Women's Access to the Legal System', page 42.

3.44 Such violence has been said to include: physical violence, fear, threats, psychological abuse, social abuse (that is, behaviour which aims to isolate the woman from friends and family); economic abuse (the allocation of insufficient funds for housekeeping or the monopolisation of shared assets such as the family car, for instance); and sexual violence.<sup>42</sup>

3.45 As noted, ADR techniques, particularly mediation, are often seen as particularly appropriate to disputes characterised as ‘interpersonal disputes’ or disputes involving ‘ongoing family relationships’ where the non-adversarial nature of ADR processes is considered an advantage in the maintenance of ongoing relationships. As a result, such disputes are often referred for mediation. In view of the fact that they could be accompanied by high levels of spousal and child abuse, it is likely that a number of interpersonal and family disputes referred to mediation will involve elements of violence.

3.46 As discussed in Chapter 1 of this Discussion Paper (Fairness and Justice and Alternative Dispute Resolution), violence may be an especially corrosive factor in a third party dispute resolution process such as mediation, where the participants may be obliged to confront one another during the course of the negotiations. In such situations, the contact with the perpetrator of the violence required by the proceedings may significantly increase a victim’s feelings of disempowerment and anxiety. As a result, their overwhelming desire may be to expedite the process as much as possible rather than to reach a fair and just solution. Moreover, in the face of violence, it is unlikely that a weaker participant will attempt to negotiate a fair agreement. Additionally, the ADR service provider will not be able to enforce the agreement, or punish breaches.

3.47 The Family Court has recognised the special problems of power imbalance where violence or the potential for violence exists. Strict guidelines provide that mediation will normally be regarded as inappropriate in cases of violence, and also, provide screening procedures aimed at ensuring that violence is detected. Order 25A Rule 5(c) of the Family Court Rules provides that in determining whether the dispute may be mediated, the interviewer must take into account ‘the risk of family violence’. Difficulties may well remain however, in making that initial assessment with respect to the presence of violence.

3.48 ADR is also widely regarded as the best way to resolve disputes involving discrimination. ADR may be a very empowering process in sexual harassment cases for example, where the process of negotiation and confrontation may encourage the victim to feel that their pain and powerlessness has been afforded recognition. In this sense, ADR may be said to be in the best interests of the participants. However, where the harassment is severe, the person who is the target of such treatment may not be able to negotiate effectively in conciliation. Suitability for conciliation involves difficult issues of judgment.

3.49 Despite potential gender bias in the formal justice system, it may have a greater capacity in situations involving violence, through the use of devices such as

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<sup>42</sup> ‘National Committee on Violence Against Women Position Paper’, National Committee on Violence Against Women, May 1991.

restraining orders and injunctions, to protect the victims of violence and to ensure compliance with orders made. Further, its evidentiary rules and procedures are designed to ensure both participants have a right to present their cases without fear. Furthermore, in so far as the parties are represented by counsel, direct contact between them can be minimised.

#### *Financial Inequalities*

3.50 In ADR, as in any other dispute resolution process, the participant with the greater resources who can hire a lawyer, afford to wait and to raise more issues will have an advantage over other participants. In terms of earning capacity, this participant is more likely than not to be male, although the impact of legal aid must not be overlooked. In the family area there is a ratio in favour of women of slightly less than 2:1. This compares with civil matters, where the numbers of men and women legal aid recipients are roughly equal, and the criminal area, reflecting the fact that far more applicants are men, where there is a ratio in favour of men of approximately 5:1.<sup>43</sup>

3.51 It has been suggested that in a majority of marital households, it is the man who will have the superior income and the greater knowledge of finances.<sup>44</sup> This may be particularly so for elderly women, many of whom have had only limited formal education and who may have spent a large portion of their lives working within the family home.

#### *Uncertainty of Legal Entitlements*

3.52 The nature of the dispute and the certainty or the uncertainty of the law in a particular area may also have an impact upon the respective powers of the participants. In family and equal opportunity law disputes for instance, which frequently involve women, concepts are often unclear and incapable of providing the complainant with a precise bargaining tool.<sup>45</sup>

3.53 Ignorance of the law has been identified as a particular problem for older people (particularly women over 50 years of age). Cultural barriers may impose additional problems for Aboriginal women and women from non-English speaking backgrounds.

#### *Information and Access*

3.54 Women who work in paid employment may find it difficult to organise time to attend dispute resolution proceedings. In some cases, it may be necessary to forego salary or wages or it may be necessary to make up time. For women in caring

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<sup>43</sup> These calculations were made on the basis of figures supplied by Legal Aid and Family Services in the Commonwealth Attorney-General's Department for the 1995/96 financial year.

<sup>44</sup> Mack, op cit note 36, page 127.

<sup>45</sup> Ibid, page 128.

roles<sup>46</sup> it may not be possible to spare the time for protracted attempts to resolve disputes. Factors such as the location of a dispute resolution centre, its hours of operation and its proximity to main transport routes may also create substantial physical and mental impediments for many carers. The absence or the inadequacy of waiting rooms and child care facilities may also represent a significant barrier.

3.55 A lack of information about the process itself also has the capacity to place one or other person at a disadvantage. In most cases, access to information is closely related to the amount of money available to obtain professional advice. As a result, women are more likely to be disadvantaged in this regard than men. They may be unable to afford, or, indeed, where there are young children, to obtain physical access to professional advice.

#### Other Informational Imbalances

3.56 Informational imbalances may also occur in certain types of disputes where women are often disputants such as equal opportunity cases where an employer may frequently have far greater access to information than the applicant.

#### Privatisation of Conflict

3.57 Commentators have pointed especially to the dangers of concealment of violence against women. It is only recently that legislation has been passed to provide needed protections for women against violence. The concern has been expressed that, if these disputes are dealt with privately, public (including governmental) understanding of the issues will be affected. The political will to provide resources to deal with violence and to improve the existing legislation will wain, since the extent and nature of the problem is concealed. For example, where a woman who has been raped chooses not to go to court, but to pursue the matter as a case of sexual harassment or employment discrimination through the Human Rights and Equal Opportunity Commission, serious social trends may be effectively buried.

3.58 Further, important areas of law may remain undeveloped. Concern has been expressed in this regard about anti-discrimination legislation, where contested or opaque statutory provisions have not been interpreted by the courts because many disputes are dealt with through conciliation.

#### Shadow of the Law

3.59 As noted in the first Chapter of this Discussion Paper, many disputes are resolved 'in the shadow of the law'.

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<sup>46</sup> The 1993 Australian Bureau of Statistics Survey, Disability, Ageing and Carers reported that in the reporting period, 33,000 people gave up work to take on caring roles (mainly women and mainly people aged over thirty years).

3.60 In disputes about family matters, for example, the views of either or both of the parties with respect to their legal entitlements may have considerable influence upon the nature of the agreement which they reach. To the extent that the law is reflected in an agreement reached in ADR, the influence of the formal justice system may therefore be said to extend, in a substantive sense, to ADR.

3.61 Research has suggested in this regard, in the United States at least, that in divorce settlement disputes, women are less likely to be influenced by the legal 'going rate' or the 'market rate' than men.<sup>47</sup>

### Cultural Issues

3.62 In some disputes, particularly those involving cultural minorities, cultural factors may need to be appreciated in order to fully understand the participants and the dimensions of their dispute.

3.63 Where, for example, a Moslem women is seeking to leave her violent spouse and to enter into a refuge, a dispute resolver may need to 'reality test' the option against not only the likely response of her husband, but of the community in which she resides. Will the woman be ostracised by her friends and relatives for taking such a course of action?

3.64 In other cases, procedural issues may be affected by gendered cultural considerations. In some cultural groups, for example, it may not be permissible to consider certain matters or do certain things in the presence of members of the opposite sex. In some cases, cultural factors may require that women be publicly submissive to their husbands or to men generally.

### **Men**

#### Bias

##### *Personal bias*

3.65 In this area, although not well documented, the potential for actual and perceived bias would seem to be just as great for men as it is for women. For example, because of gendered social roles, men who are not in paid employment and/or choose to do the work of caring for children or other dependents may be the target of discriminatory attitudes and behaviours.

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<sup>47</sup> Lenore Weitzman, 'The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America', The Free Press, New York, 1985.

## *Perceived Bias*

3.66 Men may perceive bias against men, it seems, simply because the dispute resolver is female. In the English study (referred to above) some men were deterred from using mediation because a male mediator was unavailable. One man who approached a mediation service commented:

*'... it was like everywhere else, it was all women, women everywhere. Everywhere I went, I'll tell you this, I was up against the opposite sex. Now I don't know how that's a fair system. I wanted to talk to a man ...'*<sup>48</sup>

### **Do men experience gender bias in ADR proceedings?**

## *Power Imbalance*

### *Communication Style*

3.67 Naturally, as with women, a range of other aspects of a man's identity will influence communication style. In general terms however, the male communication pattern has been said to involve linear argument, depersonalisation and a more directional style. Men are also said to use confident self-enhancing terms.<sup>49</sup>

3.68 Stereotypically also, a man who has had much greater exposure to commercial management and other sorts of negotiation than the other party to a dispute, may also have an advantage in the ADR negotiating process.

### **Are men comfortable with the ADR negotiation process?**

### **Do men feel more comfortable talking about some issues than about others?**

## *Other Imbalances*

### **What other forms of gendered power imbalance are experienced by men?**

## *Privatisation of Conflict*

### **Are there gender issues of concern to men which are/may effectively be concealed by ADR?**

<sup>48</sup> Davis, op cit, note 35, page 67.

<sup>49</sup> Kolb and Colidge, op cit note 36, page 21.

## **WHAT OTHER GENDERED BARRIERS ARE THERE TO FAIRNESS AND JUSTICE IN ADR?**

### **STRATEGIES TO ADDRESS BARRIERS TO FAIRNESS AND JUSTICE IN ADR FOR WOMEN AND MEN: SOME POSSIBLE APPROACHES**

3.69 The following suggestions are made: they are not intended to be exhaustive. Some relate more to the provision of ADR services whilst others are directed more specifically at the response of individual dispute resolvers.

#### **Training**

##### *Personal Bias*

3.70 In order to address personal gender bias and stereotyping in ADR, an empathy and understanding of the life experiences gender creates for men and women is required. The expectation of this level of self-knowledge in each alternative dispute resolver is a formidable one. Neutrality, in the sense of remaining untouched by life's experiences and influences is clearly not an option. Everyone develops cultural, class, racial and other views of one kind or another. Clearly, however, the greater the level of self-knowledge in the individual, the more empathetic can be their involvement with others in the dispute resolution process.

3.71 Dispute resolvers need to be conscious of their own socialisation and related prejudices, and the possible impact upon the mediation or other ADR process.

3.72 As indicated above, education programs have already been initiated to ensure that members of the Australian judiciary are sensitive to the special needs and conditions of Australian women. Such programs have also been instituted by other organisations. Gender awareness training programs should also be developed for all ADR service providers.

##### *Addressing Perceived Bias*

3.73 To overcome perceptions of bias, dispute resolvers should endeavour to overtly demonstrate their neutrality and even-handedness with the parties to a dispute. Strategies as fundamental as ensuring that the parties have an equal opportunity to put their positions and that they are afforded equal time in private session are important in this regard.

## Co-mediation

3.74 In ADR, it is usually possible for the participants to specify the gender of the dispute resolver that they require. In some cases, co-mediation is possible, and it is possible to have dispute resolvers of both genders.

3.75 In disputes involving men and women arising from separation, a co-mediation model, using a balance of gender and legal and social science backgrounds has been shown to be effective. For instance, in the Family Court of Australia Research and Evaluation Unit Report, *'Evaluation of the Family Court Mediation Service'*, in which 149 cases were mediated in a 12 month period, it is reported that approximately 88% of parties considered having male and female mediators with both legal and social science training made a significant (and positive) difference to the handling of the proceedings.<sup>50</sup>

3.76 The following are said to be amongst the overall benefits of co-mediation:

- It provides a counterweight to dispute resolver bias, conscious or unconscious;
- While one mediator is obtaining information in the initial stages of the mediation, the other can take notes and prepare for the next stage. This helps both participants feel understood;
- There is an advantage of one mediator sometimes 'observing' and picking up on an important point that may have been missed;
- Shared load assists concentration;
- If one participant feels 'left out' while the other is talking, the second mediator can assist in including them - through eye contact, body language etcetera. They may also reflect the fact that it is also acceptable just to listen;
- Cooperation between genders is modelled by the mediators;
- Psychologically and emotionally, having four persons provides a better (gendered) balance.<sup>51</sup>

3.77 Co-mediation can be an option at any stage in a multi-session dispute resolution model.

3.78 It is suggested that use of a co-mediation model may substantially reduce problems with actual and perceived bias. As indicated below, it may also be a useful strategy where there are significant power imbalances between the participants

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<sup>50</sup> See also, Tony Gee, Pat Urban, 'Co-Mediation in the Family Court', (1994) 5 *Alternative Dispute Resolution Journal*, page 42 at page 43.

<sup>51</sup> *Ibid*, page 44.

and/or violence. In so far as it may be seen to suggest a non-gendered service, it may provide equal encouragement to men and women to use ADR.

3.79 There is one word of warning however. In using a co-mediation model, it is important that dispute resolvers do not rely upon stereotypical responses from the participants. Sometimes, for instance, men may be more comfortable talking with a female, and as mentioned above, women with a male, mediator. Additionally, co-mediation is also more expensive, and this may disadvantage some people.

### **Dealing with Gendered Power Imbalances**

3.80 In addition to training for ADR service providers designed to increase their sensitivity to the dangers of individual and systemic prejudice, a key element of training should relate to the dynamics of gendered power imbalance in areas in which the dispute resolver practices. Training needs to examine the way power changes from situation to situation: its dynamics in relationships; and the unwillingness of some people with power to use it or alternatively, to recognise and relinquish it appropriately.

3.81 As part of this training, dispute resolvers need to be familiar with the various procedural strategies which can be adopted. For example, as suggested above, co-mediation is one mechanism that may be usefully considered when dealing with certain sorts of disputes involving men and women.

3.82 Because gendered power imbalances may be, potentially quite extreme, stemming from financial, social, physical and emotional differences between the participants, consideration should also be given to having a third party or advocate present in some cases to assist the weaker participant with their negotiations. Dispute resolvers should also be encouraged to develop new strategies. Herein lies one of the major advantages of ADR over the formal justice system.

### **Dealing with Gendered Violence**

3.83 Where violence exists, power imbalances may be at their most extreme and the propriety of proceeding by way of ADR at its most questionable. Research shows that the likelihood of violence or the threat of violence between men and women is at its greatest around the period of separation and divorce. Given the increasing use of ADR in interpersonal and family disputes where violence is often an ingredient, it is critical that the issue be addressed. The problems of violence in ADR are well documented and a range of the policy options canvassed in the comprehensive Position Paper on mediation prepared for the National Committee on Violence Against Women and in the 1996 report, *Research/Evaluation of Family Mediation Practice and the Issue of Violence*, commissioned from consultants Keys Young by Legal Aid and Family Services in the Commonwealth Attorney-General's Department.

**3.84** Mediators and other ADR providers should be trained specifically to deal with disputes involving violence. In view of the fear of either participant in the face of violence to articulate their concerns in this regard, particular care needs to be taken in each case to determine whether or not an element of violence or potential violence is present.

**3.85** There is general agreement that cases involving violence should not be mediated except in exceptional circumstances. Service providers should have clear policies and protocols about violence. They should also have an understanding of the extent to which the negotiation process is likely to be distorted by violence. In such circumstances it has been said that:

- The imbalance of power is ‘too great for a neutral mediator to redress’;
- Domestic violence makes consensual decision-making impossible;
- Mediation places too extreme a burden on the target of violence;
- Mediation contributes to the continuing endangerment of the safety of the weaker participant;
- Agreements from mediation are likely to repeat the pattern of unjust and exploitative decisions;
- Mediation removes domestic violence from the public eye: that is, it endorses the privatisation of violence.<sup>52</sup>

**3.86** Mediators should employ careful intake procedures using skilled staff to identify and exclude disputes where there is violence. However, despite the greatest care, some disputes involving violence will nevertheless find their way into mediation. There may also be some cases where the mediator assesses that, notwithstanding the violence, the target of the violence is capable of negotiating effectively in mediation.

**3.87** In such circumstances, the likely dangers of proceeding with ADR should be clearly explained to the disadvantaged participant, and his or her options fully canvassed. It should always be recommended that both participants seek advice as to what their entitlements are at law. The participant should also be encouraged to seek the assistance of an advocate or to have a legal representative present or some other person in a supporting role at the proceedings.

**3.88** Where a mediation or other ADR process does proceed notwithstanding the presence of violence, the flexibility of ADR proceedings should be used to maximum

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<sup>52</sup> Hilary Astor, “Violence and Family Mediation: Policy”, (1994) vol 8(1) Australian Journal of Family Law, pages 3-21.

effect to ensure that absolute priority is given to the safety of the target and others, such as children, who may not be present at the mediation, from further violence.

**3.89** In the 1996 Keys Young report, *'Research/Evaluation of Family Mediation Practice and the Issue of Violence'*, the following strategies are suggested where violence has been disclosed or is suspected:

- Gender balanced co-mediation;
- More than one session with relatively short sessions;
- Compulsory private sessions routinely called by the mediator;
- Clear guidance as to specific information required when legal or financial advice is sought;
- 
- Written details of tasks required between sessions to be provided at the end of each session;
- Strict protocols for safety during the session - for example, how the woman's safety will be assured during mediation breaks, opportunities to go to the toilet, and when the mediators confer;
- Phone follow-up between sessions should check safety and commitment to mediation. Between-session checks, and individual checks prior to mediation, should be routine where there is violence.<sup>53</sup>

**3.90** Shuttle mediation, ringing an adviser during a session or the presence of an advocate or some other person in a supporting role may also be of assistance.

**3.91** Separate waiting areas should always be provided to ensure that people who are in a state of conflict, possibly involving violence or intimidation, do not have to confront each other. Provision should also be made for privacy in discussions with lawyers and other support persons.

**3.92** In addition to the above, some programs provide duress alarms, schedule such sessions only for times when other personnel are at the dispute resolution centre, or encourage the participant to bring a support person.

**3.93** A number of these strategies are useful in other cases involving power imbalance where violence may not necessarily be an element.

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<sup>53</sup> See particularly pages 126 to 132 of the Report.

## Dealing with Cultural Issues

3.94 Where minority cultural groups are in dispute, dispute resolvers need to be aware of the likely impact upon the dispute resolution proceedings both in terms of acceptable and realistic outcomes and procedural adjustments which may be necessary.

## Confronting the Shadow of the Law

*In terms of substance*

3.95 To the extent that the participants in an ADR proceeding may reach an agreement that reflects the gender bias of the formal justice system, it is suggested there is little that a dispute resolver can appropriately go beyond:

*'...utilising the parties' own capacity to take an objective look at the issues and interests of all involved...'*,

through asking the right questions and helping the participants to think through their choices.<sup>54</sup>

*In terms of Information*

3.96 In terms of redressing informational imbalances about the formal justice system, it has been suggested that, to a degree, the extent of a dispute resolver's duties in this regard will be coloured by whether or not they are legally qualified. Where both participants have access to independent legal advice, it is said that the legally qualified dispute resolver's duties are confined to ensuring the existence of procedural fairness. Where people are not independently advised, one US mediator argues that the lawyer/mediator:

*'... assumes responsibility to tell the parties enough about the applicable law and its uncertainties so their settlement decision is adequately informed. The proposed standard is satisfied if the parties knowingly and voluntarily agree to deviate from the probable litigated outcome and the agreement embodies their personal preferences.'*<sup>55</sup>

3.97 A lesser standard is said to apply where the participants are independently advised or where a process such as facilitated negotiation is being used. However, most Australian mediators see this as going beyond the role of the mediator.

3.98 Where dispute resolvers do not have legal qualifications, an obligation remains to refer the participants to lawyers for advice as to their rights and possible entitlements under the formal justice system. A person cannot evaluate the fairness

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<sup>54</sup> Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation', CW Moore (ed), 'Practical Strategies for the Phases of Mediation', Jossey-Bass, Summer 1987, page 75 at page 84.

<sup>55</sup> Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns', (1990) 2 Journal of Dispute Resolution, page 347 at page 366.

of an option in the absence of information about the applicable law. It has also been suggested that:

*'Lawyers should be encouraged to prepare brochures, video-tapes, or act as legal advisers to mediation teams ....'*<sup>56</sup>

3.99 If this could be done without offending State and Territory legal professional rules of practice, it would certainly be a cost-efficient response to this problem.

### **Access to Services and Information**

3.100 Various accommodations can also be made to increase the accessibility of the service to both men and women: for example, dispute resolution agencies should provide access to child-care facilities. These should be in or close to the dispute resolution centre: if there is a charge, it should be affordable.

3.101 After hours services could be made available for people working during the day. The NSW Community Justice Centres, for example, have always provided mediation sessions at times to suit disputants outside normal office hours (9.00am to 5.00pm). In the 1994/95 reporting period, it is noted in the Centres' Annual Report that the number of sessions scheduled for 4pm or later (590) or for weekends (213) totalled nearly half of all sessions scheduled.

### **Avoiding the privatising effect of ADR**

3.102 Because of public interest considerations, it might also be considered that disputes falling within certain defined categories should not be dealt with by way of ADR. It is recognised however, that it is unrealistic, as in many disputes it is unrealistic to ask individuals to forego the advantages of ADR for general public interest considerations.

3.103 A number of strategies to address the problem of privatisation are set out in Chapter 1 of this Discussion Paper.

***Are the suggestions made in Chapter 1 (paragraph 1.49) an adequate response to privatisation concerns for disputes involving issues of gender diversity?***

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS. WHAT OTHER STRATEGIES MIGHT BE ADOPTED TO ADDRESS ISSUES OF FAIRNESS AND JUSTICE IN ADR IN THE CONTEXT OF GENDER?**

<sup>56</sup> Judith L Maute, *ibid*, page 368.



## CHAPTER 4

### MINORITY CULTURAL GROUPS IN AUSTRALIAN SOCIETY

#### INTRODUCTION

4.01 'Culture' is an elusive concept. It has been described by one writer as:

*'... the habits of our ways ... habits (which) have been learned and cultivated over time and have almost become second nature to us. Culture seems to be the backdrop against which we operate, to a large extent in an unconscious way. It represents and encapsulates the way of life of a particular group of people.'*<sup>57</sup>

4.02 In the Australian Concise Oxford Dictionary it is described as 'the customs, civilisation and achievements of a particular time or people'.

4.03 Having regard to these definitions, cultural diversity can be said to arise from an open-ended range of 'core' attributes including those of race, religion, language and belief.

4.04 Australian society is a pluralistic and diverse one. Our population derives from a variety of sources: recent migration (including legal and illegal), permanent and temporary, and voluntary and involuntary immigrants, earlier migration movements, and Aboriginal Australians subjected to colonisation or invasion. It is these broad groups that this Chapter focuses upon. At the 1991 Census, 3.8 million people had been born overseas in one of over 200 countries. A further 3.3 million had one or both parents born overseas, and there were 2.5 million people who spoke a language other than English at home.<sup>58</sup> In 1947, 81% of the overseas born population came from the main English speaking countries (the United Kingdom, Ireland, New Zealand, South Africa, Canada and the United States). By 1995, only 40% of the overseas born population had been born in the main English speaking countries.

4.05 The initial and the prevailing impression is that there are very real differences between the situation of Aboriginal Australians, Northern and Western

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<sup>57</sup> Bee Chen Goh, 'Cross-Cultural Perspectives on Sino-Western Negotiation', November 1994, *Australia Dispute Resolution Journal*, page 268.

<sup>58</sup> *ABS Year Book Australia 1997*, page 88.

European arrivals of the 1950s and 1960s, arrivals of 1968-72, Indo-Chinese arrivals from 1975 and more recent arrivals from the former Yugoslav Republics and East Timor. Aboriginal Australians were subjugated by white colonists with ignorant racist attitudes, while each of the immigrant categories came in distinctive circumstances that determined for a considerable period of time their position in Australian society and their access to power and resources, including their access to welfare services.

4.06 These differences are compounded by the complexities of the cultural groups themselves. For example, in the case of refugees from Vietnam, there were ethnic, class, regional and religious differences within the group, with Catholics and Chinese Vietnamese being over-represented.<sup>59</sup> Also, the longer immigrants have been in Australia the more likely it is that their original cultural differences will have been moulded and reshaped in response to the influence of the dominant Australian culture.

4.07 Responses to Australia's pluralistic and complex social make-up have also evolved over time. During the currency of the White Australia Policy, it was believed that social harmony could best be achieved through the long term eradication of cultural difference. This was followed, in the early 1970s and 1980s by the pluralist response which tended to focus upon and celebrate cultural difference. This approach has also been said to encourage generalisation and stereotyping. A broader approach is currently advocated in which different value systems and beliefs are considered in the context of ourselves and Australian society.<sup>60</sup>

4.08 Having regard to all these considerations, it is clearly not possible for the purposes of this Chapter to examine all cultural groups within Australian society, on an individual basis. In response to the many complexities, the Chapter attempts, however, to isolate major features common to all minority cultural groups (that is, groups other than Anglo-Celtic groups) considered relevant to issues of access and equity in dispute resolution proceedings.

4.09 In view of the unique range of factors affecting Aboriginal Australians and Torres Strait Islanders (referred to collectively hereafter as Indigenous Australians), including those of a linguistic, financial, cultural, geographic and psychological nature, they are examined as a discrete group.

***NADRAC would be grateful for information, comments and suggestions about the cultural minority groups that it has not been possible to consider specifically in this Chapter.***

<sup>59</sup> See 'Issues of Access and Equity - Barriers to Reform', Jennifer Burley, May 1995, Criminology Australia, page 15 at page 17.

<sup>60</sup> Joanna Kalowski, 'In a Manner of Speaking: A Cross Cultural View of Mediation', (1994) vol 2(2) Commercial Dispute Resolution Journal, page 200 and following.

## **THE GENERAL IMPACT OF CULTURAL DIVERSITY**

4.10 Culture affects people in many ways. Amongst the most important, it serves to place people sharing common cultural attributes within identifiable groups. As a result of this grouping, it is possible to make general observations about the members of the group, and, in the process, to develop 'cultural myths' or stereotyped views about group members. This may result in discrimination and actions by society at large which can effectively marginalise the group and increase any disadvantages that may already exist.

4.11 Few immigrants arrive in a country free from pre-judgement from a variety of sources - for example, colonial relationships, war experiences, school history classes, tourism and the mass media. Indigenous Australians are also subject to a similar number of preconceptions and assumptions. Resulting prejudices determine prevailing opinions on what a specific group wants, needs or deserves.

4.12 This can be an invidious and largely subconscious process. Here are some examples of disputes with cultural components:

- An Aboriginal Australian youth at a poor inner city school claims to have been assaulted by the white male driver of the school bus.
- An Anglo/Celtic white youth at a wealthy suburban school claims to have been assaulted by the black driver of the school bus.
- A Vietnamese youth claims to have been assaulted by a Croatian teacher at an inner city high school.
- A Torres Strait Islander youth claims to have been assaulted by a priest at has Catholic high school.

4.13 If you were asked to mediate any of these disputes, what myths, prejudices and stereotypes might you have to counter in order to assume the role of a neutral third party facilitator in each of these cases? In all four situations, it is suggested, it can be all too easy to make general assumptions on the basis of considerations such as race and socio-economic status. These assumptions may or may not be accurate having regard to the individuals involved in these disputes.

4.14 A number of related factors can also be a consequence of cultural diversity. Socio-economic factors, for example, are particularly significant to first generation Australians many of whom will be unskilled or whose qualifications may not be recognised in this country. These difficulties may be compounded if group-

members are also non-English speaking. Low self esteem may also be a resultant characteristic of some cultural minority groups.

4.15 Differences between cultural groups within a society may result in one group being at a disadvantage in a particular social environment. For members of cultural minority groups, access to, utilisation of and the standard of delivery of dispute resolution services may be no exception.

## **CULTURAL DIVERSITY AND DISPUTE RESOLUTION**

### **Types of Disputes in which Members of Cultural Minorities May Be Involved**

4.16 Cultural difference from the dominant culture in a society can lead to dispute resolution proceedings under State and Commonwealth racial discrimination and equal opportunity legislation.<sup>61</sup> It can also give rise to less specifically directed proceedings flowing from racial violence, abuse and prejudice.

4.17 Members of cultural groups may also, of course, become involved in a myriad of disputes which may have nothing, on the face of them, to do with race or culture. Race may nevertheless have an impact on the dispute. In view of the precarious position in Australian society of some members of cultural minority groups, it might be anticipated, however, that they would be quite likely to become involved in disputes with social service providers, housing and other municipal authorities.

### **Advantages of ADR for Members of Cultural Minorities**

4.18 As noted elsewhere in this Discussion Paper, there is a tendency on the part of both governments and the courts to encourage the resolution of an increasing range of disputes through the use of ADR. Disputes involving cultural minorities are no exception to this general trend. Dispute resolution provisions in legislation relating to Equal Opportunity, Racial Discrimination and National Native Title are reflective of this general trend.

4.19 There is, accordingly, an obligation to ensure that alternative forms of dispute resolution deliver fair and appropriate outcomes and do not become a secondary form of justice for minority groups or, merely a response to the overloading of the formal justice system. As observed by one writer in the context of Aboriginal Canadians:

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<sup>61</sup> In the *Annual Report of the Commonwealth Human Rights and Equal Opportunity Commission*, it is reported that during the 1995/96 financial year, 44.6% of the complaints under the *Racial Discrimination Act 1975* were employment-related and 30% related to the provision of goods and services.

*'What Aboriginal Peoples seek is an inherent right to be in charge of all our relationships, including those that involve justice. This cannot be accomplished through incremental changes in the court system that divert offenders from what is perceived to be the 'real', the 'true' and the 'legitimate' system. This kind of construction of justice relations only reinforces and perpetuates existing stereotypes, which are profound and significant in Canadian discourses, that Aboriginal people are 'lesser than', 'outside of', somehow inferior or savage. Alternative dispute resolution does nothing to change the root of the problem which is the negative perception of Aboriginal people that law has yet to fully set aside. It is precisely this history that Aboriginal people seek to change.'*<sup>62</sup>

**4.20** Subject to such reservations, however, ADR does have potential in a number of important respects for members of minority groups.

### Cost

**4.21** Members of minority cultural groups are often at the bottom of the Australian socio-economic scale, particularly those who are newly arrived or who are from non-English speaking backgrounds. For such groups, the expense of the formal justice system will often be prohibitive. For example, families seeking to establish small businesses may feel unable to resolve important disputes because of the cost of litigation. ADR may offer the only practical alternative.

### An Alternative to the Formal Justice System in Disputes Giving Rise to Legal Issues

**4.22** ADR may also offer an attractive alternative to the formal justice system for a number of other reasons. Despite the significant changes to the structure of Australian society over the last forty odd years as a result of migration, formal justice continues to be dominated overwhelmingly by Anglo traditions both in terms of content, rules and procedures. As a result, to many minority cultural groups, the formal justice system remains unfamiliar and intimidating.

**4.23** Substantive systemic and procedural cultural bias has been recognised as a significant problem for the formal justice system. In some cases, rules and procedures of the formal justice system may be directly at odds with the beliefs and traditions of a particular cultural group. In its report on *'Multiculturalism and the Law'*,<sup>63</sup> the Australian Law Reform Commission has documented problems posed for some groups by the common law concepts of 'guardianship', 'custody', 'access' or 'care' which underpin Commonwealth or State welfare laws. These laws were found often to be perceived as alien concepts, encapsulating ideas at odds with the values and experiences of many migrant communities. Minority cultural groups may be

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<sup>62</sup> Patricia Monture-OKanee, 'Alternative Dispute Resolution: A Bridge to Aboriginal Experience', in *'Qualifications for Dispute Resolution: Perspectives on the Debate'*, edited by C Morris and A Pinie, University of Victoria Institute for Dispute Resolution, page 136.

<sup>63</sup> The Australian Law Reform Commission, *'Multiculturalism and the Law'*, Report No.57, Commonwealth of Australia, 1992.

highly suspicious of and alienated from a system which seems to foster laws and beliefs which are ostensibly contrary to their own cultural beliefs and practices.

4.24 Additionally, the language of the formal justice system and the style of rhetoric peculiar to its courts may present difficulties even to members of the dominant culture, and may be even more alien and confusing to many members of minority cultural groups.

4.25 ADR is more flexible, and, potentially, culturally sensitive, than the formal justice system. This, and its potential for tailoring to the particular needs of participants, means ADR has much to offer cultural minorities. ADR processes are not fettered by the substantive, procedural and evidentiary rules of the formal justice system and it is possible to move away from rules of the formal justice system which may be culturally inappropriate. Considerable modifications can be made to practices and procedures in order to accommodate diversities of culture. For example, it is open to the participants to choose their own mediators (or co-mediators) and to select a venue for the mediation or other ADR process to take place. It may be possible to hold a mediation in the open air if this is more acceptable to the participants. Likewise, where there are taboos regarding the sorts of matters that can appropriately be discussed in the presence of men or women, mediators and conciliators can be either male or female.

4.26 Even more fundamentally, it has been observed that:

*'... culture plays an important role in determining an individual's understanding of what constitutes a dispute. Not only does culture impact on the understanding of the concept of a dispute, but it is important to note who has the power to label an incident or interchange 'a dispute' and when. The existing system (ie the formal justice system) determines the definition of a dispute to the exclusion of other people's definitions or their ways of resolving disputes.'*<sup>64</sup>

In contrast, ADR may accommodate disputes which may lie beyond the scope of the formal justice system.

### Empowerment

4.27 Whilst it does not always give the participants the right to define the parameters of their dispute (and will not do so, where this is governed by legislation), where it does afford them this option, ADR will be very empowering.

4.28 The flexibility of ADR and the control of the process and outcomes afforded to the participants may also be an empowering element for members of minority groups in all disputes.

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<sup>64</sup> Patricia Monture-OKanee, op cit note 62, page 137.

## Barriers to Fairness in ADR for Members of Cultural Minorities

4.29 This is not to say, however, that there are no difficulties with ADR for cultural minorities.

### Bias

#### *Systemic Bias*

4.30 Although mediation is not peculiar to white Western or Anglo-Celtic culture, it has been claimed that it is not culturally neutral,<sup>65</sup> and that notwithstanding the significant advantages of mediation for members of cultural minorities, systemic procedural bias may still exist.

4.31 As indicated below in relation to Indigenous Australians, there may be many elements of standard ADR processes that do not coincide with the cultural practices of minority groups.

4.32 In terms of the negotiating process in mediation or conciliation, the way in which the participants interact with each other may also be very much culturally influenced. For instance, because:

*'..... Chinese culture is basically homocentric and high context, and Western culture is essentially egocentric and low-context, clashes of behavioural rules come into play in a Sino-Western negotiation. Their respective thought patterns, rules of conduct, arousal and responses to feelings originate from and advance to different points'.<sup>66</sup>*

In situations where one cultural group may use direct argument and feel free to express its dissatisfaction with a particular proposal, another group may feel disposed to listen politely to the proposal but reject it all the same. As noted in the 'Access to Justice Report':

*'Assumptions based on Anglo-Australian cultural norms may create cultural misunderstanding, as for example, where a witness from a culture deferential to authority simply assents to leading questions put in cross-examination, even where they are not true, or where the accused comes from a culture where direct answers to questions are considered impolite appears to the court evasive.'<sup>67</sup>*

**What other forms of systemic cultural bias may ADR processes and proceedings give rise to for members of cultural minority groups?**

<sup>65</sup> G Tillett, 'The Myths of Mediation', The Centre for Conflict Resolution, Macquarie University, 1991.

<sup>66</sup> Bee Chen Goh, op cit note 57, page 277.

<sup>67</sup> Page 56 of the Report.

## *Personal Bias*

4.33 Unless specifically countered, actual bias at the individual level is just as likely to be a problem in ADR proceedings involving members of cultural minorities. Indeed, the private nature of the proceedings may well make the problem a more invidious one. Additionally, the informality of ADR proceedings may make the display of prejudice by dispute resolution providers more likely.<sup>68</sup> Such bias is often unconscious, deriving from largely unexamined ideas about what it means, for example, to be 'Asian', 'Chinese' or 'Aboriginal'.

4.34 Perceived bias may also be relevant here. In an inter-cultural dispute a member of a cultural minority may presume an understanding between a mediator and a participant who are both members of the same cultural group. Notwithstanding that the perception may be quite unfounded, the misconception may be just as destructive of the trust between the participants and the dispute resolver as actual bias.

## *Stereotyping*

4.35 Problems may also arise for cultural minorities as a result of prejudice on the basis of prevailing social attitudes. There is a related danger of stereotyping culturally different groups. In the context of the formal justice system, for example, it has been observed that:

*'Some magistrates still adhere to the myth that domestic violence among some migrant communities is still much more prevalent than among the general community, and hence more acceptable. Various stereotypes utilised by some magistrates result in the positioning of the victim's behaviour and (her) culture as the appropriate arena for scrutiny rather than the adjudication of the violence of the perpetrator'.<sup>69</sup>*

4.36 Stereotyping has also been identified as a problem in Chapter 5 of this Discussion Paper (Age - Moving through the Life Cycle and Dispute Resolution) as a problem for adolescents who are identifiable as members of certain cultural groups.

## *Power Imbalance*

### *Communication*

4.37 In view of the fact that ADR processes like mediation rely on the participants negotiating their own solution, with legal representatives, when present, assuming only a supporting role, effective communication is an essential factor. As with the

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<sup>68</sup> Richard Delgado, 'Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution', vol 6 (1985) Wisconsin Law Review, page 1395.

<sup>69</sup> Kathy McCarthy, 'Violence Against Women and Children Working Group, Equal Before the Law? Not if you are a Woman whose First Language is not English', Hearsay, edition 36, page 10.

formal justice system, where people from non-English speaking backgrounds are engaged in negotiations, it is imperative that they have the back-up and support of professional interpreters. If this does not happen, a highly valued component of many ADR processes, the opportunity for the participants to be heard, may be seriously impaired.

4.38 Communication involves not only an understanding of words, but also of responses and attitudes. As noted by one writer:

*'... the facility of language is no assurance of complete cultural insight. All too often, we have seen how words may be misunderstood, gestures misinterpreted, and meanings mishandled'.<sup>70</sup>*

4.39 Cross-cultural negotiation may be particularly challenging:

*'... because it is the natural human tendency to evaluate another's behaviour with reference to one's terms, and misunderstandings may therefore readily occur.'<sup>71</sup>*

Suspicion and mistrust may well result which will significantly impair the trust of participants in each other and in the ADR process itself.

4.40 When an interpreter is used, the process can be very time-consuming and other parties can often become impatient. If the interpreter is also the advocate for the participant, they need to take particular care to ensure that they consult with the person sufficiently. Insufficient consultation can result in further disempowerment of an already disadvantaged person. Often too, interpreters will not be readily available.<sup>72</sup>

4.41 As noted above, even where language difficulties are overcome, cultural barriers may impede communication and prevent fair outcomes. There may also be more subtle communication problems arising from different cultural responses to different situations.

4.42 In some instances, dispute resolvers and participants who are members of the dominant cultural group, may feel constrained in negotiations by a concern not to appear biased or discriminatory.

#### *Poor Presentation and Belief*

4.43 As noted, members of cultural minorities may experience alienation at the hands of the rules and procedures of the formal justice system. This may further exacerbate existing low self esteem. This in turn may affect credibility and general demeanour, and may mean that under cross-examination, for example, a disputant will fare less than well.

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<sup>70</sup> Bee Chen Goh, op cit note 57, page 275.

<sup>71</sup> Bee Chen Goh, op cit note 57, page 279.

<sup>72</sup> Access to interpreters emerged as a key concern of participants in the Australian Law Reform Commission's Report No 57, *'Multiculturalism and the Law'*, see page 41 and following.

4.44 Similar problems may also be encountered in the face-to-face negotiations of ADR processes like mediation. Significant problems may arise where people are not proficient in the English language and are not afforded the support of a good interpreter. Even where they do have the services of a good interpreter, the fact that they are unable to speak directly on their own behalves may well make them appear vulnerable and at a disadvantage and may encourage prejudicial views. Low self esteem and feelings of inferiority may also be problems when a member of a cultural minority group is negotiating directly with an 'old Australian'.

#### *Violence*

4.45 Violence may be an underlying threat in many disputes involving members of cultural minorities. This is so even if the disputes do not openly relate to race or to racial discrimination. Racism may be an underlying element of virtually any dispute between members of cultural minorities and majorities.

4.46 Anger and violence may also exist in internal disputes between members of the same cultural minority group. For example, in seeking to take a dispute outside the confines of a small, close-knit cultural group for mediation or conciliation, a member of the group may be running the risk of resentment or violence from other group members. A similar response may come from members of the dominant cultural group, who may, perhaps, be outraged at the 'temerity' of the minority group member in seeking to obtain redress against them.

#### *Information and Access*

4.47 For a range of reasons, members of minority cultural groups may not seek recourse to available dispute resolution mechanisms in the resolution of their disputes. For instance, the process of obtaining adequate and accurate advice, as to rights and entitlements and the options available, is clearly greatly impeded, where people cannot speak and/or read English well, or where, in some cases, they may be illiterate in their first language.

4.48 There is evidence to suggest that members of cultural minority groups need to know more about the existence, and operation of ADR procedures, such as counselling and mediation, and about informal tribunals, such as those relating to small claims in the consumer contract and family law areas.<sup>73</sup>

4.49 A lack of information and the inability to obtain such information may also lead to suspicion and mistrust on the part of members of minority cultural groups. For recent immigrants, experience in their country of origin may sometimes have led to a distrust of law, or of any state institutions. In the end result, some may be discouraged from seeking external assistance in the resolution of disputes. This may have disastrous consequences.

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<sup>73</sup> See for example, Australian Law Reform Commission Report No. 57, 'Multiculturalism and the Law', page 25.

Privatisation/Appropriateness of ADR

4.50 With some sorts of disputes, there may be costs consequent upon foregoing the publicity of the formal justice system. The settlement of a dispute through mediation does nothing to develop, or, to explain the relevant law, or, to expose any shortcomings in that law.

4.51 Resolution of a dispute by way of mediation or conciliation may also signal a willingness to make concessions, where in fact, concessions are not appropriate and should not be made. Notable in this regard, are disputes with respect to race and discrimination. According to one writer, in such circumstances:

*‘One party is a member of a minority group who carries all the political, social and psychological handicaps that society imposes on the disempowered, while the other party to this mediation is there because of their attempt to take advantage of this power imbalance’.*

*‘Mediation and conciliation will simply replicate these already existing inequalities because the process itself incorporates an assumption of a false equality. The process must lead to failure for an even more fundamental reason. There is, quite simply, nothing to talk about. The mediation mechanism proceeds ... on the assumption that common ground can be achieved between the parties. Not only does this ignore the very real power imbalances of the situation, but its working assumption of rationality privileges one discourse while demeaning another. By acknowledging that a racist deserves a hearing, deserves to participate in the mediation process on the basis of discursive equality, the state grants a certain legitimacy to the content of that discourse.’*

*‘At the same time the victim of racism is being told that a priori their discourse is only as valid as that of their victimiser.’<sup>74</sup>*

4.52 Whilst this may perhaps be regarded as adopting the high moral ground in the face of the alienating nature and cost of the formal justice system, for many members of cultural minority groups, it nonetheless hints at the particular moral sensitivity required of service providers in such disputes. It suggests also, having regard to issues of disempowerment, that it is important that cultural minority groups are at least afforded the option of accessing the formal justice system should they wish to do so. As noted in Chapter 6 of this Discussion Paper, (People with Disabilities and Alternative Dispute Resolution), this option is something which people with disabilities also require.

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<sup>74</sup> David Fraser, ‘Racism and the Law’, (1989) vol 14(2), Legal Services Bulletin, page 67 at page 70.

## **DISPUTE RESOLUTION - CULTURAL BARRIERS - INDIGENOUS AUSTRALIANS**

4.53 As reflected in the following,<sup>75</sup> Indigenous Australians are amongst the most disadvantaged members of Australian society:

*'... the Australian Aboriginal population is severely socio-economically disadvantaged. The median income for Aboriginal people in 1986 was 68.4% of that for the general Australian population (Rose, 1993), life expectancy for Aboriginal people is 53 years for men and 58 for women as compared with 74 for men and 80 for women in the general population (Bostock, 1991), and Aboriginal adult mortality rates are similar to those in the poorest third world countries, while those for children are similar to those in developing countries (Bostock, 1991).'*

4.54 As in the general section above, there are consequences of being a cultural minority which impact upon the fairness of dispute resolution procedures and outcomes for Indigenous Australian peoples. First, of course, are the dispute resolvers themselves, who inevitably bring to the mediation their own views and understandings. Indigenous Australians are also disadvantaged in other ways in Australian society: by race, by geographical isolation and by a higher level of disability than that of the general population. In addition, their native tongue is often not English and their level of education may be low. Indigenous Australians may also have significantly different religious beliefs and behavioural patterns.

4.55 Like other minority groups, and as a result of centuries of poverty and oppression, Indigenous Australians may be unused to asserting themselves in the presence of white Australians whom they may regard as authoritative. Having regard to their sorry history at the hands of the formal justice system, they are also likely in some cases, to take a passive and defeatist attitude when challenged, on the basis that nothing that they might say would change anything. Some may concur gratuitously with whatever is said by those in authority. Some may see fighting and swearing as being appropriately assertive.<sup>76</sup>

4.56 There is also the nature of the system itself. For many Indigenous peoples, processes like mediation work, but only if they take note of the cultural environment in which they are seeking to operate. For mediation to be culturally relevant, the service provider has to reconcile the requirements of quality service with the requirements of culture.

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<sup>75</sup> Lindsay Gething, 'A Case Study of Australian Aboriginal People with Disabilities', (1995) 2 Australian Disability Review, page 77.

<sup>76</sup> See paragraph 4.59 below.

## **The Advantages of ADR for Indigenous Australians**

### Non Legal Disputes

4.57 As noted above, ADR allows people to ‘define’ their own disputes. This may be particularly useful where disputes between members of minority cultural groups are not justiciable. Many disputes involving Indigenous Australians fall into this category. Quarrels about customary law are illustrative. In these situations, ADR can provide a dispute resolution forum which would not otherwise be available.

### Legal Disputes

#### *The Formal Justice System*

4.58 It is useful for the advantages of ADR for Indigenous Australians in justiciable disputes to be viewed against the back-drop of the formal justice system.

4.59 In traditional Aboriginal and Torres Strait Islander society, the emphasis was upon the maintenance of harmonious relations rather than punishment of the wrongdoers. Disputes were mainly settled in public and physical violence, conflict, anger and aggression were acceptable, but strictly controlled. Swearing was another traditional strategy employed in dispute resolution: neither fighting nor swearing have been deemed legitimate by the formal justice system.<sup>77</sup>

4.60 Disputes arising amongst kin would be resolved by a variety of means such as public debate, family meetings or clan community moots.<sup>78</sup> This ill accords with the formal justice system, where punishment, or the attribution of fault is fundamental, and where justice is externally imposed upon the participants.

4.61 According to one writer:

*‘There is no doubt that any mechanisms that might distance Aboriginal justice needs from white man’s courts is overwhelmingly to be preferred. Aboriginal experience of the adversarial legal and criminal justice system of white Australia has been, at worst, horrific, and at best, unrelentingly ethnocentric.’<sup>79</sup>*

4.62 Speaking in the context of the Family Court, the Chief Justice of that Court, the Hon Alastair Nicholson has observed that:

*‘Historically, Indigenous peoples have had little contact with the Court and have been reluctant to seek out the Court’s services. One of the reasons for this may*

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<sup>77</sup> Langton, ‘Medicine Square: For the Recognition of Aboriginal Swearing and Fighting as Customary Law’, Canberra, 1983.

<sup>78</sup> For further discussion, see article by K L Pringle, ‘Aboriginal Mediation: One Step Toward Reempowerment’, (1996) vol 7(4) Australian Dispute Resolution Journal, page 253-270.

<sup>79</sup> Madelaine Suavé, ‘Mediation: Towards an Aboriginal Conceptualisation’, (1996) vol 3(80), Aboriginal Law Bulletin, page 10. See also, Larissa Behrendt, ‘Aboriginal Dispute Resolution’, Federation Press, Sydney, 1995, page 51 and following.

have been lack of knowledge about the services the Court can provide, as well as an association of the Court with the previous 'welfare' policies which resulted in the removal of Indigenous children from their families. It may also have reflected the internal methods Aboriginal and Torres Strait Islander people have for resolving family difficulties within their communities. When contact has occurred, it has usually been in the context of so-called mixed marriages where the Indigenous person may well have felt disadvantageous in dealing with a 'white' institution.<sup>80</sup>

**4.63** In the same article, the Chief Justice notes the establishment, in 1993, of an Aboriginal and Torres Strait Islander Awareness Committee which, he says, 'has been consulting with a wide range of Aboriginal and Torres Strait Islander organisations throughout many regions of Australia, including metropolitan and provincial areas'. Further work undertaken in this area is said to include:

*'... cross-cultural awareness training (in conjunction) with the Australian Institute of Judicial Administration in order to maximise the resources we each have available. Such programs have been delivered through the AIJA in Western Australia and Queensland, and other States will soon follow...'*

*'We have been conscious of the diversity of languages and cultures among groups in the Territory, particularly the differences between the Top End and the Centre. A constant theme of those whom we consult is the need to address language barriers: there are about 20 major languages in the Top End and 5 in the Centre, and numerous dialects. To this end, discussions have been held with Batchelor College in Darwin and the Institute of Aboriginal Development in Alice Springs.'*<sup>81</sup>

**4.64** Despite these sorts of responses by the courts, Indigenous Australians generally continue to be uncomfortable at the hands of the Australian judicial system. Indeed:

*'It is arguable that the adversary system is of limited appropriate application to the problems of Aboriginal (and Torres Strait Islander) people taking cognisance of traditional cultural traits.'*<sup>82</sup>

It should also be noted, having regard to the paragraph above, that the overwhelming majority of Indigenous people live outside the Northern Territory.

#### *ADR*

**4.65** It was found by the Royal Commission into Aboriginal Deaths in Custody that the lives of Indigenous Australians were often subject to many external controls

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<sup>80</sup> 'Family Court Initiatives with Aboriginal and Torres Strait Islander Communities', Vol 3, October 1995 (76)Aboriginal Law Bulletin, page 15.

<sup>81</sup> Hon A J Nicholson, *ibid*, page 15.

<sup>82</sup> P R Grose, 'Towards a Better Tomorrow: a Perspective on Dispute Resolution in Aboriginal Communities in Queensland', (1994) Alternative Dispute Resolution Journal, 29 at 34.

by a range of government bodies and authorities. This was found to be extremely disempowering for Indigenous peoples and communities.

4.66 The emphasis of ADR processes, such as mediation, upon personal and group empowerment, face to face confrontation of protagonists, structured discussions, free expression of feelings as well as facts and the ability to deal with 'substantive' as well as perceived bias are said to be attractive features for Indigenous Australians.<sup>83</sup> According to one writer:

*'Its emphasis on self-empowerment ....., is particularly appropriate to community people who for the last 200 years have suffered dispossession.'*<sup>84</sup>

4.67 Its encouragement of ongoing relationships may also be an important element in a small close-knit Indigenous community, where people will have to continue to live closely together, or where relations with a mining company will continue. The Royal Commission into Aboriginal Deaths in Custody highlighted mediation processes as being appropriate mechanisms for Indigenous people in managing conflict.

4.68 It has also been said that:

*'..... mediation is a dispute resolution tool which in many respects complements traditional Indigenous Australian dispute resolution processes. Many Indigenous people state that they had their own practices of mediation in traditional society and today they mediate all the time in community disputes in the accepted style and convention of their particular community. There appears to be comfort in a process which fits more readily into traditional dispute resolution processes than the alien nature of processes inherent in our British system of justice.'*<sup>85</sup>

### **Ensuring the Appropriateness of ADR for Indigenous Australians**

4.69 Notwithstanding the advantages of ADR outlined above, it has been said that there are a number of cultural considerations which need to be taken into account in disputes involving Indigenous Australians. These include:

- **Community empowerment:** The essential difference between mediation in the 'Western' sense which seeks to empower individuals, and mediation in the Indigenous Australian sense which seeks to empower the community.
- **Neutrality:** The fact that in many Indigenous Australian societies, neutrality of the mediator is not possible. Rather, it may be imperative

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<sup>83</sup> Marg O'Donnell, 'Mediation within Aboriginal Communities: Issues and Challenges', 1992, page 9.

<sup>84</sup> Grose, op cit note 82, page 37. See also Pringle, op cit note 58.

<sup>85</sup> Pringle, op cit note 78, page 255.

for the mediator to be known and respected by the participants to the dispute. Traditionally, respected members of the community play roles in conflict resolution and are considered to have the capacity to treat people fairly and impartially. To this end, the mediator will be expected to know and be known by the disputants. The emphasis is therefore upon fair mindedness rather than neutrality. In each case, from the outset, the degree of neutrality required by a particular community should be established.

- **Confidentiality:** The fact that confidentiality or the privatisation of disputes is rarely possible because of close-bonded living arrangements. It has been noted that:

*‘A major difficulty is the public nature of Indigenous Australian social interactions.’*

*‘The fact that many Aboriginal community disputes are multi-partied also makes confidentiality problematic. Furthermore, the requirement of confidentiality conflicts with the traditionally public nature of Aboriginal dispute resolution. Community members were generally aware of the background and circumstances of a dispute and were involved in its resolution.’*

*‘In Aboriginal communities there are cultural and practical reasons for families and others interested in a conflict to be aware of negotiations and the outcomes of any mediation session. Those who stand in a kinship relationship to a disputant may be obliged to exert pressure on the disputant to resolve a dispute. Further, the outcome of the mediation and its terms may require many, if not all, community members to be made aware of it.’*

*‘As long as this is acceptable to the disputants and to the particular community, there seems no reason why the confidentiality characteristics of the mediation process cannot be applied flexibly.’<sup>86</sup>*

- **Involuntariness:** Whilst the generally held view is that it is preferable for a dispute resolution process to be entered into on a voluntary basis, it is not uncommon, in some Indigenous Australian communities, for disputants to be required, pressured or directed by family members and by respected authoritative members of the community like Elders and bodies such as the community council, to attend at mediation, resolve a dispute and conform to their obligations and duties.

It has been suggested in this regard that:

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<sup>86</sup> Ibid, page 261.

*‘Mediation is a process whose in-built flexibility can accommodate these elements of involuntariness. After many years of disempowerment resulting in dependence on others there are likely to be many disputants reluctant to voluntarily enter into the mediation process. Referral systems and community involvement in getting these people to mediate should be acceptable.’<sup>87</sup>*

- **Participants:** In dispute resolution processes involving Indigenous Australians, because of wide community involvement in disputes, it may be difficult to establish who should participate in the mediation. Much pre-mediation negotiation may be required. Where Indigenous and non-Indigenous people are involved in a dispute, this may lead to difficulties with such people objecting to the involvement in the proceedings of people whom they view as having no direct involvement in the matter. In such cases, mutual agreement must be reached.
- **Violence:** It has been said that the most common problems in Indigenous communities are conflicts within families and extended families, and that they will often involve some degree of domestic violence.<sup>88</sup> In Western society, mediation where there is violence is seldom satisfactory. (Comments made in Chapter 3 of this Discussion Paper dealing with Gender are relevant in this regard.) In an Indigenous Australian society however, with the emphasis upon community mediation, this may not be the case. An Aboriginal or Torres Strait Islander woman who uses the formal justice system to punish a violent husband could well be ostracised by society. Securing a restraining order whilst living in a small isolated community would clearly be disastrous. For these and many other reasons, Indigenous women may be very reluctant to turn to the formal justice system. For them, ADR may offer the only ‘real’ option.
- **The Role of Elders:** It has been said that the use of mediation impinges upon the traditional role of Elders in the resolution of disputes.<sup>89</sup>

**4.70** Ownership of a dispute or a process may be of the utmost importance to Indigenous Australians. A parallel may be drawn in this regard with the position of Aboriginal Canadians:

*‘... Aboriginal Peoples do not construct social order or social control in the same way Canadians do. This also affects the meaning which is attached to the definition of a dispute. Aboriginal persons as individuals have not abdicated the individualised form of sovereignty. Social control within Aboriginal communities is both an internal individual responsibility as well*

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<sup>87</sup> Ibid, page 262.

<sup>88</sup> Marg O’Donnell, op cit note 83, page 12.

<sup>89</sup> Larissa Behrendt, op cit note 79 page 65.

*as one of the ways in which one's individual relationship with one's community is defined. That is to say that an individual of an Aboriginal Nation has maintained a level of sovereignty that Canadian citizens long ago discarded in favour of the State<sup>90</sup>*

4.71 Unless the cultural considerations described above are accommodated by ADR, this important 'ownership element' may be placed in jeopardy with a consequent negative outcome in resolving the dispute.

4.72 There may also need to be an awareness of the differences between urban and rural Indigenous peoples, and ADR procedures are also likely to need further modification when only one of the participants is Aboriginal.

## **WHAT OTHER BARRIERS ARE THERE TO FAIRNESS AND JUSTICE IN ADR FOR MEMBERS OF CULTURAL MINORITIES?**

### **STRATEGIES TO ADDRESS BARRIERS TO FAIRNESS AND JUSTICE FOR MEMBERS OF CULTURAL MINORITIES: SOME POSSIBLE APPROACHES**

4.73 Rendering the dispute resolution process fair and appropriate for members of cultural minority groups requires a non-discriminatory attitude from service providers, a commitment to seeking innovative variations in the delivery of the service to accommodate cultural differences, and sufficient professional expertise to maintain the quality of service across a range of cultural and cross-cultural situations. Factors such as discriminatory attitudes, organisational restrictions, professional limitations and ignorance of particular client groups militates against this.

4.74 The following are amongst the measures which might be taken by dispute resolvers and their agencies to address some of the potential difficulties with ADR, for cultural minorities.

#### **Training**

4.75 The establishment of appropriate training programs for dispute resolvers is a key element in redressing problems of bias, stereotyping and power imbalance identified above. It is perhaps trite, but nonetheless true to say that, unless the dimensions of a problem can be recognised, it is unlikely that it will be able to be adequately addressed.

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<sup>90</sup> Patricia Monture-OKanee, op cit note 62, page 138.

4.76 Whilst it may be empowering for some groups to have their own ADR service providers, it would not be possible or necessarily desirable for every dispute involving a particular minority to have a mediator or conciliator from that cultural group. It has been said in this regard that:

*'... matching parties and mediators based upon gender or race or sexual orientation does not assure that those individuals who happen to be members of the same identity groups will have the same perspectives. But the concern for providing a broad range of interpretative frameworks that such teams symbolise can make the parties feel that they are or will be treated fairly and be heard accurately'.<sup>91</sup>*

***Is co-mediation used in some cross-cultural disputes?***

***Does it assist in redressing power imbalances and bias?***

***In terms of the availability of dispute resolvers from minority cultural groups, is co-mediation a realistic option in many disputes?***

4.77 Rather than seeking to match participants and mediators, it would seem far more important that the mediator or the conciliator involved in the proceedings has a high level of training, including a high level of cultural sensitivity. If this is not the case, there is a danger that the provision of ADR services to members of cultural minorities will be less than first rate. This may be considered easier said than done! Notwithstanding the recommendations which have been made in reports such as the Australian Law Reform Commission's *'Multiculturalism and the Law'*, it is unlikely that it would be possible for mediators (and other dispute resolvers) to obtain a comprehensive understanding of the nuances of all cultural groups. Moreover, the groups themselves are often far from homogeneous.

4.78 Nonetheless it has been remarked that:

*'What is possible is the development of a conscious level whereby the individual is conscious of the potential for biases through self-reflection, and takes active steps to produce a behaviour which is, so far as possible, impartial.'<sup>92</sup>*

4.79 A number of cultural training initiatives have already been instigated in the formal justice system. Whilst specific training with respect to all minority cultural groups may well be an impossibility, training should aim at developing a responsiveness to the requisite 'cultural warning bells'.

4.80 Training should endeavour to do more, however, than to encourage 'cultural awareness', a process which has been described as involving:

<sup>91</sup> Isabelle Gunning: 'Diversity Issues in Mediation: Controlling Negative Cultural Myths', vol 1 (1995) *Dispute Resolution Journal*, page 55 at page 89.

<sup>92</sup> G V Kurien, 'Critique of Myths of Mediation', (1995) vol 6 (1) *Alternative Dispute Resolution Journal*, page 43 at page 52. See also G Tillett, *op cit* note 65, page 2.

*'... learning how they (members of cultural minorities) behave, eat, celebrate, raise their children and bury their dead ...',*

**an approach said to encourage, and even depend for its success:**

*'... on the kind of generalisation that also leads to stereotyping of a negative kind'.<sup>93</sup>*

**4.81** In addition to communication skills, an awareness of cultural diversity, the ability to perceive differences, sensitivity and a knowledge of the migration process, dispute resolution providers are said to require a 'broad view' of culture, which, while recognising the complexities and diversities of a pluralist society, also suggests bridges of shared concern, binding culturally different persons to one another.<sup>94</sup>

**4.82** Using this approach, it is said:

*'... a mediator may successfully assist parties to identify common ground by focussing on their expectations and common goals, rather than the behaviours that arise out of their differences in approach.'<sup>95</sup>*

**4.83** Behaviour is not, in itself, an accurate guide to intention. Dispute resolvers also need to be aware of culturally learned assumptions, particularly their own. It has been suggested that the broad view of culture allows dispute resolvers to:

- (a) *be more accurate in matching a party's intended culturally learned expectation with their behaviour, and not to read into their behaviour the (dispute resolver's) unstated or unconscious beliefs;*
- (b) *become more aware .... of how the mediator's culturally learned perspectives predispose them to a particular set of decisions or outcomes;*
- (c) *expand awareness of the complexity in cultural identity patterns which may or may not include the obvious indicators of ethnicity and nationality;*
- (d) *accept what is salient in one situation may not be so in another, that 'culture' ... does not exert a prime influence in all circumstances but that an individual struggling to adjust to new social circumstances may well be moving from one cultural world view to another and back again;*
- (e) *develop the communicative competencies to track and clarify what particular elements of personal experiences and cultural expectations .... may at a given moment be influencing the interaction.'<sup>96</sup>*

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<sup>93</sup> Kalowski, op cit note 60, page 201.

<sup>94</sup> Ibid, page 203.

<sup>95</sup> Ibid, page 204.

<sup>96</sup> Ibid, page 205.

4.84 In communities where there is a significant grouping of one or more particular cultural groups, this training could of course be extended to include specific training with respect to the customs and traditions of that, or of those, groups.

4.85 It is also interesting to note from the 1995/96 Annual Report of the National Native Title Tribunal, that it has been recommended that the Tribunal also:

*‘undertake systemic training of non-indigenous parties (our emphasis) to mediation in cross cultural awareness....’.*

4.86 Certainly, in the case of major cross-cultural disputes likely to continue for a considerable length of time, this would seem a very positive suggestion. It also indicative of the link between dispute resolution as a service, and dispute resolution as an element of community development and education.

**What other training methods or initiatives have proved or might prove useful in disputes involving members of cultural minorities?**

### **Modification of the Process/system**

4.87 Whilst ADR procedures are far more flexible and their informal nature assists cultural sensitivity, there is still the danger that in differentiating between cultural groups, all that may be achieved is to further marginalise them.

4.88 It has been said for example, that as citizens, members of the Aboriginal and Torres Strait Islander community are entitled to have the same laws as apply to the broader community sensitively applied to their particular communities. And that an abandonment of the system and introduction of an alternative which denies Indigenous Australians the right to legal advice and representation, or, which submits them to swift justice at the expense of fair justice, creates a potentially less satisfactory system than presently exists. For similar reasons, care must be taken in making modifications to ADR processes for cultural minority groups, to ensure that these modifications do achieve fairer processes and outcomes and that they are empowering rather than debilitating, for members of the group.

4.89 Nonetheless, especially in the case of intra-cultural disputes, many culturally sympathetic measures can be taken to reduce the prejudice and to increase the user-friendliness of the system.

4.90 A willingness on the part of service providers and considerable expertise will also be necessary. Modifications are likely to be more sustainable if undertaken in consultation with community representatives. Encouragement of a cultural group to participate in the provision and adaptation of a service to meet its particular needs, will nurture enduring feelings of ownership of and confidence in the service.

4.91 Two such imaginative service responses are outlined in the Final Report of the Commonwealth/State Disability Agreement, namely, the disability work and<sup>97</sup> other projects being undertaken through the auspices of the Ngaanyatjarra, Pitjantjatjara and Yankunytjatara Women's Council in Central Australia and the Western Australian Local Area Coordination model of service delivery. In both cases, an attempt has been made to develop viable community-based service responses so that:

- (a) people are not forced to leave their families and move elsewhere; and
- (b) the design of the service response is located in the community which shaped the need in question.

4.92 According to the Report, the services are driven by:

*'... locally-embedded generalist support workers or coordinators who develop the resources of the local community to respond to disability-related needs'.<sup>98</sup>*

4.93 Access to additional expert or professional knowledge is done in ways which harnesses this knowledge so as to permanently expand the capacity of the community. To achieve this, it is considered preferable that the expert go to the community rather than the reverse. A further element of the process is the understanding, on the part of both generalist and specialist disability workers of their dependence for being effective on a partnership with members of the community. Finally, it is said:

*'... when expert knowledge and skills are used to inform generalist support/coordinator work strengths in partnership with the wisdom, common-sense, skills and capacities of local communities, an enormous amount can be achieved through creative problem solving and 'making do' of the most imaginative and effective kinds.'<sup>99</sup>*

4.94 It is suggested that this sort of approach is equally applicable to the provision of ADR services with respect to intra-cultural disputes in culturally marginalised communities as it is to the remote Aboriginal Australian communities at which it was directed.

4.95 There are indeed synergies with this approach in the response of the Queensland Department of Justice and Attorney-General in the 1991-92-93 financial years to growing interest in ADR within the Queensland Indigenous community.

4.96 Whilst providing ADR services, the mediation program subsequently developed, placed emphasis upon the training of Indigenous Australians in

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<sup>97</sup> Anna Yeatman, 'Getting Real: The Final Report of the Review of the Commonwealth/State Disability Agreement', AGPS, Canberra, July 1996.

<sup>98</sup> See page 54 of the Report.

<sup>99</sup> Ibid.

mediation skills. In the developmental process, there were three guiding assumptions:<sup>100</sup>

- The project need(ed) to be developed in consultation with individual communities. It could not be imposed.
- It needed to avoid undermining traditional dispute processing mechanisms in place to various extents in different communities.
- The need to develop a comprehensive and coherent set of interlocking strategies, of which mediation is only one, to address problems of disputation and violence.

4.97 The provision of existing ADR services may also be modified through decentralisation or internal restructuring of an ADR service providing organisation (the establishment of an ethnic unit for example). There may also be an emphasis upon recruiting additional staff, notably bilingual and bicultural workers. Whilst , having regard to the comments made in the previous section (Training) such changes may not provide a complete or an achievable solution (given the sheer cultural diversity of the Australian population), they may, nevertheless, do much to increase the ‘user friendliness’ of particular ADR services to members of cultural minority groups. Pertinently, the 1995/96 Annual Report of the National Native Title Tribunal recognises the importance of presenting a face to the public which includes Indigenous people. The Tribunal indicated, accordingly, that it was seeking to increase the participation of Aboriginal and Torres Strait Islander staff.

### **Procedural Strategies in Cross-Cultural Disputes**

4.98 In cross-cultural disputes, a more balanced approach may well be required, with an emphasis upon the cultural sensitivity of the dispute resolver, rather than a significant remodelling of the process. Even so, modifications made to ADR procedures in response to the cultural awareness of the dispute resolver may be resented by other participants. Affirmative measures designed to ensure fair participation for the member of the minority may be perceived as unfair or as a compromise of neutrality to the member of the dominant group. In extreme cases, feelings of mistrust amongst the participants and the dispute resolver may result.

***In dealing with cross-cultural disputes, how might dispute resolvers best achieve a ‘level playing field’ for members of one group without attracting negative responses from members of other groups?***

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<sup>100</sup> Marg O’Donnell, op cit note 83, page 7.

## **Power imbalance, Actual and Perceived Bias**

4.99 Power imbalance is likely to exist in many cross-cultural disputes. In coming to a dispute, dispute resolvers need to be able to analyse the dispute to see whether the conflict will be appropriate for ADR - for example, whether the client can articulate his or her needs without fear of intimidation, either from within or from outside his or her cultural group. The dispute resolver will also need to explore other options which might be open to the disputant. In some situations, it may be incumbent upon the dispute resolver to intervene actively in order to redress a potentially damaging power imbalance.

### Communication

4.100 Where interpreters are used, service providers should always speak directly to the parties to the dispute. Whilst moves to ensure the availability of proficient interpreter services are very important and the employment of bilingual workers may also be considered a useful strategy, the approach will fail if the only criteria for selection of dispute resolvers are linguistic skills and ethnic background.

***Do interpreters need training to acquaint them with ADR processes? Is training needed for dispute resolvers in the use of interpreters?***

### Redressing Violence

4.101 Whilst intra-group problems can be substantially reduced by the 'integration approach' referred to above, the reactions of dominant group members may be more difficult to tackle.

4.102 Certainly, as a matter of course, at the outset, mediators and conciliators should assess cross-cultural disputes for elements of violence. Comments and suggestions set out elsewhere in the Discussion Paper with respect to violence are also relevant here.

## **Ensuring Access and Information**

4.103 Care should be taken to use the most effective means of communication for the particular cultural group. It has been noted for example that:

*'The Aboriginal population ha[s] lower levels of access to services than members of the non-Aboriginal population. This was felt to be due to distance, lack of information about services, fear of involvement with government agencies, having no Aboriginal workers in an agency, lower levels of education and literacy among Aboriginal people and the inappropriateness of conventional forms of information*

dissemination such as brochures and letters. Word of mouth was seen as the most successful method of disseminating information.<sup>101</sup>

4.104 It has been said that there needs to be a nationally coordinated approach to providing information to cultural minority groups about their legal rights and entitlements.<sup>102</sup> It is suggested that similar coordination is needed with respect to information about ADR.

**What sorts of barriers do members of cultural minorities encounter in accessing ADR services and information?**

**How is information about ADR currently distributed to members of minority cultural groups and how might this be improved?**

#### **Avoiding the privatising effects of ADR**

4.105 Just as elsewhere in this Discussion Paper, there are some culturally-related disputes which involve wider public issues. Whilst it is unrealistic in such circumstances, (and indeed, it could be their direct disadvantage) to forego ADR, members of cultural minorities may be the losers in the longer term, if adverse social trends are not revealed, or standards developed, with respect to important issues.

**Are the suggestions made in Chapter 1 (paragraph 1.49) an adequate response to privatisation concerns for disputes involving issues for cultural minorities?**

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS. WHAT OTHER STRATEGIES MIGHT BE ADOPTED TO ENSURE FAIRNESS AND JUSTICE FOR MEMBERS OF CULTURAL MINORITIES?**

<sup>101</sup> Gething, op cit note 75, page 83.

<sup>102</sup> 'Multiculturalism and the Law', page 30.



## **CHAPTER 5**

### **AGE - MOVING THROUGH THE LIFE CYCLE AND DISPUTE RESOLUTION<sup>103</sup>**

#### **INTRODUCTION**

5.01 This chapter focuses on 'age' as the acquisition of competencies and the loss of competencies over a person's life cycle and within that context, examines the effectiveness of dispute resolution processes.

5.02 'Age' is defined as a continuum, in that, a person progressively acquires competencies and progressively loses competencies over the whole life cycle. People have different abilities and competencies at different ages, with considerable variations between individuals of comparable ages.

5.03 Many laws define 'age', as chronological age, but in this context, such a definition is not helpful.

5.04 For the sake of clarity, it is expedient to categorise people of particular ages into groups within certain age ranges. The groups are:

- children, in the age range of 3 - 10 years;
- adolescents, in the age range of 11 - 22 years;
- adults, in the age range of 22 - 75 years, and;
- elderly adults, in the age range of 75+ years.

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<sup>103</sup> NADRAC wishes to thank Moira Rayner, Consultant, Dunhill, Madden and Butler and Louise O'Sullivan, Mediator and Youth Worker, for their assistance with certain aspects of this Chapter.

5.05 Obviously these age groups are arbitrary. Each person's development and abilities are different.

5.06 As detailed in this Discussion Paper there are many other factors as well as 'age' which impact on a person's development and abilities and create variances. These include factors such as, a person's race, their socio-economic status, their geographic location and any disability. For example, an Aboriginal woman living in the remote regions of Western Australia will develop her competencies and abilities differently from a city dwelling man of the same age, who was born in Italy and migrated to Australia in his middle adolescent years. As individuals, despite being the same age, those other intersections of their identity will cause significant variations in the competencies they acquire and lose over their life cycles.

5.07 Whilst there are differences between individuals in the same age groups many have common problems. These common problems should not be confused however, with general characteristics or assumptions made about people in particular age groups which stereotype and discriminate against them. Being aware and sensitive to those problems, and not stereotyping people, is a very fine line which constantly challenges professionals, particularly those involved in dispute resolution.

5.08 Conflict amongst people of all ages seems to be inevitable. It occurs across a person's life cycle, although the forms of conflict vary considerably depending on the particular stage in the person's life cycle.

5.09 The management and resolution of that conflict will be contingent not on a person's age, but on whether they have developed and maintained their competencies. These competencies include the capacity to speak, to listen, to concentrate, to comprehend issues, to understand their own needs and what will meet those needs, to make decisions, to negotiate and exercise judgment appropriate to the circumstance. Because individuals develop and lose competencies at particular stages in their life cycle, such individuality makes the management and resolution of conflict at any age, complex.

## **THE GENERAL IMPACT OF BEING AT A PARTICULAR STAGE IN THE LIFE CYCLE**

5.10 Most children and adolescents are developing competencies, whereas some adults and many elderly adults are likely to be losing competencies.

5.11 Developing competencies enables people to become fully independent, reach their potential, manage and resolve their conflicts. The development of competencies as a child, or, as an adolescent and into adulthood is significantly influenced by the intersections of our personal identity, such as our race, geographic location, or whether we have a disability. It also depends on our genetic heritage and our environment. Whether or not we maintain or lose our competencies will depend as well on all those factors.

5.12 While recognising a person's individuality some general patterns can be identified for each group.

### **Children - in the age group from 3-10 years**

5.13 Children are in the stage in their life cycle where they are developing competencies, so they require care and support. They are dependent on others physically, emotionally and financially. Such dependence can be accompanied by vulnerability to threats of, or, to actual intimidation and violence.

5.14 Children's dependence, education and experience limits their access to information, so they are generally unaware of the options available to them. They often do not understand that they have been wrongly treated, do not know where to complain or what process they can use.

5.15 Most children in the age range of 3-10 years will have developed some competencies, including the capacity to construct sentences. Their needs and wishes can and should be considered.

5.16 If children can move through this part of their life cycle free from psychological, physical and sexual abuse, are guided and supported, they are much more likely to be able to reach their potential and to take up the challenges of adolescence positively.

### **Adolescents - in the Age Group from 11 - 22 Years**

5.17 Adolescents too, are in the process of developing competencies. Adolescence is a period of transition. It is the dividing line between childhood and adulthood. It is characterised by: sudden spurts in physical and sexual development; changes in cognitive and social development; changes in expectations of parents and the wider society; and ambivalence about the decision-making process inherent in choices confronted. It is the time of the "identity crisis" where adolescents either establish a positive and independent personal identity or develop a diffuse and negative identity.

5.18 Early adolescents (around the ages of 11 - 13 years) are generally concrete and egocentric thinkers which constrains their ability to comprehend complex issues, understand their own needs and exercise appropriate judgment to resolve their conflicts.

5.19 Middle adolescents (around the ages of 14 - 16years) have usually developed a greater capacity for abstract thinking.

5.20 Middle Adolescents are capable of increased introspection and are more able to comprehend complex issues and understand their own needs. However, their sense of invulnerability and lack of reality testing constrains their capacity to resolve

conflict. They generally believe that what they want is good and that their opinions are correct.<sup>104</sup>

5.21 In contrast, late adolescents (around the ages of 17 - 22 years) are more likely to be able to think through problems and develop alternatives, although they are generally highly idealist and have rigid concepts of right and wrong, which impacts on their capacity to resolve conflict.

5.22 Adolescents' access to information can be limited. This lack of access to information makes them vulnerable and unaware of the remedies available to them. They frequently have to contend with societal myths which label them as "lazy" or "good for nothing", "angry" and "destructive". Such discrimination impairs their ability to manage the issues they confront in a constructive and positive way.

5.23 Adolescence is also a stage in the life cycle which is characterised by high levels of conflict, particularly family conflict. Such conflicts are exacerbated by inconsistencies in the provision of government services which provide support, and which are based on varying views as to the age at which adolescents may be able to assume full personal responsibility.

5.24 While seeking to be independent many adolescents remain dependent, both physically and financially. Such dependence is a source of conflict for them and their families.

5.25 Education policies, apprenticeships and job training programs also tend to extend dependency. Independence is recognised in a number of respects for adolescents at 16 years of age. As well, 16 years is the age at which most government authorities consider their wardship responsibilities to be at an end.

5.26 Throughout adolescence the family's level of organisation and function are critical aspects in the adolescent's adjustment and adaptation towards a positive, independent identity. If there is perceived family support and a sense of family cohesion there is a greater likelihood that the adolescent will develop a positive independent identity in adulthood and acquire the key competencies necessary to reach their potential, manage and resolve their conflicts.

### **Adults - in the Age Group 23 - 75 years**

5.27 Theoretically, people in this stage of their life cycle are fully independent and able to resolve and manage their conflict. It is obvious however, that many adults have not, and do not ever attain this level of competency. In conflicts with adolescents, for example, there is evidence to suggest that abused parents, many of whom have not acquired the requisite competencies, are frequently unwilling to seek assistance for themselves.

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<sup>104</sup> M Stern, M R Van Slyck, L M Newland, vol 9 (4) (1992) *Mediation Quarterly*, 'Adolescent Development and Family Dynamics: Delineating a Knowledge Base for Family Mediation', page 307.

5.28 Adults at the younger end of this age group often feel they have little in common with those at the older end, or even, with those in the middle. This divide of the generations has many causes. Younger adults often feel they are more in touch with the "real world" and have many more competencies to deal with situations than middle or older aged adults. In reality, the extent to which adults of any age are able to be independent and resolve conflict depends on the competencies which they possess.

### **Elderly adults - in the age group - 75+ years<sup>105</sup>**

5.29 For elderly adults this stage in the life cycle brings with it an increasingly acute process of ageing. Physiological, sensory, mental, social and psychological changes occur with aging, but each person ages in his or her unique way. The impact of these changes will therefore vary considerably with each individual. Indeed gerontological research has highlighted the existence of numerous variations in the patterns of ageing. It has been argued that the conclusions from that research show that deterioration is a function of closeness to death not chronological age.<sup>106</sup> For most people then, aging is an incremental disabling process which results in the loss of some, but not all of their competencies.

5.30 Elderly adults are frequently stereotyped and discriminated against. There are a multitude of deeply rooted societal myths which surround them. For example:

- although it is widely believed that chronological age determines physical, mental and emotional status from person to person, there are in fact, great differences in the rates of physiological, psychological and social aging;
- elderly people are often thought of as inflexible and unproductive. Inflexibility is a character trait, not a trait of age. In the absence of disease and hardship, elderly adults can be actively involved and productive members of society, evidenced by the late life activities of many Australians;
- it is often believed that most elderly adults are senile, forgetful and confused. However, confusion and disorientation, often labelled 'senility', can be the result of emotional, nutritional or drug problems and are often reversible.

5.31 Gaining access to information can be very difficult for elderly adults, as it is for children. Their awareness of the avenues and options available is limited. Many elderly adults also have not experienced the same level of education as people of younger ages, consequently their comprehension of available options may be

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<sup>105</sup> It is worth noting that according to the ABS 1997 *Yearbook Australia*, 28% of the population will be over 60 by the middle of next century. At present, the figure is 16%.

<sup>106</sup> Katherine Lindsay, "Cradle to the Grave": Age Discrimination and Legislative Policy in Australia', (1996) vol 3 (1), *Australian Journal of Human Rights*, page 97.

superficial, even if they are able to travel to locations where such information is available. Such limited access to information increases the vulnerability of elderly adults.

5.32 In many instances elderly adults will be aware of their loss of competencies and experience a loss of self esteem, frustration and anger at no longer being able to do what they could do in the past. Some may have particular disabilities and some will be dependent on others to varying degrees, for their care and support. To be effective that support will need to recognise individual needs, maximise the opportunities for the elderly adult to be involved and maintain independence, as far as possible.

## **AGE AND DISPUTE RESOLUTION**

### **Types of Disputes in which Children, Adolescents, Adults and Elderly Adults may become involved**

5.33 In each age group, whether they are children, adolescents, adults or elderly adults, people have common problems which can involve them in disputes.

#### *Children in dispute*

5.34 Children can be involved in a range of disputes. Some will relate directly to this age group whilst other disputes will be similar to those experienced in other age groups.

5.35 Disputes within the family can include conflict with one or both parents about separation, divorce, custody issues, contact with friends or conflicts with siblings. Welfare disputes arise from conflict about the protection of children, children in foster care, guardianship or provision of other community services. School disputes include conflicts between other school children and conflicts with school authorities over matters such as academic performance, discipline and suspensions from school, sex and race discrimination issues. Disputes with the police relate to the anti-social behaviour or criminal behaviour of children. And civil actions or next friend cases, involve claims by children for damages for tort wrongs done to them, for example, car accidents.

#### *Adolescents in dispute*

5.36 Adolescents too are involved in range of disputes, many of which raise the same issues as those of children, while other issues are different. Disputes occur between a parent or parents and their adolescent children concerning issues of independence from the family, primarily because adolescence is a transition period between childhood and adulthood.

5.37 Disputes with police involve the anti-social and criminal behaviour of adolescents. Whereas welfare disputes raise different issues for adolescents, such as, an adolescent leaving home because of family conflict or abuse and then becoming homeless. Housing and accommodation disputes emerge as a result.

5.38 The right of the state to intervene in families, the rights and responsibilities of the parents and the rights and responsibilities of adolescents, themselves, are relevant issues. The interaction between Federal and State laws and the provision of services to adolescents under care orders is complex.

5.39 Education disputes between adolescent students, teachers, lecturers and educational authorities are broader than those concerning children because they involve many more authorities such as, assessment boards, universities, technical and further education departments, commercial and training commissions and other training bodies responsible for apprenticeship training and other courses.

5.40 Employment and consumer disputes arise primarily for late adolescents because of the statutory age limits which prevent children entering into contracts or leaving school. Employment related disputes involve industrial, health and safety, discrimination and sexual harassment issues, whereas the focus of consumer disputes is mostly about the quality of goods or services provided.

5.41 Despite the fact that many young people are remaining at home well into adulthood, a number rent accommodation and this is a source of conflict. These disputes between adolescents as tenants and their landlords are generally about overdue rents and the care of the property. Disputes between neighbours are not as common, although they do occur over such issues as loud music being played late at night, and differing lifestyles. A number of young people are also housed in community housing and university colleges. Disputes in these areas arise over facilities, food and relationships between members of the community house and with students and staff of the colleges.

#### *Adults in dispute*

5.42 In contrast to children and adolescents, adults may be involved in the full range of disputes which include not only those disputes detailed but commercial disputes and other civil and criminal matters.

#### *Elderly adults in dispute*

5.43 Elderly adults too, are involved in a very wide range of disputes, some of which directly relate to their age group. For example, family disputes may involve multi-generational or inter-generational issues where there is a divorce and separation of adult children. Amongst these issues is the access of elderly adults to their grandchildren. There can be conflict also, where elderly adults are residing with members of their family.

5.44 Welfare, age discrimination and consumer disputes are further examples of the disputes which are related to this age group. These disputes can involve legislative changes affecting benefits, access to public utilities, disputes with organisations, such as nursing homes and home care programs, elder abuse, guardianship, particularly when elderly adults are deemed by the family or caregivers to lack capacity and the competencies to make functional decisions on their own behalf. Elderly adults also routinely confront problems, and are in dispute with social security, Medicare, veterans benefits to name a few of the government agencies providing services to this age group. Consumer disputes tend to arise from the vulnerability of elderly adult consumers who are more susceptible to deceptive practices, in certain areas, such as: insurance sales, home repair, health cures, retirement land sales and hearing aids.

5.45 Disputes in estate and long term planning involve very sensitive matters and include nursing home or other residential placements, financial management, the need for an enduring power of attorney, estate planning, provision of health services to meet day to day needs. In these disputes particularly, where elderly adults are confronting their loss of independence, loss of capacity and loss of competencies and family support. The state may intervene in ways which affront and anger them.

5.46 Disputes in high density residences, such as retirement villages are inevitable because of large numbers of people living in close proximity. They may not be specifically related to the age group.

### **Advantages of ADR for Children, Adolescents, Adults and Elderly Adults**

5.47 Generally ADR is very attractive for many children, adolescents, adults and elderly adults because of its flexibility, lack of formality, emphasis on direct communication, its speed and its consequent reduction of the trauma associated with a power or rights contests. ADR can ameliorate what can become very painful and protracted disputes.

5.48 Its comparative cheapness is also an advantage for all age groups. Adolescents, many families and elderly adults rarely have the financial means to take their disputes to court. In so far as ADR is less confronting and more amenable to the continuation of good relations and the promotion of co-operative approaches, it may also be preferred particularly by those people who are in situations of long term dependence.

5.49 Because of the developmental aspects of adolescence ADR is considered an optimal process for assisting parents and their adolescents negotiate resolutions to their ongoing conflicts during this transition from childhood to adulthood.

5.50 ADR also allows for greater control and 'ownership' of the conduct of the proceedings and of the outcomes which are achieved. Such control can be very empowering for everyone involved particularly for those who feel marginalised by society, including many elderly adults who feel not only marginalised by society but also excluded from their families.

5.51 ADR is likely to be preferred to the formal justice system, particularly where children and adolescents are involved. Children's experiences of the courts are often alienating, confusing and intimidating. They are frequently dwarfed and discomforted by the physical court setting and experience considerable difficulty with the language of the law and the rhetoric of the courts. They perceive the courts as a process run by adults, for adults, and feel anxious and discounted. They view the adults as unsympathetic and hostile and they are often left with a sense that everyone has talked over their heads and no-one wanted to hear their views.<sup>107</sup>

5.52 In their Draft Recommendations Paper, 'A Matter of Priority: Children and the Legal Process'<sup>108</sup>, the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission have identified a number of key areas of concern with respect to children<sup>109</sup> and the formal justice system. These include:

- Marginalisation of children involved in legal processes when decisions of significant concern to them are being made;
- lack of co-ordination in the delivery of, and serious deficiencies in services to children;
- Systems abuse of children involved in legal processes, particularly in the areas of care and protection and in interviewing and examination procedures;
- The increasingly punitive approach to juveniles in some juvenile justice systems;
- Inconsistencies in legislation dealing with legal capacities and liabilities of children.

5.53 Many of these concerns are directly relevant to adolescents particularly those in early and middle adolescence. Like children, most adolescents have difficulty understanding the legal processes and comprehending the language of the law. They may also have difficulties adequately instructing their legal representatives and they often perceive the process as hostile. They can experience difficulties in being perceived as credible.

5.54 Most adolescent offenders do not re-offend. If they are charged and punished through the courts such punishment has been shown to be counterproductive in some cases. Where minor civil or criminal matters are involved, diversionary conferencing and reparation<sup>110</sup> have been said to be effective options.

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<sup>107</sup> Christine Flynn and Robert Ludbrook, 'A Justice Strategy for Children and Young People', For the National Children's and Youth Law Centre and the National Network of Children's and Young People's Legal and Advocacy Services, University of NSW Discussion Paper Series 005/94 at pages 13 and 15.

<sup>108</sup> Human Rights and Equal Opportunity Commission and Australian Law Reform Commission Draft Recommendations Paper, DRP3, May 1997.

<sup>109</sup> Consistent with the United Nations Convention on the Rights of the Child, children are defined for the purposes of DRP3 to include persons under 18 years of age.

<sup>110</sup> Reparation is the making of amends by an offender, usually through mediation, either to his or her own victim (direct reparation), or, to the victims of other offenders (indirect

5.55 Since 1994, ACT police have sent more than 1,200 people to diversionary conferences instead of court. Initial results show that for most people, conferences worked better than court. Young people felt they could express their points of view better (77%) than in court (54%); more felt the police were fairer to them in conference (82%) than in court (52%); and more felt encouraged to obey the law in future by conferences (92%) than by court (76%).<sup>111</sup> While there are benefits in this ADR program it needs to be noted, that a number of concerns have been raised about conferencing.<sup>112</sup> These include: the absence of due process; excessive, disproportionate or inconsistent outcomes; the centrality of the police to the process; the imbalance of power between the conference participants and the police or other professionals present; and the lack of accountability of police.

5.56 Elderly adults experience similar barriers in the courts. They are generally very averse to initiating court action. Where they are involved they are often intimidated and confused by the process.

## **Barriers to Fairness in ADR for children, adolescents, adults and elderly adults**

### **Children**

#### Access and Availability of Information

5.57 Access to the ADR for children is governed by those adults on whom the particular child or children are dependent, or, by those adults who may support them, or perceive that issues exist which require resolution. Children's disputes have no status unless adults affirm and promote them. As a consequence, children have very little, if any, say in whether to complain or not. Consequently those children are rarely able to take steps to enforce their rights or seek remedies for their infringement.

5.58 Because of their dependency and lack of access to information, children do not know where to complain, what process they can use, nor are they able to settle or withdraw their complaint. In fact, children generally are not given the opportunity nor the information to be able to make meaningful decisions about the matters which affect them.

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reparation). Reparation may take the form of compensation, atonement, restitution, or the performance of service for the victim.

<sup>111</sup> 'Canberra Times', 22 April 1997, page 1.

<sup>112</sup> See in this regard Julie Stubbs, "Shame, Defiance and Violence Against Women: A Critical Analysis of 'Communitarian' Conferencing", in *Women's Encounters with Violence: Australian Experiences*, eds. Sandy Cook and Judith Besant, Sage 1997, page 109 at page 115.

## Paternalism

5.59 Because children need protection and support, mediators may fall into the trap of believing they know what is best for the child, or in thinking that the parent or parents know what is best for their child, which may not necessarily be so. In their Draft Recommendations Paper,<sup>113</sup> the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission note:

*'... failures by all entities of the legal process to accommodate changing roles of children's evolving maturity, responsibilities and intellectual independence and, in particular, a consistent failure to consult with and listen to children in matters that affect them.'*

5.60 It is also noted in the Report that:

*'Children who are able and willing to participate in litigation that affects them may effectively be denied the opportunity to be heard properly by the imposition of best interests advocacy. Encouraging and facilitating children's participation should not be confused with burdening children with unwanted or inappropriate decision making.'*<sup>114</sup>

5.61 Frequently children are only consulted after most of the decisions have been made. Instead of explaining to the child in a way in which they can understand, what decisions are going to be made which will affect them, who will be making the decisions, who the decision maker will be talking to, and when the decisions will be made, dispute resolution practitioners assume children will not want to be involved. If they are consulted they are generally not consulted throughout the process.

5.62 Even where it is recognised that the views of the child need to be taken into consideration, it is often presumed that children will not be able to comprehend the issues involved. If a child makes a choice or a decision, there is a strong tendency for it to be assumed they are not mature enough to make such a decision, particularly when the child's decision does not accord with the views of the dispute resolver or other involved adults. What is concerning about such presumptions is that it is 'maturity' which is the criterion used in assessing to what degree their views will be 'heard' in the ADR process.

5.63 Dispute resolution practitioners and parents also frequently find it hard to accept that a child has a right to change his or her mind. It is even more difficult when a child's view conflicts with that of a parent, or their advocate, or another professional. In these circumstances children can be excluded from the process.

## Violence

5.64 Children may be the victims of violence and abuse. This is a major problem because of the power imbalances it creates between the parties to a dispute, and the

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<sup>113</sup> DRP 3, op cit note 108, at page 5.

<sup>114</sup> Ibid, page 54.

impact it will have upon the ability of the weaker participant -the child; to enter into effective negotiations.

5.65 Any ADR process which involves a formal meeting of the child with the perpetrator of such violence will be a harrowing experience for the child, and will significantly increase their disempowerment and anxiety. Rather than trying to achieve an outcome, the child may seek not to pursue, or to discontinue proceedings, without a fair resolution having been achieved. In these instances the greater formality of the courts and the assistance afforded by representation, rules and procedures, despite the barriers, could be a more efficacious process for the child.

#### Other Power imbalances

5.66 Significant power imbalances can also arise where a number of participants are involved in a dispute. For example, child protection disputes can involve the child, the parent or parents, family relatives, the foster parents and staff from two or more community care and government agencies. Despite legislative protections it has been argued that families are not given sufficient voice in the decision-making processes. According to some, child protection staff still retain the greater control over the outcomes of the process.<sup>115</sup> A complicating factor in these disputes is that there is not necessarily an identity of interests between children and their families.

5.67 There are likely to be significant power imbalances in conflicts involving adults and children. Large age discrepancies can give rise to cultural differences in communication styles. These differences will further increase the power imbalance and impede both the communication and the negotiations between the participants.

#### Non-negotiable issues

5.68 ADR is inappropriate in some situations: for example, where parents dispute that their child is being abused; or parents dispute that child protection agencies have a ground to intervene when it is believed the child is being physically abused.

#### Privatisation of Disputes<sup>116</sup>

5.69 As in other areas, disputes involving children may involve issues of general public interest. Concern may be generated by a particular case, or by a pattern reflected in a number of cases. The confidential nature of ADR may hide such issues from public scrutiny. As a result, certain needs of children may not be recognised.

### **What other barriers are there to fairness and justice in ADR for children?**

<sup>115</sup> Phillip Swain, 'In the Best Interests of Children - Alternative Decision Making and the Victorian Children's Court', (1994) Australian Journal of Family Law, page 237.

<sup>116</sup> Equally, this may also be a concern in disputes involving the other age groups under consideration.

## **Adolescents**

### Family Dysfunctionality

5.70 Often disputes between parents and adolescents arise because the family is highly dysfunctional. Such dysfunction can create serious barriers to effective participation in ADR. Even when the family is not highly dysfunctional, parents and adolescents have very divergent perceptions of their conflict and how the conflict can be resolved. These widely divergent views cause significant difficulties.

### Power Imbalance and Access

5.71 Adolescents also experience a number of other difficulties, including significant power imbalances and problems trying to negotiate, when they endeavour to handle their family, welfare, employment, accommodation and consumer disputes. Their access to information about their legal rights may be limited so they can be unaware of support which may be available them. 5.72

5.72 Adolescents can also be exploited because their level of articulateness is not fully developed and they generally lack experience in managing disputes.

### Stereotyping

5.73 Adolescents are often perceived to be rebellious because they negatively evaluate, test and argue with their parents' views and opinions and those of other adults, in their desire to become independent and sever emotional ties. Other forms of negative stereotyping occur as well. Adolescents are frequently accused of being angry, not making an effort to find work, generally only conforming with the ideas and actions of their peers and never taking appropriate advice. Such stereotyping creates very real difficulties in being 'heard' when they are involved in ADR.

5.74 There is evidence to suggest that as a result of negative stereotyping, adolescents may be subject to unfair targeting by police; police abuse or harassment; and to a lack of concern about their legal rights.

5.75 The Australian Law Reform Commissions notes in its Report on 'Multiculturalism and the Law' that:

*'There is concern about a perceived tendency to cast young people of particular ethnic background as delinquent. This may result in a young person being at a disadvantage in dealings with the police and at court. Young people who gather together because they are related, are family friends, go to school together or live near each other, may be assumed by the police to be involved in illegal gang*

activities simply due to their appearance. On the other hand, submissions from the police deny, that this kind of stereotyping influences police behaviour.<sup>117</sup>

5.76 Stereotyping appears to be most pronounced with adolescents from cultural minority groups where youth, ethnicity and crime are often regarded as going together.<sup>118</sup> Because of their high levels of unemployment and social visibility, young people from Aboriginal, Lebanese, Vietnamese and Pacific Islander backgrounds have been found to be most at risk. Journalistic reports about such groups play a part in fuelling community mistrust and fear of these groups.

### **What other barriers are there to fairness and justice in ADR for adolescents?**

#### **Adults**

5.77 The barriers to fairness and justice for adults have been extensively detailed in other Chapters of this Discussion Paper.

#### **Elderly Adults**

##### Stereotyping

5.78 'Ageism' is a major barrier for elderly adults. It is systematic stereotyping of, and discrimination against people because they are old. It can come from elderly adults themselves, as well as other people in different age groups. 'Ageism' is manifested in a multitude of deeply rooted societal myths which permit others to distance themselves and not identify with any of the views or needs of elderly adults.<sup>119</sup>

5.79 Community stereotyping of elderly adults also prevents them from being 'heard' in ADR. This is compounded by the attitudes many hold about themselves. For example, some elderly adults do not see themselves as the kind of people who could have a legitimate claim to anything better.

5.80 Issues of culture may also be of importance here. In Indigenous communities, Elders are respected authoritative figures, but many elderly adults from other cultures may be ignored and isolated from friends and families.

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<sup>117</sup> At page 201.

<sup>118</sup> See generally, Chris Cunneen, 'Contemporary Comment: Ethnic Minority, Youth and Juvenile Justice: Beyond the Stereotype of Ethnic Gangs', (1995) vol 6 (3) Current Issues in Criminal Justice, page 387.

<sup>119</sup> Erica F Wood and Prudence B Kestner, Mediation: the Coming of Age - A Mediator's Guide in Serving the Elderly, American Bar Association Standing Committee on Dispute Resolution and Commission on Legal Problems of the Elderly for the National Institute for Dispute Resolution, second edition, November 1989.

## *Power Imbalance*

### *Low Self Esteem*

5.81 Elderly adults, more than at any other time in the life cycle, face a number of losses which includes losses in their roles relating to retirement, loss of physical functioning and independence, and death of friends, relatives and spouses. These losses often lead to an erosion of an elderly adult's social identity and self esteem. Their reaction to their losses, as well as the actual loss of identity and self esteem reduces their capacity to participate effectively in ADR because they feel unable to negotiate and often do not have the experience or the skills. This low self esteem and lack of competencies means they are frequently vulnerable and have very little power.

### *Passivity*

5.82 A great majority of conflicts in which elderly adults are involved are tolerated, avoided, or suppressed. Even when they do become actively involved elderly people have difficulties recognising their inability to cope with conflict. As a consequence, they are frequently reluctant openly to discuss their dispute, downplay it or deny its existence. They tolerate discomfort, and regard it as a personal achievement to manage their problems silently, which further adds to their powerlessness.

### *Negotiation Skills*

5.83 The capacity of elderly adults to argue for their own interests, or to agree to a particular outcome depends on the extent to which they have the requisite competencies. If they have lost those competencies, they will be unable to articulate their difficulties or negotiate a resolution. Even when they have an advocate who represents their interests and does not fall into the trap of believing they know what is best, without those competencies, elderly adults feel overwhelmed and powerless, and frequently are unable to continue.

### *Dependency and Abuse*

5.84 Added to this, where frail elderly adults are in nursing homes, for example, and are in conflict with the management of the nursing home, or, their doctor, they may not have sufficient strength to face those with whom they are in conflict. In these circumstances the barriers may be so great as to prevent resolution of the dispute.

5.85 Where an elderly adult has become dependent, a common result is that their rights, over and above access to basic living needs, are forgotten or dismissed.<sup>120</sup> Failure to recognise that elderly adults should be enabled and encouraged to make informed choices about their individual care plans, or assisted to retain control of

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<sup>120</sup> Meredith McLaine, 'The Rights of the Elderly: Who Decides?', vol 17(5) (1992) *Alternative Law Journal*, page 228.

their financial affairs, even if they are dependent, disempowers them to such an extent that their competencies are further diminished. In these circumstances, many elderly adults are abused and neglected. ADR needs to be a discrete process that distinctly focuses on promoting the autonomy, independence and control of the participants. When problems, pathology, and grossly unequal power relations are dominant, it is likely to be inadequate on its own.<sup>121</sup>

### Access and Information

5.86 Gaining access to information can be very difficult for elderly adults. If they are losing some of their competencies, or are physically or financially dependent their self-confidence will be diminished and their capacity to access information will be severely curtailed.

5.87 Because many elderly adults have not enjoyed the standard of education now offered, their comprehension of the options available to them may be superficial, even if they are able to gain the necessary information.

5.88 Lack of access to information, for whatever reason, may interfere with the ability of elderly adults to resolve their disputes. As a consequence, they will become increasingly vulnerable and powerless which will impair their potential to gain knowledge about their rights and prevent them from initiating ways to protect those rights. And this will not only deny elderly adults justice, but will become an increasing problem for society.

**What other barriers are there to fairness and justice in ADR for elderly adults?**

## **STRATEGIES TO ADDRESS AGE RELATED BARRIERS TO FAIRNESS AND JUSTICE IN ADR: SOME POSSIBLE APPROACHES**

5.89 Whilst a number of barriers have been identified it is important to note that ADR is increasingly being used to resolve disputes for people in every age group. For children, adolescents and elderly adults ADR may be the most suitable option to resolve disputes.

5.90 The flexibility, informality and less confronting nature of ADR means that it can be more amenable to change to address the barriers discussed.

5.91 It is therefore very important that dispute resolution practitioners recognise the existence of barriers to fairness and justice, and increase their awareness of how the barriers to resolving disputes are caused. This includes barriers created by ADR

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<sup>121</sup> Yvonne Craig, 'Elder Mediation: Can It Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and their Carers', (1994) vol 6(1) Journal of Elder Abuse and Neglect, page 83.

practitioners, by the ADR process itself and by the people who are in dispute. This may require additional training for dispute resolvers. With increased awareness dispute resolvers can then take the necessary action to remove or reduce the barriers and accommodate the capacities of the people involved. It is clear many dispute resolution practitioners already do take steps to reduce barriers and accommodate the capacities of the participants in dispute. Their efforts need to be further enhanced.

5.92 Recognising 'age' as a continuum where people develop and lose competencies over the life cycle, can assist dispute resolution practitioners in their initial assessment of the needs and capacity of the participants in a dispute. It is recognised that accurately assessing the needs of participants is difficult and requires considerable skill and experience. Despite the difficulties unless an appropriate assessment is made, it is unlikely ADR will achieve fair or just outcomes. Advice and support can be provided in the early stages to enable the participants to make informed choices to enhance their opportunities to resolve their dispute, in a way which appropriately meets their need. Potential barriers also need to be identified and addressed early to increase the potential effectiveness of the process.

### **Responding to Dependency**

5.93 Children, most adolescents, some adults and some elderly adults will either be developing or losing some of their competencies so will be dependent on others for some of their needs. Identifying their actual needs and ensuring ADR takes account of those needs will enhance the potential for the child, adolescent or elderly adult actively to participate in the process.

5.94 may restrict a person's ability to achieve an outcome which will be fair and will resolve the dispute. Appropriate support may be need to be provided from others or from services provided by government and the non-government sectors. The person with such support needs may require a helper, an advocate, a next friend or a guardian.

5.95 In ADR proceedings a 'helper' can play a positive role in reducing power imbalances and increasing the accessibility of ADR processes to people who do not have the requisite competencies. In such a situation there usually would be an advocate, to represent the interests of the more vulnerable and less powerful participant. The 'helper' would provide necessary assistance to that participant, perhaps by explaining what is occurring, ascertaining clearly what are the wishes of the participant and providing this information to the advocate. Such support enables a dependent person to be 'heard' during the process and enhances the possibility of a fairer outcome.

5.96 In any case, whatever particular roles are decided upon, helpers, advocates, next friends or guardians are obliged to act in the 'best interests' of their clients. The role of advocating on behalf of another is a difficult one. It involves an assessment of the competencies possessed by an individual, and matching these with the requirements of the ADR process. It requires also, a sensitivity to the right of an individual to participate in the process to the extent of their current capacity.

5.97 Advocates need to be aware of their own beliefs about their clients, be cautious of what others say about their clients and take action to ensure inappropriate statements are not being made. Advocates also need an intimate knowledge of their client in order to recognise what their needs, interests and wishes will be. They need to consult with their clients throughout the process, not just at the time they are making their assessment. And they need to ensure those needs and wishes are taken into account, even if their client's desires are contrary to their own, unless there is a right of fundamental importance which the client cannot appreciate.

***Do advocates act in the best interests of children and/or members of other age groups?***

***Do they assist in redressing power imbalances between the participants?***

### **Responding to Stereotyping**

5.98 When making an assessment of a child, an adolescent or an elderly adult, it is important that a dispute resolution practitioner confronts their own attitudes to the people in the particular age group with whom they are working. The dispute resolver should endeavour to ensure that their assessment is not informed by their own prejudices and attitudes but by an accurate and fair assessment of the competencies and capacity of the individual concerned.

5.99 Most importantly, an assessment should never be made on the basis of stereotypes about members of a particular age grouping. An assumption that an adolescent is likely to be irresponsible and uncaring would be inaccurate and disempowering in many cases. An assumption that a 90 year old person will not be able to make his or her own decisions will be inaccurate for many people. An assumption that an elderly adult with an intellectual disability cannot negotiate on their own behalf may also be wrong. It is therefore important, always, to assess competency on the basis of the needs of the individual.

5.100 Similarly, dispute resolution practitioners should be very wary of making assessments on the basis of what other people say. They need to make their own assessment on a basis which is fair and as far as is possible, objective.

### **Responding to Power Imbalances**

5.101 Dispute resolution practitioners need to be sensitive to power differences between the parties to a dispute and take the necessary action to reframe the negotiations in a way which will ensure both participants understand the issues in conflict, and the possible resolutions being proposed, otherwise it is likely the fairness of the outcome will be jeopardised.

5.102 ADR is based on the principle of: voluntary participation, neutrality, confidentiality and empowerment. The key element is empowerment, that is, providing parties to a dispute with the skills to gain control over, and responsibility for, decision making in their lives.<sup>122</sup>

5.103 Dispute resolution practitioners need to try to make people feel respected and more equal through keeping all the participants engaged and encouraging them to bring up every issue, no matter how small. They need to recognise that there is frequently a clash of values. Because of this clash, the participants need to gain a greater understanding of why each person is acting in a particular way, to enable them to recognise the reasons for the behaviour, and in so doing, achieve a more effective outcome. For example, this clash of values is particularly evident in disputes involving adolescents where they often feel offended by their adolescent's behaviour where parents do not understand the driving need of the adolescent for independence. On the other hand, adolescents frequently fail to understand the adjustments parents must make to accommodate that independence as well as being able to feel assured that there is minimal risk to the adolescent.

5.104 In family disputes, the level of comprehension of the child, or, the adolescent may be limited, their use of language may differ significantly from their parents, and they are likely to feel controlled by their parents. In these circumstances the dispute resolver needs to encourage the child or adolescent to speak about their issues in conflict, whilst keeping the parents silent, and then translating their statements to enhance communication between the parties.

5.105 Separate sessions apart from parents also reduce power imbalances. To effect a fair outcome dispute resolvers must have empathy, understanding for both the parents' perspective and that of the child, or, adolescent, plus considerable skill and experience to recognise the issues in conflict and reframe them in way in which the parties understand.

5.106 Additional training would seem to be warranted to ensure that those representing children and adolescents have the necessary skills to promote the 'best interests' of the child.<sup>123</sup>

5.107 Seating in ADR processes is crucial in equalising power. Some dispute resolution practitioners believe that the parties in dispute should be indirectly in eye line with each other, with those who feel less powerful in a position which maximises their chance to gain more control. Dispute resolution practitioners need to plan the seating and ensure the parties are seated in place. During ADR the balance of power may shift on one or more occasions. When this occurs, the dispute resolver needs to recognise what is happening and intervene to change the course of the process. One way of doing this is to propose a separate session, and then re-order the seating when the parties come together again.

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<sup>122</sup> Ilene Wolcott and Ruth Weston, 'Keeping the Peace: Resolving Conflict between Parents and Adolescents', (1994) vol 32(2) Family and Conciliation Courts Review, page 208.

<sup>123</sup> Comments in the Family Law Council's Discussion Paper, 'Involving and Representing Children in Family Law', May 1995, at page 20 and following are pertinent here.

5.108 It is important to set the ground rules for the ADR process clearly, and explain the process so that all participants understand what will occur. It is also important to be brief, to speak in plain English so that all parties understand the rules. It is even more important to ensure the rules are not too complex, particularly with disputes involving children and adolescents. If participants lack understanding or feel overwhelmed with rules, they will feel even less powerful. There is no need to seek agreement about the rules from the participants. It is far more significant to establish the framework within which the dispute can be resolved, rather than to gain agreement over process.

### **Responding to People who have been subjected to Violence**

5.109 Where violence is one of the issues involved in the dispute, people who have suffered that abuse almost always feel vulnerable and powerless. In these matters it is extremely important that the dispute resolution practitioner make an early assessment as to whether or not the dispute is suitable for ADR. Where they do proceed, the dispute resolver needs to be continually aware of the impact the violence has had on the participant, and if there is any evidence of it arising in any form, the proceedings should be stopped. In fact, an advocate for the person who has suffered the abuse may be imperative, if there is to be a fair outcome.

5.110 As well, the dispute resolution practitioner must ensure, through separate sessions, if required, that agreement was not just achieved because the person felt exhausted and disempowered when faced with the other party, or was unable to assert themselves sufficiently.

### **Peer Programs**

5.111 Another strategy to reduce the barriers in ADR is the use of peer mediation programs, where adolescents and elderly adults are trained to mediate disputes of their peers.

5.112 Peer programs for adolescents have been trialed in some States of Australia with encouraging results. Those adolescents who were involved not only proved effective in resolving the disputes of their peers, they gained conflict resolution skills themselves, which were valuable in managing their future conflicts.

5.113 Elder mediation programs have also been trialed and Wood and Kestner argue the benefits are compelling. They argue that such programs draw on a wealth of life and professional experience which can lend expertise and credibility to the mediators. As well, they can sometimes communicate more effectively and gain the trust of their peers more readily, and feel they too are gaining a sense of contribution and participation, and in so doing, being of benefit to their community..<sup>124</sup> These programs have proven to be empowering for both mediators and the people in dispute.

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<sup>124</sup> Wood and Kestner, op cit note 119.

## **Privatisation of Disputes**

5.114 As has been discussed in other Chapters of this Discussion Paper there is considerable debate about the confidential nature of ADR. Whilst it is recognised that there are matters which are clearly in the public interest, there is evidence to show that the fairness and justice of the outcomes can be significantly enhanced or diminished by the process. For example, for children involved in claims for civil actions in the courts it is important that these issues are open to public scrutiny, but in such claims the children involved have very little control, or awareness about what is going on, or how their claim is being conducted.

5.115 If the outcomes of disputes are to be fair and just and the public versus private nature of disputes addressed; it is important to ensure that both the confidential and public processes are enhanced so that the issues clear, but the individuals involved, (who are the reason for the claim or the dispute) are adequately consulted, involved and given every opportunity to participate in the process.

## **Conclusion**

5.116 The competencies which are progressively acquired and lost over the whole life cycle will be the basis upon which a person is able to participate in dispute resolution processes. 'Age' therefore, will be a significant and relevant factor which needs to be taken into account in dispute resolution.

***Are the suggestions made in Chapter 1 (paragraph 1.49) an adequate response to privatisation concerns for disputes involving issues for the age groups under consideration?***

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS. WHAT OTHER STRATEGIES WHICH MIGHT BE ADOPTED TO ENSURE FAIRNESS AND JUSTICE FOR MEMBERS OF THE VARIOUS AGE GROUPS UNDER CONSIDERATION HERE?**



## **CHAPTER 6**

### **PEOPLE WITH DISABILITIES AND ALTERNATIVE DISPUTE RESOLUTION**

#### **INTRODUCTION**

6.01 This Chapter examines the accessibility and appropriateness of existing alternative dispute resolution services for people with disabilities.

6.02 The term 'disability' may be used to cover a huge range of conditions. For example, a disability can be:

- Physical;
- Intellectual;
- Neurological;
- Psychological/emotional;
- Obvious;
- Hidden;
- Temporary and/or episodic;
- Permanent;
- Improving, stable or worsening over time;
- Minor, moderate or severe;
- Multiple;
- Of genetic origin;
- Resulting from trauma, disease, illness, substance abuse;
- Accompanied by physical or emotional pain;
- Experienced as stigmatising or shameful.

6.03 As reflected in the results of a survey of Disability, Ageing and Carers conducted by the Australian Bureau of Statistics in 1993, there were an estimated 3,176, 000 persons (18% of the Australian population) with a disability. Of these, 2,500, 200 (78.7%) were also classified as having a handicap (need for assistance, difficulty and/or use of aids in the area of self-care, mobility or verbal communication, or limitations in employment or in schooling because of disability).

6.04 There are various definitions of disability used in State and Territory equal opportunity and anti-discrimination legislation. For intellectual disability alone, a number of definitions or related terms are used, many of them outdated or inaccurate.

6.05 For the purposes of this Chapter, reliance is placed upon the comprehensive definition of 'disability' set out in sub-section 4(1) of the Commonwealth Disability Discrimination Act 1992. In this sub-section, 'disability' is defined as:

- (a) a total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour;

and includes a disability that;

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

6.06 It might also be noted that, although the Commonwealth Disability Services Act 1986 does not define disability as such, those people the Act is intended to cover are defined in subsection 8(1) as:

*'People with a disability that:*

- (a) *is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;*
- (b) *is permanent or likely to be permanent; and*
- (c) *results in:*
  - (i) *a substantially reduced capacity for communication, learning or mobility, and*
  - (ii) *a need for ongoing services.'*

6.07 In seeking a definition it is recognised, however, that for some Australians, the idea of disability may be very different. For instance, for Indigenous Australians, only highly visible conditions such as severe mobility impairment, strokes, spinal cord injuries and amputations, may be regarded as disabilities. As a result, many Indigenous people would not regard themselves as having a disability, although they may be labelled as such by service providers. Furthermore:

*'Aboriginal people often regard attempts to categorise people as eroding community solidarity and community identity. L Bostock, (1991)'<sup>125</sup>*

6.08 For some groups also, definitions may be problematic in so far as they define people negatively and by reference to others' abilities. For instance, the Deaf do not describe themselves as disabled, but as belonging to a different language and cultural group.

## **HOW DOES DISABILITY AFFECT PEOPLE GENERALLY?**

6.09 Disability may affect a person's capacity, either partially or completely, to do any or a combination of the following:

- Hear, see, or speak;
- Understand others;
- Be understood by others;
- Acquire knowledge and skills/access information about what is happening in the world or what others are doing or saying;
- Understand the likely effects of their actions or those of others;
- Walk, travel, sit, stand;
- Concentrate, read or remember;
- Look after themselves;
- Effectively express their needs and interests;
- Make decisions for themselves or on behalf of others;
- Socialise effectively.

6.10 People with disabilities are likely to be treated unfairly on many occasions, often in ignorance or negligently, and from time to time, intentionally or deliberately.

6.11 As a consequence, people with disabilities may be reluctant to reveal the full extent of their disability, and may endeavour to keep it secret, or to minimise its effect. Illustrative is the reluctance of a person who suffers from literacy problems to admit those problems, or of the person who is HIV positive to publicise that fact.

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<sup>125</sup> Lester Bostock, 'The Meares Oration: Access and Equity for People with a Double Disadvantage', (1991) vol 2 Australian Disability Review, pages 3-8.

## **Support Needs**

6.12 Whilst many people with disabilities are independent and self-sufficient, others may be dependent to varying degrees upon the care and support of others. Some, those with multiple disabilities for example, may be wholly dependent upon care-givers, whilst others may be less so. Others may be dependent on others only on relatively isolated occasions. For example, faced with an exceptionally steep gradient, a narrow ramp or an inconveniently positioned public phone, a wheel chair user who is usually independent may require assistance.

6.13 Significant dependence upon others for one's care and support may give rise also to significant psychological dependence. Even limited dependence upon others for care and support together with social attitudes to disability may lead to a reduction of self esteem and feelings of self worth. As a result, people with disabilities may lack self-confidence in many social settings. This may be accompanied in some circumstances by a reduction in communication skills. All this may mean that it is extremely difficult for some people with disabilities to be assertive enough to take the initiative in a dispute and to defend rights and entitlements.

6.14 Dealing with discrimination as an individual can lead to a sense of isolation and oppression, and there may be a strong feeling of 'I' versus 'the rest'. For many people with disabilities, having an advocate to assist them to stand up for their rights and to speak out for them may make all the difference. This service is increasingly available to people with disabilities through a range of disability complaints and legal services.

6.15 People with disabilities may be at greater risk of violence and of sexual abuse. There is, for example, a significantly higher level of sexual abuse of people with disabilities than there is for the rest of the community.

6.16 Members of the community whose disabilities are severe may be dependent upon pensions and other support for their economic survival. It is noteworthy in this regard that 73.7% of people aged 16-64 who have a profound handicap and 58% of people with a severe handicap rely on a government pension or benefit as the main source of their income. This compares with 23% of the general population (Australian Bureau of Statistics 1993 Survey of Disability, Ageing and Carers). Whilst liberating in one sense, a pension may also contribute to psychological dependence.

6.17 People with disabilities may also be dependent upon the government and others for assistance in obtaining mobility aids - a motorised wheelchair, for example, or a car with special modifications to enable them to drive. The level to which they are assisted in this regard will have a direct correlation with the extent of their community integration.

## Attitudes to Disability

6.18 In addition to physical and intellectual and psychiatric disabilities and the related degrees of dependence upon others to which this may give rise, the major disadvantage experienced by this social group arises from the treatment meted out to them by other, non-disabled, members of the community.

6.19 Over the last 10 years, there has been a value shift towards the integration of people with disabilities into Australian social life, and a corresponding shift from institutional to community-based care. This shift is reflected legislatively in the introduction of the Home and Community Care Program in 1985 and the Commonwealth Government's *Disability Services Act* in 1986.

6.20 The trend towards integration has exposed some people with disabilities to a new range of situations and challenges. These may include renting a house, setting up a residential community and establishing their rights in the workplace.

6.21 This has been accompanied by the increasing assertion by people with disabilities of their human rights and their rights as citizens. It has also resulted in those who regard themselves as non-disabled being called upon to confront their negative attitudes to people with disabilities - attitudes which result in discrimination and disadvantage. Whilst many people may think removing barriers for people with disabilities involves practical responses such as dropped kerbs and ramped access, in fact, attitudinal barriers are recognised as the greatest hurdle to human rights for people with disabilities.

6.22 For many non-disabled people, the fact of a person's disability - the fact that a person is in a wheel chair or requires the assistance of a seeing-eye dog for example - may still effectively override all other claims to social stature by that person and negate all their (often considerable) achievements.<sup>126</sup>

6.23 There is a danger also, that in some cases, decisions may be made about people with disabilities that are more accommodating of the needs or interests of carers and others than of those with disabilities. Sterilisation of mentally disabled persons provides an example of this. It has been suggested that:

*'Integrity of body is by no means guaranteed for young women who have an intellectual disability: unknown numbers of young women are 'sterilised' every year without the permission of the court.'*<sup>127</sup>

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<sup>126</sup> For more on this topic, see Encounters with Strangers: the Public's Response to Disabled Women and How They Affect Our Sense of Self, Lois Keith, (J Morris Editor, Women's Press, 1996, London.)

<sup>127</sup> Annual Report, Human Rights and Equal Opportunity Commission, 1996/97, page 103. For a succinct account of the law in this area, see 'Include Me In', Queensland Advocacy Inc., 1994, page 149-150.

## Stereotyping

**6.24** The tendency to stereotype people with disabilities rather than to regard them as individuals is an element of this attitudinal response to people with a disability and is, unfortunately, still widespread. As stated in *The Practical Manual developed for use with the Commonwealth Disability Discrimination Act, 'Acting Against Disability Discrimination' (1994)*:

*'The community tends to have particular perceptions of people with disabilities ... Some images which modern society has created around various disabilities include being:*

- *seen as an 'eternal child';*
- *expected constantly to prove competence;*
- *perceived as dangerous or menacing;*
- *assumed to have limitations that the person does not in fact have;*
- *'judged' according to the manner in which the disability was acquired;*
- *seen as unable to make decisions about one's own life;*
- *seen as a burden.'*

**6.25** People with particular sorts of disabilities can be subjected to ignorant and erroneous assumptions about the nature, extent and consequences of their disabilities, almost invariably, to their detriment. For example:

- A person with an intellectual disability may be described in terms of his or her 'mental age'. People with an intellectual disability are less likely to be seen as having their own views and opinions on things, and constantly have to 'prove their competence' before being given the opportunity to make decisions, take risks and try new things. Such people are likely to spend a lot of their lives in custodial environments intended to protect or to shelter them.
- Many people with mental illness are assumed to be mentally impaired, although their intellectual capacities may not be affected by their illness.
- People with an acquired brain injury will obviously have experienced the loss of some abilities, either gradually or suddenly. Although the precise nature of a person's disability depends on the area and the extent of the brain injury, there is a tendency for anyone with acquired brain injury to be labelled 'stupid'.
- In the case of people with physical disabilities, the more severe the disability, the more likely it is that the person will be assumed to have other disabilities as well. They may be assumed to be unintelligent and/or deaf and other people may tend to speak down to them.

- People with sensory impairments may be the victims of similarly negative assumptions as those with physical disabilities. A sight impaired person may also be assumed to be deaf, whilst a hearing impaired person may also be assumed to be intellectually incapacitated.

### Discomfiture/Fear

6.26 Most of us, at some time in our lives, experience some temporary disability, for example, a broken limb or chronic migraines, which may affect their physical and/or mental functioning and capacities for a time. However, non-disabled people dread more severe and long-term incapacities, and may find it difficult to cope with those who suffer from them. To be confronted by a person with an obvious disability may be very disturbing. To be confronted by a number of people with disabilities simultaneously may be even more difficult for a non-disabled person to come to terms with. One wheelchair in a restaurant may be acceptable: three may be a dilemma. Non-disabled people may therefore seek to avoid contact with people who are disabled, or rush to provide unwanted or inappropriate assistance without taking the time to find out what would really help.

6.27 This compounds the problems of those with severe disabilities. People with disabilities not only have to cope with the thousand and one difficulties which present themselves as a result of their disabilities on any given day, but also with the fear, discomfort, and ignorance of others. It is an added burden for people with disabilities to be constantly having to explain to others their different needs and the reasons for them, or having to listen to others do so for them.

### **Discrimination**

6.28 People with disabilities are often treated very differently from non-disabled people by family members or others entrusted with their welfare, or by those in the community with whom they interact.

6.29 As a result of the negative impact of discrimination, people with disabilities may feel stigmatised, inhuman, vulnerable, excluded from family or social networks or from the workplace, or of little or no value to their families and to the community. In contrast, affirmative action to ensure substantive equality may result in disabled people feeling special, needed, valued and included.

6.30 The particular difficulties and needs of people who are disabled have been recognised in numerous State and Commonwealth legislative provisions designed to prevent adverse discrimination and to provide complaint procedures in relation to a wide range of matters.

6.31 The objectives of the Commonwealth Disability Discrimination Act, for example, are to eliminate negative discrimination against persons on the ground of

disability including work, education, accommodation, sport and recreation and the provision of goods and services. The Act is also intended to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community. The Commonwealth Disability Strategy follows this intention in the development of a strategic framework of action applying to Commonwealth Departments and authorities over the next 10 years, whilst the Commonwealth State Disability Agreement<sup>128</sup> was introduced to clarify government responsibilities and rationalise the provision of services for people with a disability. The Disability Services Program seeks to foster the development of environments and supports that promote participation and choice in work and community life for people with a disability.

6.32 Discrimination arises because our society values certain attributes and qualities above others - and those with such attributes are best accommodated. As a result, we have buildings designed only for people who are physically mobile, a job market catering almost exclusively for those with literacy and communication skills, and a society which has a limited capacity to accept and accommodate anyone who is not able bodied.

6.33 Some discrimination is intentional, such as refusal to admit people with disabilities into the workplace. However, much discrimination is not intentional or actuated by malice or ill feeling. It occurs because society does not accommodate the needs of those with disabilities. Our environment is organised on the assumption that citizens can walk and use stairs, or that they can hear, read and write, for example, even though many cannot freely do these things. Most houses, shops, streets, foot paths, telephone boxes, public toilets, cars and buses are still designed to accommodate only the needs of non-disabled people.

## **DISABILITY AND DISPUTE RESOLUTION**

### **Types of Disputes in which People with Disabilities May Become Involved**

6.34 People with disabilities may become involved in a range of disputes connected, either directly or indirectly, to their disabilities. Obvious areas of direct dispute include disputes with respect to pensions and entitlements, problems relating to the rights and duties of care-givers, decision-making by adults with a disability, discrimination and accident compensation.

6.35 Government and other support for 'independent living' programs rather than institutionalisation means that people with an intellectual disability are

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<sup>128</sup> This Agreement was scheduled to end on 30 June 1997. At this point in time, a further Agreement has not yet been concluded, although negotiations are understood to be continuing. In the interim, the previous Agreement continues to operate on a month to month basis.

becoming a more visible and active part of the community. As a result, they may also be involved in disputes quite unconnected with their disabilities, for example, family law disputes, claims for moneys owed or owing, neighbourhood disputes over noise or trees, or claims for defamation or breach of contract.

6.36 People with disabilities may also be involved in larger disputes affecting a group or community of which they are a member. In some instances, for example, in family disputes, there is a danger that attention may focus upon the person's disabilities although the dispute may in fact be about much broader issues.

### **Advantages of ADR for People with Disabilities**

6.37 The overriding advantage of ADR for people with disabilities is its adaptability and its related potential to accommodate their special needs. The consensual nature of ADR is also a very important factor where ongoing relationships are involved. For people with disabilities, many of whom survive on very low incomes, the cost of taking a matter to the courts may be prohibitive. The comparative cheapness of ADR may therefore also be an important consideration for people with disabilities.

### **Disability and Barriers to Fairness and Justice in ADR**

6.38 For people with disabilities, access to dispute resolution services can be highly problematic if not impossible.

#### Access to dispute resolution services

6.39 There are a number of reasons for this. In some instances there may be no distinction to be made between the formal justice system and ADR.

#### Lack of information

6.40 People with disabilities may lack knowledge of their rights or the range of available dispute resolution processes. In addition, they may not understand that action has been taken against them or that they are entitled to seek redress for it. Others may have only limited personal autonomy/authority to make their own decisions or even to be consulted about the decisions made for them. Some may even be involved as parties in a dispute without their consent or knowledge.

6.41 The situation may be further compounded by the fact that disputes may be multi-faceted and involve several jurisdictions and different regulatory systems, each of which may incorporate quite different approaches to the issues. For example, a person injured at work who has residual disabilities may, if made redundant, have all of the following claims: work-cover, industrial relations, equal opportunity and employer negligence. Separate dispute resolution processes may be

utilised by the different agencies in each of these areas. In such a case there may be no one with an overview and no authority for any conciliator dealing with any one of these claims to bring all the issues together. For people with hearing impairments, often the interpreter in dispute resolution proceedings is the “case manager” with the overview!

#### Fear of conflict, intimidation

6.42 Some people with disabilities may be keen to avoid conflict. As a result, they may be reluctant to make a complaint or defend any action taken against them. Many people with disabilities may have little experience of asserting their needs and desires, let alone of claiming their rights. As a result, they may fear to speak out in an unfamiliar situation, and may be more likely, even if they do take action, to give up, give in, or compromise inappropriately. Some may be dependent upon others for their care and well being to a large degree, and may be unable to initiate proceedings on their own account.

6.43 Court systems and lawyers are intimidating to many people. For people with disabilities, this feeling may be accentuated. It has been said, for example, that:

*‘... an intellectually disabled client is likely to fear the experience of attending court more ... than a non-disabled client; the disparity of knowledge and legal competence is even more pronounced ...’<sup>129</sup>*

6.44 The thought of confronting one’s protagonist in a closed environment in the course of ADR proceedings may, however, for some people with disabilities, be equally disquieting.

6.45 Indeed, for some, the formal justice system, with its third party decision maker and its legal representatives, might seem almost reassuring, being one step removed, as it were, from the disputants themselves.

#### Fear/reluctance to identify as a person with a disability

6.46 People with disabilities may also be reluctant to identify themselves as such: for example, taking action under the Disability Discrimination Act means identifying yourself as a person with a disability. There may be particular difficulty when the disability is hidden or not apparent to others. This is often the case for people with HIV/AIDS or mental illness. All these disabilities have an extremely negative stigma in the community. Additionally, many people will be unaccustomed to or unfamiliar with thinking of themselves as people with a disability.

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<sup>129</sup> M Ierace, ‘Acting for the Intellectually Disabled Offender: Questions of Understanding’, vol 4 (1987) 25 Law Society Journal at 45.

### Communication

6.47 For some, both physically and intellectually disabled, communication with dispute resolvers, lawyers and barristers may represent a major difficulty. People with disabilities may also be dependent upon the effective advocacy of others to protect their rights and to defend them when they are being treated unfairly. Some may lack the confidence, experience or skill to communicate with potential advisers or advocates effectively. Unless lawyers and other spokespersons are sensitised to the needs, requirements, strengths and weaknesses of people with disabilities, they will not be good advocates for those people.

### Physical impediments

6.48 Because of physical pain and/or lack of motivation, strength, and energy, and/or sufficient to enable them to travel any distance, or to talk or sit for any length of time, people with disabilities may have difficulties in physically accessing advisers and dispute resolution services. The absence, or deficiencies, of accessible transport may also cause or exacerbate these problems.

### Cost

6.49 In addition, the cost of doing anything or going anywhere may be much higher for the person with disabilities, the availability of assistance is likely to be restricted and insufficient to meet all their needs, and their own financial resources are usually inadequate.

6.50 People with disabilities may be disadvantaged in other ways as well, which may make access and participation in dispute resolution processes not merely difficult but impossible. Illustrative in this regard are Indigenous Australians with disabilities, many of whom are culturally, economically and geographically disadvantaged as well.

### Disability and use of Dispute Resolution Systems

6.51 Once people with disabilities have accessed the dispute resolution system, their difficulties may not be over. In the environment of the court or the ADR venue, they may still encounter misunderstandings and prejudices.

### Bias

#### *Systemic Procedural Bias*

6.52 In both the processes of the courts and of ADR, people with disabilities may encounter little appreciation of or accommodation to their special needs.

6.53 Notwithstanding its simpler processes and comparative cheapness, ADR may not be without its challenges for people with disabilities.

6.54 Mediation and conciliation (commonly used in disability discrimination legislation, including the Commonwealth Disability Discrimination Act) require parties to be able to communicate verbally in a group - to be able to hear and observe and understand other people's communications and to participate effectively in those verbal transactions themselves. Participation may also require participants to read printed material before or during the process.

6.55 For some people with disabilities, some or all of these things may be extremely difficult if not impossible. In the absence of a signer for example, deaf people may encounter great difficulties: even where a signer is present, the negotiation process may be very constrained. The problems for people with intellectual disabilities for example, are reflected in the following excerpt from Issues Paper No. 8 released by the NSW Law Reform Commission in 1992, entitled, 'People with an Intellectual Disability and the Criminal Justice System':

*'Victims and witnesses may be competent but need assistance, such as interpreters, communication boards or merely appropriate questioning techniques to be able to make themselves understood. ... People with an intellectual disability are likely to find giving evidence mentally exhausting and likely to suffer concentration lapses more quickly than a non-disabled witness, and will therefore require more frequent adjournments. Difficult questions for such people including leading or lengthy questions, those spoken rapidly or containing many concepts or double negatives. Such questions are particularly likely to arise in cross-examination.'*<sup>130</sup>

6.56 Similar problems to those arising in the context of a court appearance, may be encountered by such people in the environment of ADR.

6.57 In mediation, participants need to be able to negotiate for themselves or with the assistance of an advocate. This requires that they have the capacity to know what they want and to communicate this, and the reason they want it, to the other participant (or to their advocate), the capacity to listen to the other person's claims and requirements, and the capacity to develop options and to make appropriate concessions and to commit themselves to an agreement or to decide to disagree.

6.58 In conciliation, the conciliator may have a statutory obligation to protect some rights and there may also be a greater likelihood of representation by a lawyer or advocate, or for the support of an adviser. Importantly, in this latter regard, the Commonwealth Human Rights and Equal Opportunity Commission reports that a significant proportion of the complainants with disabilities who come to it do so with the assistance of an advocate from one or other of the disability complaints services. Assistance is said to be particularly strong for deaf and blind complainants. Growing numbers of parents of disabled children who lodge complaints with the

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<sup>130</sup> IP 8 1992, page 47.

Commission are also said to be turning to advocates for support. In addition to those who are unable to communicate effectively in their own right, such as those suffering from cerebral palsy or from certain intellectual disabilities, others without apparent communication difficulties are also said to use advocates. For these people, some of whom may suffer socialisation problems as a result of their disability, the presence of an advocate may represent a significant psychological support.

6.59 Nevertheless, it is reported that, where they attend conciliation conferences, some deaf people find them very difficult. They are easily confused and may have difficulty in lip-reading (if they are able to do so at all), and in interpreting the behaviour of other participants. Where they do not attend the proceedings, they may feel excluded.

#### *Personal Bias*

6.60 The attitudinal problems referred to above are equally relevant in this context.

6.61 People with disabilities often have difficulty being believed. In the eyes of the non-disabled, the persuasiveness of a story can be substantially diminished if it is delivered with the aid of a sign board, or with a stutter; or by someone whose physical appearance prompts discomfiture or repugnance in others.

6.762 A person's disability may not be recognised, or it may be minimised or maximised for different purposes. This is particularly likely with people with an intellectual disability who are frequently regarded on the one hand as too stupid to make their own decisions and as unbelievable witnesses, and on the other, as fully responsible for their actions, particularly if harm to others resulted from those actions.

#### *Power Imbalance*

6.63 Social attitudes to disability have limited the opportunities for many people with disabilities. Opportunities to access basic services such as education, employment, transport, entertainment and sport are constrained or non-existent. Isolation in institutions, separate education and sheltered workshops may be part of the experience of people with disabilities. Despite recent advances, people with disabilities are often seen as the recipients of charitable assistance, rather than as bearers of rights and entitlements. Social attitudes to disability affect the self image and self esteem of many people with disabilities, and it may be difficult for some to feel entitled to assert their own needs and interests. Their are particular arising from the social response to hidden disabilities such as epilepsy and illiteracy, and intellectual disability. As a result, disability will almost certainly result in a power imbalance in dispute resolution. If power imbalances are not addressed, they have the potential to jeopardise the fairness and justice of dispute resolution proceedings. Comments made in this regard in Chapter 1 of this Discussion Paper are relevant here.

6.64 In the foreign environment of dispute resolution proceedings, feelings of inadequacy and low self esteem can be significantly magnified, particularly in situations where needs and requirements arising as a result of a person's disability are not appropriately or adequately addressed.

6.65 Additionally, in some instances, a person with a disability may find themselves in conflict with someone upon whom they are dependent to some degree for their care and support. In this sort of situation, it may be extremely difficult for the person with the disability to assert themselves sufficiently to take any action for redress. Even if they do, the care-giver is likely to have an obvious power advantage in any dispute resolution proceedings that may ensue. In some instances there may be a danger of subsequent violence or threatened violence.

***How do power imbalances commonly manifest themselves for people with disabilities?***

### **Privatisation of Disputes**

6.66 As in other areas, disputes involving people with disabilities may involve issues of general public interest and importance. Often, trends reflected through a number of cases as distinct from a single case, may provide important social indicators. Growth of a particular sort of discrimination in housing or in employment might be reflected in this way through a number of cases. The confidential nature of ADR may hide such matters from public concern. Ultimately, of course, this will be to the disadvantage of the disabled community.

**WHAT OTHER BARRIERS ARE THERE TO FAIRNESS AND JUSTICE IN ADR FOR PEOPLE WITH DISABILITIES?**

### **STRATEGIES TO ADDRESS BARRIERS TO FAIRNESS AND JUSTICE IN ADR PROCEEDINGS FOR PEOPLE WITH DISABILITIES: SOME POSSIBLE APPROACHES**

6.67 Despite the problems involved, people with disabilities are increasingly asserting their rights. Action under the Disability Discrimination Act, for example, has been pursued by people with disabilities and they are challenging prejudice in other circumstances. In its 1995/1996 Annual Report the Human Rights and Equal Opportunity Commission reports that 526 complaints were lodged under the Act for the 1995/96 financial year. As these challenges are often representative actions, groups of people with disabilities may gain support from their shared involvement. Practitioners of dispute resolution are therefore increasingly likely to come into

contact with people with disabilities and to need to know how to provide appropriately for their needs.

6.68 As noted above, its flexibility is one of the greatest advantages of ADR. The following suggestions are made to endeavour to use this quality to maximise the fairness of ADR proceedings and outcomes for people with disabilities.

## **Assessing Capacity to Participate in Dispute Resolution Process**

### Identification of type and level of ADR

6.69 Where ADR processes are voluntary, people need to be able to understand the process, what it requires of them and what other dispute resolution processes are available to them, in order to be able to make an informed and appropriate choice. It is critical that dispute resolution service providers identify their client's disabilities and understand the difficulties that the disabled person may face.

6.70 This may require high levels of skill and perception. For instance:

*'The degree of deafness experienced by hearing impaired individuals covers a broad spectrum ranging from a mild to profound loss, which is often exacerbated by background noise and reverberations.'*

*'The communication modes used by hearing impaired persons are also diverse. It is apparent that the majority of individuals with a hearing loss for example, do have normal, intelligible speech and use speaking and listening as their primary means of communication, while others use lipreading, finger spelling or signing.... or a combination of any of these methods.'*<sup>131</sup>

6.71 Additionally, as noted by the NSW Law Reform Commission in its Research Report 4: 'People with an Intellectual Disability and the Criminal Justice System: Appearance Before Local Court':

*'The difficulties of recognition are exacerbated by the fact that the accused persons generally present themselves as well as possible for the court appearance. They wear their best clothes (or borrow from family or friends); they have had impressed upon them the need for behaving in an acceptable way; they have been schooled to answer a set routine of questions using a now familiar script. Obvious indicators, such as being in receipt of a Disability Support Pension, are frequently not present. Most importantly, the accused with an intellectual disability is likely to have spent a lifetime attempting to disguise their deficits. Intellectual disability is not readily identifiable from appearance or presentation in the majority of cases.'*<sup>132</sup>

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<sup>131</sup> Susan Priest, 'Into a Silent World Justice Can Penetrate: The Use of a Signing Interpreter in Mediation when the Party/ies is/are Hearing Impaired', © Susan Priest, 1997.

<sup>132</sup> At page 56 of the Report

Further development of dispute resolver assessment skills

6.72 Whilst dispute resolvers such as mediators and conciliators will be familiar with assessing capacity to participate in the relevant process, programs may need to be instituted to help dispute resolvers to develop their skills further if they are to make the most creative use of ADR for people with disabilities, and to assess if and how the proposed process can be adjusted to allow the person with the disability to participate fairly. A helpful approach could be for dispute resolvers to break down the skills and abilities which are required of the participants in the proposed dispute resolution process, and assess the capacity of the person with the disability to fulfil those requirements.

**Are there any other ways in which the creative skills of dispute resolvers might be developed to enable appropriate changes to be made to procedures?**

**Bias**

Systemic Bias - Access to Dispute Resolution Processes for People with Disabilities

6.73 It should not be assumed that, because a person with a disability lacks the capacity to carry out the requirements of a dispute resolution process, they cannot participate. They may well be able to participate if accommodation is made to their needs. The Commonwealth Disability Discrimination Act proscribes discrimination against people with disabilities. Section 24 of the Act requires people who provide goods and services to avoid discrimination and to provide accommodation for the needs of people with disabilities unless doing so would impose unjustifiable hardship.

6.74 It is important that dispute resolution providers have the capacity to recognise the sorts of accommodations that may be needed in each case. Training is needed in this area.

6.75 The types of accommodation which may be required may be resource intensive both economically and in terms of time, although they are unlikely, in most cases, to create unjustifiable hardship for dispute resolvers. Some examples of accommodations which may be required are:

- Travelling to the disputant who has the disability rather than requiring them to travel;
- Scheduling the mediation at an accessible venue;
- Providing a sign language interpreter;
- Fast tracking the process so that short term memory problems are overcome;

- Scheduling multiple sessions or frequent breaks;
- Providing a sighted guide;
- Permitting/providing legal or other representation or support;
- Working with an advocate;
- Arranging the venue to maximise participation (for instance, paying attention to lighting and seating if a participant needs to lip read);
- Providing information about the dispute resolution process in an accessible form: for example, on computer disc or tape;
- Learning to use appropriate communication and questioning techniques; and
- Orienting a person with a disability to the dispute resolution venue and to the procedure which will be followed.

Where accommodations cannot be met, they should at least be acknowledged and such power imbalances as may exist, in consequence, be made overt.

***Information is sought as to the sorts of accommodations which dispute resolution service providers find it difficult to respond to, and of the approach that is/might be adopted in such circumstances.***

6.76 There may be situations in which the effective participation of the person with a disability is difficult to achieve and advocacy with a third party decision maker is more appropriate. Some people may have profound intellectual disabilities which may mean that they are not able to understand ADR proceedings and participate in them effectively. Others may have decision making disabilities such as advanced dementia which would prevent them from participating in a dispute resolution process. Nevertheless, if the person with the disability is involved in the dispute or will be affected by its outcome, an effective way of ascertaining and representing their needs and wishes must be found. If it is not, ADR cannot provide a fair process or outcome.

#### Use of Interpreters/Advocates

6.77 Where interpreters, advocates and others are used to accommodate the needs of a disabled person, it is important that dispute resolvers are familiar with the modifications that may be required. For example, it may be necessary to speak more slowly than normal, to have more frequent breaks in the proceedings, and to ensure that the person with the disability is not effectively marginalised by speaking to the interpreter rather than to them. Dispute resolvers and interpreters also need to understand and appreciate each others respective roles and abilities. Training may be of assistance in this area.

6.78 Of course, in seeking to accommodate the needs of people with disabilities, it is important that dispute resolvers do not confuse human rights with older concepts of welfare and of paternalism.

## Individual Bias

6.79 When making an assessment, it is important that the assessor confront their own attitudes to disability. They should ensure that their assessments are not informed by their own prejudices and attitudes about disability but by an accurate and fair appreciation of the capacity of the person who is involved in the dispute and who has a disability.

6.80 Perhaps the most important factor to take into account is that assessments about capacity should never be made on the basis of stereotypes about a particular disability. An assumption that someone who is hearing impaired will use sign language, for example, would be quite inaccurate for many people. An assumption that someone who is legally blind cannot access printed material may be wrong. An assumption that a person with an intellectual disability cannot negotiate on their own behalf may also be inaccurate. It is important to assess capacity on the basis of the needs of the individual, not on the basis of preconceptions about their disability.

6.81 Dispute resolvers should beware, in particular, of making assessments based on what *other* people say about the person with the disability. People with disabilities often find themselves in situations where other people speak for them and their needs and desires are ignored or misrepresented. ADR should not be another of those situations. The effective participation of all parties is absolutely essential to the provision of dispute resolution mechanisms which are fair and capable of satisfying “users” interests and needs.

***Would a disabilities awareness program be a useful response to the possibility of stereotyping and individual bias?***

***What accessible resources can dispute resolvers call upon to educate themselves about attitudes and stereotypes with respect to disability?***

### **Information and Access to ADR: Providing Reasonable Accommodation to the Needs of a Disputant with a Disability**

*Information about dispute resolution processes*

6.82 Informational material needs to be in a form which is accessible to people with disabilities.

6.83 For instance, for people with mental disabilities, the use of straightforward direct language is critical. Pictorial representation as in comic book type formats has often been found to be very effective. This is also very useful for those who are otherwise not suffering significant intellectual disability but have great difficulty reading as for example those who are dyslexic.

## **Responding to Power Imbalance and Disability**

6.84 Power imbalance must be carefully assessed to determine whether or not it can be compensated. If it cannot, other dispute resolution mechanisms, including arbitration or adjudication are indicated.

6.85 Where accommodations are required to redress power imbalance, they should be seen as the right and entitlement of the person with a disability, rather than as charity or a special favour.

6.86 In dispute resolution proceedings involving a person with a disability, the other person is frequently a person or organisation with considerable power or authority over the person with the disabilities. For example, in a situation where the parents are wanting more inclusion of their physically disabled child in the local school, significant power lies with the Education Department, the school officials and teachers. The parents often feel isolated from other parents and guilty about having this “problem” child. Interestingly, as noted above, this is one of the areas where the Human Rights and Equal Opportunity Commission indicates that parents are increasingly turning to advocates for advice and support in the presentation of their complaints.

6.87 Advocacy is clearly one of the most effective ways of redressing power imbalances. Where there are multiple disadvantages, for example, a non English speaking young man suffering from schizophrenia, on a pension who is trying to resist being thrown out of his accommodation, there should always be representation in any ADR process. In other cases too, however, even where people with disabilities may seem capable of negotiating on their own behalves, it may be that they would be assisted by the presence of an advocate. This need should be recognised and accommodated.

6.88 Both dispute resolution providers and advocates may require training to ensure that the ‘best interests’ of the person with a disability are being met and that the person with the disability is not further disempowered.

***Where advocates are used in ADR proceedings, are they representing the best interests of people with disabilities?***

***Would advocates benefit from training to acquaint them with the aims and objectives of ADR processes?***

***Do dispute resolvers need training in the use of advocates?***

***What other methods of responding to power imbalance can be used or accessed by dispute resolvers?***

## **Knowledge of Available Services**

6.89 Dispute resolution service providers should be familiar with the many advocacy services, including the Legal Advocacy Services set up with funding from the Commonwealth Attorney-General's Department in each Australian State and Territory.

6.90 Dispute resolvers, should also be aware that some advocacy services, those in relation to sign language interpreting for example, are minimal and early bookings are necessary. In rural and remote areas advocacy services generally may be very limited. Individual advocacy services may also be restricted for some sorts of disability. This is said to be the case, for example, for persons with psychiatric disabilities.<sup>133</sup>

6.91 Dispute resolvers should be familiar with other forms of assistance and support available to people with disabilities, and should make recommendations and referrals as necessary.

6.92 In situations where the person with the disability may be at risk as a result of taking action, (for instance, where they have lodged a complaint against a care-giver upon whose services they will, necessarily, continue to depend), dispute resolution service providers must be aware of the dangers of physical or psychological mistreatment, and should take appropriate action. In extreme situations, they should refer the dispute elsewhere. Comments made elsewhere in this Discussion Paper with respect to violence are also relevant here.

## **Avoiding the Privatising Effects of ADR**

6.93 Just as elsewhere in this Discussion Paper, it there may be some disputes or series of disputes concerning people with disabilities which also involve wider public issues. Whilst it is unrealistic, (and indeed, it could be their direct disadvantage) to forego ADR in such circumstances, if certain disputes or trends are not brought to the public attention, the disabled community may suffer in the longer term.

6.94 To avoid the privatising effects of ADR in such circumstances, it might be that there should be some obligation upon dispute resolvers, so far as possible, to monitor and publicly identify problem areas to enable legislative or other redress to be taken in the longer term. If such monitoring does not occur, systemic problems, for example, problems with the approach of particular service providers, may not be identified and remedied. Close links with relevant agencies and support groups are critical in this regard.

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<sup>133</sup> Report by MGM Consultants in Human Services, 'Advancing Advocacy: Disability Advocacy Effectiveness Project', commissioned by the Commonwealth Department of Health and Family Services, September 1995.

***Are the suggestions made in Chapter 1 (paragraph 1.49) an adequate response to privatisation concerns for disputes involving people with disabilities?***

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS. WHAT OTHER STRATEGIES ARE THERE FOR ENSURING FAIRNESS AND JUSTICE IN ADR FOR PEOPLE WITH DISABILITIES?**



## CHAPTER 7

### MINORITY SEXUAL PREFERENCES - LESBIANS AND GAY MEN

#### INTRODUCTION

7.01 There is a dearth of information about the dispute resolution experiences of members of minority sexual groupings. This is particularly so with transsexuals and bisexuals. As a result, the primary focus of this Chapter is, necessarily, upon lesbians and gay men. Where possible, there are also a number of limited references to transsexuals. There is no specific reference, however, to bisexuals.

7.02 A significant number of the Australian population are lesbian or gay. In the Discussion Paper the terms lesbian and gay man are used, rather than the term “homosexual”. This is because when the word “homosexual” is used many people think only of gay men, and lesbians are forgotten. The experiences of lesbians and gay men are often different. Gender makes a difference to the experience of being homosexual and it would sometimes distort the experience of lesbians and gay men to generalise about “homosexuals”. The categories of sexuality are not fixed or immutable. Some people would describe themselves as lesbian or gay at one time in their lives, and heterosexual at other times. Some people would describe themselves as bi-sexual.

***Information would be welcome on the experiences of transsexuals and bisexuals in the area of dispute resolution. Further information would also be welcome with respect to lesbians, gay men and dispute resolution.***

#### THE GENERAL IMPACT OF BEING A MEMBER OF A SEXUAL MINORITY GROUPING

7.03 Lesbians and gay men say that the most significant impact on their disputing behaviour is homophobia. Lesbians and gay men report the impact of homophobia on every area of their lives, saying that they confront prejudice, discrimination and

violence as a result of their sexuality. Homophobia is found in employment; in acquiring accommodation; in gaining access to goods and services as diverse as medical services and holiday accommodation; in education and elsewhere.<sup>134</sup> Homophobia may be found in the family of origin of lesbians and gay men. Young people who are gay or lesbian can experience particular difficulties. Rejection by family can result in homelessness.<sup>135</sup> More generally it can result in isolation and lack of emotional and other supports.

7.04 A consequence of homophobia is that many lesbians and gay men choose to conceal their sexuality. They fear the prejudice, hostility and discrimination which can result from “coming out”. Studies demonstrate a very high level of discrimination and violence against lesbians and gay men. It has been established that the more open lesbians and gay men are about their sexuality, the more likely they are to suffer from discrimination and violence.<sup>136</sup>

7.05 Prejudice against gay men may be compounded by negative social attitudes to HIV/AIDS. Because a man is gay it may be assumed that he has HIV/AIDS. The attribution of HIV/AIDS may bring with it further discrimination.<sup>137</sup> Those gay men who are HIV positive or have AIDS may experience prejudice and discrimination against them because of their sexuality, their HIV status or their illness.

7.06 Lesbians may suffer discrimination which arises from their gender as well as their sexuality. Anti-discrimination agencies report that very few complaints by lesbians are pursued. However, some complaints of discrimination on the ground of gender are made by lesbians. This may be because they find it more acceptable to complain in a fashion which does not necessitate revealing their sexuality. Alternatively it may reflect their experience of discrimination or harassment. A lesbian who is harassed, for example, may find it difficult to tell what lies behind the harasser’s behaviour - sexism or prejudice against lesbians.

7.07 The position of transsexuals may be even more acute. Most experience extreme forms of discrimination in the workplace, where the majority of their workmates may find it very difficult to adapt to the sex change of a colleague and to accept their new identity. Where a man, working in an essentially ‘macho’ environment, such as maintenance engineering for example, becomes a woman, she may suffer severe and deeply offensive harassment. Many families may also find it difficult to come to terms with the sex change. Whereas they have previously had a son, they may, ‘overnight,’ have a daughter. Additionally, individual transsexuals

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<sup>134</sup> See Gay Men and Lesbians Against Discrimination, Not A Day Goes By: Report of the GLAD Survey into Discrimination and Violence Against Lesbians and Gay Men in Victoria, GLAD, 1994; Anti-Discrimination Board NSW Discrimination and Homosexuality (1982); Lavender (ed) What is Lesbian Discrimination? Proceedings of an October 1987 Forum held by the Anti-Discrimination Board Anti-Discrimination Board NSW, 1990.

<sup>135</sup> Jude Irwin, Barbel Winter, Mel Gregoric and Simon Watts “As Long as I’ve Got My Doona”: A Report on Lesbian and Gay Youth Homelessness”, Twenty-Ten Association Inc., 1995, especially 33-36

<sup>136</sup> See GLAD survey, *ibid.* This could equally apply to members of other sexual minority groups.

<sup>137</sup> Anti-Discrimination Board NSW Discrimination: The Other Epidemic, April 1992.

may have difficulty with the extent of the treatment which they have had and with their own identities.

## **MEMBERS OF SEXUAL MINORITY GROUPS AND DISPUTE RESOLUTION<sup>138</sup>**

### **Types of Disputes in which Members of Sexual Minority Groups Become Involved**

7.08 The experience of being lesbian or gay is likely to be significant when an individual has a dispute. The experience of homophobic violence, harassment or vilification may increase the likelihood of gay men and lesbians coming into contact with the justice system, as may the experience of discrimination. Although federal discrimination legislation does not presently cover discrimination on the ground of sexuality, nevertheless gay men and lesbians may use the legislation to deal with discrimination, using the grounds of gender and disability. Various State jurisdictions prohibit discrimination against transsexuals and although the Commonwealth has not specifically legislated in this area, as with lesbians and gays, the Commonwealth human rights legislation could provide some protection.

7.09 For transsexuals, most disputes appear to arise in the employment area and in terms of their status as men or women. Discrimination on the grounds of sex may also occur, as when, for example, the owner of a nightclub advertises for 'real girls' and will not employ transsexuals. Most disputes in which complaints arise appear to involve men who have become women, although disputes involving women who have become men are not unheard of.

7.10 Of course, members of sexual minorities also have exactly the same range of disputes as the heterosexual population - disputes concerning business, employment, accommodation, and relationships for example.

### **Advantages of ADR for Members of Sexual Minorities**

7.11 As well as the advantages it has for any citizen (comparative cheapness and speed), ADR has a number of particular advantages for lesbians and gay men.

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<sup>138</sup> For the purposes of this discussion attention will be focussed for the most part on mediation and conciliation. Conciliation is relevant because it is the method of dispute resolution adopted by human rights and equal opportunity bodies. Conciliation is often used before there is any possibility of a tribunal hearing in these jurisdictions. Mediation is the method of dispute resolution which is developing at the greatest rate in Australia. It is a method of dispute resolution increasingly being used by lesbians and gay men.



### An alternative to the formal justice system

7.12 ADR also offers lesbians and gay men the possibility of avoiding the problems that they perceive with the formal justice system. There are indicators that lesbians and gay men may be experiencing problems with the formal justice system. Attitudes may be prejudiced; rules may be discriminatory; laws may not provide for gay and lesbian relationships or may distort or misrepresent their experiences.<sup>139</sup>

7.13 Through the use of ADR, homophobia may be avoided. There may be the possibility of choice of mediator, and an individual mediator (or co-mediators) with appropriate understandings and attitudes may be selected.

### Values

7.14 Irrespective of whether or not a dispute involves legal issues, mediation allows people to decide the values which they wish to apply to the resolution of their dispute. Legal frameworks which the disputants find inappropriate and rules which are discriminatory may be rejected in favour of understandings which are compatible with the beliefs of the participants.

### Privacy

7.15 Privacy may also be an attractive feature of ADR for members of sexual minorities. If a dispute leads to litigation it may become increasingly difficult for those lesbians and gay men who wish to do so, to conceal their sexuality. The pressures on their time and the financial and emotional strain of litigation may mean that employers, workmates and family members, for example, must learn about or be told what is occurring. Some cases, such as discrimination matters, also frequently receive attention from the press. ADR mechanisms offer the possibility of a private, confidential dispute resolution process. The participants are not required to come out to anyone except the mediator. If mediation, conciliation or another ADR process succeeds, the dispute may be resolved quickly and cheaply. There will certainly be less delay and expense than would have accrued had the participants needed a court hearing, and there will be a consequent reductions in stress.

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<sup>139</sup> See below and also see Hilary Astor "Mediation of Intra-Lesbian Disputes", (1996) 20 Melbourne University Law Review 953, at 957-962; Australian Law Reform Commission Interim Report No 67, 'Equality Before the Law: Women's Access to the Legal System'; Susan Boyd "Expanding the 'Family' in Family Law: Recent Ontario Proposals on Same Sex Relationships", (1994) 7 Canadian Journal of Women and the Law 545; Lesbian and Gay Legal Rights Service, "The Bride Wore Pink: Legal Recognition of Our Relationships", (1993) 3 Australian Gay and Lesbian Law Journal 67; Jenni Milbank "Lesbian Mothers, Gay Fathers: Sameness and Difference", (1992) 2 Australian Gay and Lesbian Law Journal 21.

## **Barriers to the Fairness of ADR for Members of Sexual Minorities**

7.17 At first blush, therefore, alternative dispute resolution appears to have very positive benefits for the lesbian and gay communities. However, it is useful to ask whether or not there might be problems or challenges which could be addressed in using ADR. Certainly, a more careful examination may reveal things which can be done to improve alternative dispute resolution for lesbian and gay disputants and to maximise the likelihood that they will receive fair and appropriate treatment.

### Bias

#### *Individual Bias*

7.18 Negative attitudes to lesbians and gay men are common. They are not confined to the formal justice system. It cannot be assumed that all mediators, conciliators or others involved in ADR are free from homophobia. Difficulties which may arise from lack of familiarity, prejudice, or lack of training include misunderstanding or trivialisation of homophobia or other important issues. There may be an unwillingness to recognise that lesbian and gay relationships may be just as committed and lasting as heterosexual relationships. There may be a failure to recognise issues of sexuality which lie at the root of a dispute or, conversely, a focus on issues of sexuality where they are not necessarily relevant. There may be an unnecessary concern about HIV infection or HIV/AIDS issues.

7.19 A mediator who disapproves of lesbians and gay men, or who feels uneasy dealing with them, or has no understanding of the difficulties they may face as a consequence of homophobia, is unlikely to be able to offer an appropriate and fair service. To give one example of the knowledge needed by mediators, “outing” the other participant may be used as a threat to induce a favourable settlement. Fear of the other participant revealing their sexuality to family or an employer, for example, may strongly influence the capacity of a gay man or lesbian to negotiate effectively for a fair and just outcome in ADR. A good mediator needs to be sensitive to this dynamic and deal with it appropriately at intake and in mediation.

7.20 Because everyone has a sexuality, mediators need to be careful not to form views and to make assumptions about the participants in a mediation on that basis. This is as true of a gay mediator mediating a dispute between two gay men as it is for a heterosexual mediating such a dispute.

#### *Perceived Bias*

7.21 Mediators also need to be aware of perceived bias. For example, a lesbian may assume an understanding between a heterosexual mediator and the other participant in a dispute resolution proceeding, also heterosexual, which does not exist. Despite the fact that this assumption may be unfounded, such a misconception can be just as destructive to the mediation process as actual bias.

## Power Imbalance

7.22 Maintenance of the balance of power between the participants becomes more complex in disputes between lesbians and gay men. For example, one strategy a mediator may use to ensure fairness is to refer the participants to legal advice, so that they bargain with an understanding of their rights and a fair outcome according to the law.

7.23 The less powerful person in a lesbian or gay relationship cannot necessarily be referred to legal advice to ensure that she or he knows what a just or fair outcome might be. What lesbians and gay men think is equitable and just may be different from what is provided by the law. Mediation may need to confront competing ideas of fairness without the fall back position of legal rules and precedents. Power imbalance may also be a difficult issue where homophobia creates an advantage for a heterosexual disputant.

7.24 Power imbalances between heterosexuals and members of sexual minorities may, moreover, be difficult to detect. Take the example of a man who is in dispute with his business partners where the termination of a personal relationship has impacted upon the business relationship. This is not an unusual occurrence, and the nature of the dispute and the issues in dispute may be very similar whether the man in our example is heterosexual or gay. However, sexuality may make a difference to the way the two men approach the resolution of their dispute. The heterosexual will not fear the public revelation of his sexuality or fear that he will find prejudice against his sexuality in the formal justice system. The gay man, however, may fear being “outed” and therefore find the formal justice system unattractive as a dispute resolution option. If mediation were to be used to settle this dispute, it might be possible to use the reluctance of the gay man to turn to the formal justice system as a powerful negotiating tool.

## Violence

7.25 There is little research on violence in lesbian relationships, and even less on violence in gay male relationships. What research there is suggests that there are similarities with the dynamics of violence in heterosexual relationships. Many of the descriptions of personal experiences of violence in lesbian and gay relationships have strong similarities with the stories of women in heterosexual relationships. There is also evidence however, of dissimilarities.

7.26 One theory about violence in lesbian relationships is that violence is most often perpetrated by the less powerful party and is an attempt to equalise power. In heterosexual relationships there are indicators that, violence is frequently perpetrated by the male, who is likely to have most of the external indicators of power. Assuming the same dynamic of violence in a lesbian relationships may lead ADR providers towards wrong assessments of capacity to mediate.<sup>140</sup>

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<sup>140</sup> Mary Eaton “Abuse by Any Other Name: Feminism, Difference and Intralesbian Violence” in Martha Fineman and Roxanne Mykitiuk, ‘The Public Nature of Private Violence: the Discovery of Domestic Abuse’ (1994) 195; Elaine Leeder “Enmeshed in Pain:

7.27 Available data also suggests that lesbians' experience of leaving a violent relationship, of seeking help and of attempting to resolve disputes associated with the termination of the relationship are not the same as the experiences of heterosexual women. Homophobia may make it very difficult to leave a violent relationship. The fear, or the threat, of "outing" may be a factor, or the fear of losing custody of the children of the relationship. There is anecdotal evidence that agencies established for the support of women who are the target of violence do not always respond to lesbians who seek help. The silence and denial which always surround violence may be heightened in lesbian and gay relationships.

### The Shadow of the Law

7.28 Using alternative dispute resolution does not necessarily allow people to depart from the law for at least two reasons. First, the formal justice system may have a very strong impact on what occurs in ADR.

7.29 This may be illustrated by the situation where two gay men separate and enter into a dispute about ownership of their home, to which one of the parties holds the legal title. While they lived together they may not have thought it necessary to change the legal ownership of the property to take into account indirect financial contributions or financial sacrifices by one of them. An acrimonious end to the relationship, however, may cause the title holder to minimise the contributions of his ex-partner. Since his partner may have great difficulty in recouping non-financial contributions in court he may also abandon or reduce his claim to them in mediation.

7.30 Second, the creation and maintenance of shared understandings which depart from those embodied in law may be exceedingly difficult, especially when the parties are in dispute.

7.31 Whilst mediation theoretically allows the disputants to settle a dispute according to their own rules and values, in practice this may be difficult to carry through. It is a very difficult task for two people in dispute at the end of a relationship to develop a critique of the legal rules; agree to apply their own ethics or standards; reach some consensus about what these are; maintain them over time; maintain them in the face of the distress attendant upon the ending of the relationship. The task may be even more difficult if departure from their agreed values and resort to the formal justice system would benefit one of the participants.

### Privatisation of Issues

7.32 The confidential nature of mediation may be of benefit to lesbians and gay men who wish to protect themselves by concealing their sexuality. However, there

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Counselling the Lesbian Battered Couple" (1988) 7 Women and Therapy 81; Claire Renzetti, 'Violent Betrayal: Partner Abuse in Lesbian Relationships' (1992); David Island and Patrick Letellier, 'Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence' (1991).

are potential disadvantages for the lesbian and gay community if the majority of disputes are resolved in the private forum of mediation. When important issues are litigated there is the possibility of change which can benefit many lesbians and gay men.

7.33 The role of some litigated cases in setting beneficial precedents can be far reaching. The example of the challenge by Nick Toonen to the provisions of the Tasmanian Criminal Code provides an excellent example of a situation in which the rules were changed and public awareness was increased. This may be contrasted with the conciliation of discrimination complaints. Whilst conciliation may provide a satisfactory result for individual lesbian and gay complainants, it does not assist in the interpretation of relevant legislation; provide public education; or inform other gays and lesbians what can be done to deal with discrimination.

7.34 Additionally, the confidential nature of conciliation makes it very difficult for the anti-discrimination agencies to inform those who are the target of discrimination about the work it is doing. In the past, this led to the expression of a lack of confidence in some agencies by gay men and lesbians. Very few complaints from lesbians and gay men are received, for example, by the NSW Anti-Discrimination Board.

7.35 ADR may therefore be a mixed benefit for lesbians and gay men. Some of the flaws perceived by lesbians and gay men with the formal justice system may replicate themselves in mediation, and there may be other problems. It is important, therefore, to consider carefully what can be done to maximise the likelihood that ADR will provide an effective, appropriate and fair service for lesbians and gay men.

## **WHAT OTHER BARRIERS ARE THERE TO FAIRNESS AND JUSTICE IN ADR FOR MEMBERS OF SEXUAL MINORITIES?**

### **STRATEGIES TO ADDRESS BARRIERS TO FAIRNESS AND JUSTICE IN ADR FOR MEMBERS OF SEXUAL MINORITIES: SOME POSSIBLE APPROACHES**

7.36 There is very little written on these issues. Set out below, however, are some of the issues identified by mediators with relevant experience and by writers on this topic.<sup>141</sup>

<sup>141</sup> Hilary Astor "Mediation of Intra-Lesbian Disputes", op cit note 138; Suzanne Bryant "Mediation for Lesbian and Gay Families", (1992) 9 *Mediation Quarterly* 391; Alan Campbell 'Mediation of Children Issues When One Parent is Gay: A Cultural Perspective' Conference Proceedings Second International Mediation Conference (1996) at page 17; Bonnie Englehardt and Katherine Triantafylliou "Mediation for Lesbians" in Boston Lesbian Psychologies Collective (eds) 'Lesbian Psychologies' (1987) 327; Ruthann Robson,

## Selecting an Appropriate Mediator

7.37 Selection of appropriate mediators for the participants and their dispute is a feature of mediation schemes that employ careful intake procedures. Many mediation services report that they will take care to find mediators with relevant experience who are acceptable to lesbian and gay disputants. It is essential that mediators confront their own attitudes and values about lesbians and gay men if they are to provide a service which is appropriate, accepting, effective, informed and not tainted by homophobia. As lesbians and gay men become more informed about the use of mediation they are increasingly likely to ask about the attitudes, training and knowledge of mediators.

7.38 It has been argued that only a lesbian or gay mediator has the capacity to mediate where a lesbian or gay relationship is involved. Being lesbian or gay, it can be asserted, is the only way that a mediator would have a sufficiently sensitive understanding of the relevant issues, particularly the impact of homophobia. Some gay men and lesbians may feel uncomfortable in revealing their sexuality and discussing intimate issues related to disputes with a heterosexual mediator, or they may simply be impatient with heterosexual ignorance of the realities of their lives. However, being a lesbian or a gay man is not, by itself, a guarantee of freedom from homophobia. Nor is it a guarantee of appropriate skill in mediation.

7.39 Disputes between lesbians and gay men have dynamics other than sexuality, and a mediator with great experience or with other attributes may be important for some disputes. Certainly a mediator with appropriate training and attitudes is likely to be more effective than one chosen solely on the basis of sexuality. It is also important to note that gay and lesbian mediators are not interchangeable. For example, having a woman mediator with positive attitudes (whatever her sexuality) may be more acceptable for some lesbians than having a male mediator, whether he is homosexual or heterosexual. Anecdotal evidence suggests that often gay male disputants may be accepting of heterosexual women mediators but not of heterosexual men.

## Mediator Training

7.40 Mediator training which will allow an effective, fair and appropriate service to be provided to lesbians and gay men is clearly important. Mediators cannot simply map assumptions relevant to heterosexual relationships onto lesbian and gay male relationships. They need to take particular care to discover and to clarify the

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*'Lesbian (Out) Law: Survival Under the Rule of Law'*, Firebrand Books 1993; Annette Townley "The Invisible-ism: Heterosexism and the Implications for Mediation", (1992) 9 *Mediation Quarterly* 397; Isabelle Gunning "Mediation as an Alternative to Court for Lesbian and Gay Families: Some Thoughts on Douglas Macintyre's Article" (1995) 13 *Mediation Quarterly*.

participants' assumptions. Mediator training and continuing education needs to develop these skills, to the extent that it does not do so already.

7.41 Mediators who provide a service for lesbian and gay disputants also need to understand the impact of homophobia on their clients. It may affect the nature of their clients' disputes; their clients' options for resolving those disputes; the balance of power between disputants. Mediators need to know what questions to ask in order to ensure that the issues between the parties are placed on the agenda, options for resolving the dispute are properly developed and a fair outcome is achieved.

7.42 The avoidance of stereotypes of lesbian and gay relationships is also important. The mediator should be dealing with the participants' relationship, not the mediator's view of what constitutes a gay or lesbian relationship. Familiarity with the range of lifestyles of lesbians and gay men is also needed. Mediators should not be shocked by lifestyles which differ strongly from their own.

7.43 Being comfortable with issues of HIV/AIDS is especially important for disputes between some gay men. Mediation may be especially responsive in some cases involving HIV/AIDS, if all participants are willing to use it. For example disputes may arise concerning the estate of a person with HIV/AIDS between their partner and their family of origin. Such disputes may be especially difficult if the family discovers both sexuality and HIV/AIDS just before or just after death.

### **Power Imbalance/Violence**

7.44 Training is relevant in this regard. Importantly, power imbalance in disputes involving lesbians and gay men should not necessarily be dealt with in the same way as power imbalances arising between heterosexuals.

7.45 In view of the fact that there may be an even greater denial of violence in lesbian and gay relationships than in heterosexual ones, it is important that mediators address issues of violence clearly and directly.

7.46 Decisions about whether a dispute should be accepted as suitable for mediation may involve difficult value judgments in cases where there is, for example, a marked imbalance of power between the participants.

7.47 Given the shortcomings of the formal justice system, mediators may find it harder to turn away disputes between lesbians and gay men, knowing that they are sending people to other dispute resolution mechanisms which are very unsuited or, indeed, antagonistic to their needs. The pressure from the participants to accept their dispute for mediation may be correspondingly stronger. However the fact that there are deficiencies in other forms of dispute resolution does not make mediation a suitable dispute resolution mechanism for some people.

## **Providing Appropriate Referrals**

7.48 ADR service providers often need to refer disputants to other services. This may be because the participants are not suited for the service provided by mediators, because they need information and advice to assist in the resolution of the dispute or because people have needs which cannot be fulfilled by the mediator or the agency providing ADR. If service providers are to be an effective referral agency they need to acquire information about the location of services which provide for lesbian and gay disputants. Services which are suitable for heterosexual disputants may, or may not, provide such a service.

## **Maximising the Values of the Participants**

7.49 Dispute resolvers should be skilled in eliciting the understandings and assumptions of the participants, assisting them to decide what their interests are, and helping them to resolve their dispute in a way which accommodates their interests as far as is possible.

## **Avoiding the Privatising Effect of Mediation/ADR**

7.50 It is difficult for dispute resolvers to deal with the privatising effect of ADR. Clients who come to mediation, for example, looking for a confidential forum to resolve their dispute are likely to be unimpressed if told that they should take their case to court because there may be benefits for the lesbian and gay communities in public resolution of their dispute.

7.51 General strategies which might be adopted in the face of the privatisation of issues of public concern are outlined in Chapter 1 of this Discussion Paper.

***Are there circumstances in which it might be in the broader public interest to bring disputes involving members of sexual minorities to the attention of the public?***

***Would privacy, perhaps one of the greatest attractions of ADR for lesbians and gay men, be put at risk if measures such as those suggested in Chapter 1 (Fairness, Justice and ADR) (paragraph 1.49) were adopted?***

7.52 Additionally, dispute resolvers could discuss the advantages and disadvantages of all dispute resolution processes, including litigation, with lesbian and gay clients. They might also publicise their work with members of sexual minorities, distinguishing, however, between the categories. They could also strengthen or develop links with the gay and lesbian communities.

7.53 Dispute resolvers have social policy and political roles. They can and do influence those who make and implement law and policy. They support, initiate and

carry out research and writing about ADR. In all of these roles they could and should point out the issues raised by their work with lesbian and gay clients.

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS.  
WHAT OTHER STRATEGIES ARE THERE TO ENSURE THE  
FAIRNESS AND JUSTICE OF ADR FOR MEMBERS OF MINORITY  
SEXUAL GROUPS?**

## **CHAPTER 8**

### **GEOGRAPHIC LOCATION - RURAL AND REMOTE COMMUNITIES<sup>142</sup>**

#### **INTRODUCTION**

8.01 Most of Australia's population is concentrated in two widely separated regions. By far the largest lies along the eastern coastal fringe, particularly the south east of the continent. The other smaller region is in the south-west. Because of its size and the fact that the vast proportion of its small population is concentrated along its coastline, it is to be expected that, in Australia, geography will be a significant factor in the delivery of services of any kind. The delivery of alternative dispute resolution services is no exception.

8.02 This Chapter focuses upon the impact of geographic remoteness on the delivery of dispute resolution services. It encompasses persons living and working in rural and remote areas or communities or mining settlements and others, such as Indigenous Australians, who may or may not be engaged in rural or mining activities.<sup>143</sup>

8.03 In the context of this Discussion Paper, geographic remoteness means living at a sufficient distance from a major service centre to be at a disadvantage in accessing resources. For the provision of ADR services, access to an ADR service provider is required, someone who though not necessarily unfamiliar to the participants, can be assured of maintaining their impartiality in any dispute resolution proceedings in which they are involved.

8.04 Beyond that, the precise nature of the ADR service required in a particular area can be very much affected by the economic activity and the population make-up of the region. In very remote areas for example, where pastoral leases predominate, men may greatly outnumber women. In mining communities, it is single men or very young families who tend to predominate. There may be high levels of immigrants in such towns and very few older people. In contrast, coastal centres

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<sup>142</sup> NADRAC wishes to thank Dr Ruth Sturmey, Counsellor, Relationships Australia (Vic) for her comments on this Chapter.

<sup>143</sup> For a full discussion of the position of Indigenous Australians, see Chapter 4, Minority Cultural Groups in Australian Society.

attract people of all ages and there is a high proportion of single or unmarried mothers and retirees. Remote areas which are also tourist centres can attract large numbers of transient residents. The economic activity within a region may have a significant impact upon the types of disputes likely to be encountered and the sort of experience a dispute resolver is likely to be required to provide in that region.

8.05 Importantly also, the degree of disadvantage is not necessarily commensurate to distance in all instances. The disadvantages of distance may also escalate or decline according to the capacity of individuals to overcome it: in some situations, if they have no means of transport and no information as to the sorts of services which might be available to them, someone living an hour from a metropolitan centre might be more disadvantaged than someone living in remote north west Queensland.

## **THE GENERAL IMPACT OF GEOGRAPHIC LOCATION**

8.06 Geographic location can have a profound effect upon many aspects of the lives of people living in rural and remote communities.

### *Personal Relationships*

8.07 The ties between inhabitants of rural or remote areas may be much stronger than those in larger population centres. These close-knit or 'strong tie' relationships have advantages and disadvantages. Living in rural and remote areas can promote high levels of self-reliance and adaptability. Men and women may be adept mechanics, 'fixers' and improvisers and can generally 'make do' when commodities are in short supply. Women often have skills that are not stereotypically women's skills, like driving a tractor or combine harvester, moving sheep or cattle or managing the farming company finances.

8.08 The interdependence of members of rural or remote communities may also promote caring and supportive attitudes towards other community members and pride in their achievements. There may be tolerance of some behaviour which might provoke disputes in other communities. Self-reliance in resolving disputes may also be encouraged, and an increased motivation to anticipate disputes and to resolve them promptly when they arise.

8.09 Also however:

*'... strong-tie communities embody the very powerful requirement that people conform to the dominant values and lifestyle of the groups(s) to which they want to belong.'*<sup>144</sup>

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<sup>144</sup> Hugh Crago, Ruth Sturmey and Jenny Monson, 'Myth and Reality in Rural Counselling', (1996) vol 17(2) Australia and New Zealand Journal of Family Therapy, page 61 at page 64.

8.10 As a result, people in rural and remote communities may tend to be more conservative than their city counterparts. There is evidence, for instance, of conservative attitudes to gender roles and to male - female relationships in rural communities.<sup>145</sup> Because of this, dispute resolution service providers may need assistance, for example, in confronting and coping with not only the attitudes of the husband of a wife seeking a divorce but also, those of family members, neighbours and the community at large.<sup>146</sup> Country people may be also less tolerant of sexual or cultural differences. Whilst discomfort in the face of diversity is not confined of course, to country or remote areas, such responses may be more likely to be found in such areas.

8.11 Conformity and the related conservatism of rural communities, may significantly narrow options for change in individual behaviour.

#### *Financial Considerations*

8.12 With the exception of communities dependent upon mining, incomes are significantly lower in rural and remote Australia. The economic recession has hit rural communities hard. The variables of drought and flood have had a significant impact in recent times, whilst the volatile nature of the commodities market can also generate significant socio-economic uncertainty in rural and mining communities.

#### *Education and Employment*

8.13 There are fewer employment and educational opportunities in the country so it is not surprising that children often leave school early, that there are lower levels of education and literacy in some rural and remote areas, and that youth unemployment and male youth suicides are higher than in the cities. Occupational choice is also much narrower, especially for women. Many people, particularly young people, move away from rural and remote areas. This may result in a range of problems and anxieties for remaining family members.

#### *Freedom of Movement*

8.14 Public transport is very limited, if it exists at all, in rural and remote areas. Petrol too is more expensive. In view of the distances involved, it usually takes longer to do things - to obtain and to deliver services. As a result, costs are correspondingly greater.

8.15 Distances mean that access to service centres is frequently more time consuming and expensive for rural workers or people living in remote areas than for city people.

8.16 Many rural people are very much tied to farming and other seasonal activities. It may be simply impossible for a farmer to leave the farm even for half a day during planting or harvesting, or while shearing is taking place. Seasonal

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<sup>145</sup> Crago, Sturmeay and Monson, *ibid.*

<sup>146</sup> *Ibid.*

workers may be unable to afford to lose a day's pay in order to travel to a service centre. For many, there is no sick or special leave, and no regular income. Depending upon the location, roads may be impassible at some times of the year.

### Services

8.17 Services are in short supply in rural and remote areas. Diminishing populations as people move elsewhere may be accompanied by a gradual erosion of local services. For economic reasons, some services, such as banks, are being increasingly centralised in larger regional centres. Unless they have the time and money to travel to larger centres, the range of services available to people in rural and remote areas will be correspondingly reduced. People requiring specialist services may have to travel far from home to obtain them. There may be no adequate support when they return home.

## GEOGRAPHIC LOCATION AND DISPUTE RESOLUTION

### Types of Disputes in Rural and Remote Areas

8.18 People within rural and geographically remote areas become involved, of course, in many of the same sorts of conflicts as people living elsewhere in Australia.

8.19 However, particular sorts of disputes in which people in these areas may become involved include:

*Family disputes:* these are just as likely in rural and remote areas as they are elsewhere, although there is evidence to suggest that in rural areas, people remain more committed to marriage than elsewhere, even where there are marital problems.<sup>147</sup> Where family disputes arise, women's unpaid work on the farm, including their management of the business side of things, may not be sufficiently taken into consideration. Particular difficulties may arise in dividing rural property, especially where equitable division between a husband and a wife may result in the property becoming non-viable.

Rural isolation for some can also mean restricted social interaction and information exchange. In the context of conflict and disputes in geographically remote communities this can be dangerous. Isolation from others in the community and from other social controls and neighbourly advice and assistance, coupled with the ready availability of guns, can result in the creation of a threatening environment and the real risk of conflict escalating out of control, or of it being controlled by violence. Knowledge of other methods of dispute resolution and the ability to access them safely may not exist.

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<sup>147</sup> Ibid, page 64.

The threat of violence, particularly against women, may be very real. In some Aboriginal communities, there may be high levels of violence against women, and little potential for redress.<sup>148</sup> It has been noted that ‘crimes of intimacy’ such as domestic homicide, suicide and sexual assault within the family may also be more prevalent in some rural and remote communities.<sup>149</sup>

In rural and remote communities there may not be the infra-structure available to guarantee a woman’s protection and to enforce a restraining order which may have been taken out against her husband. In a conservative community, moreover, there may not always be the community support or understanding for a woman in a violent relationship that one might be able to rely upon elsewhere. In such communities, it is important that a solution is worked out which has the support of the community as a whole as well as the parties to the dispute.

In small rural towns, a significant proportion of the businesses may be family-owned. In consequence, disputes may have both a personal dimension and a vital economic dimension. In view of the declining economic situation in many rural areas, the latter may serve to ‘load’ a dispute centred on family issues.

*Financial disputes:* these are common in many rural areas where, as a result of extended periods of drought and low and fluctuating prices on international markets, there are high levels of debt.

The New South Wales *Farm Debt Mediation Act 1994* enables farmers suffering financial hardship to explore cheaper, quicker and less emotionally draining ways of resolving disputes. The critical provision of the Act is section 8 which provides that a creditor to whom money is owed by a farmer under a farm mortgage must not take enforcement action against the farmer until at least 21 days have elapsed from the date of notice being given of intended enforcement action and of the availability of mediation under the Act.

If mediation proceeds, it is conducted with as little formality and technicality, but with as much speed as possible. As specified in section 13 of the Act, the functions of the mediator are to:

- . listen to the farmer and creditor;
- . attempt to mediate between the farmer and creditor;
- . advise the farmer and creditor of the programs that are available to assist them;
- . advise Counsel and assist the farmer and creditor in attempting to arrive at an arrangement for the present agreements and the future conduct of financial relations among them.

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<sup>148</sup> Nanette Rogers, ‘Bush Women Confront Male Violence’, (1997) vol 22(2) *Alternative Law Journal*, page 99.

<sup>149</sup> Crago, Sturmeay and Monson, *op cit* note 144, pages 63 and 64.

The functions of the mediator do not include:

- . advising a farmer about the law;
- . encouraging or assisting a farmer or creditor in reserving or establishing legal rights; or
- . acting as an adjudicator or arbitrator.

*Insurance disputes:* these may arise in rural and remote communities, upon the failure of crops, flooding and damage to livestock and crops, or in connection with mining or farming accidents. Court-annexed mediation is frequently used in insurance disputes that are brought to the formal justice system. A number of non-court schemes have been set up for limited sorts of insurance disputes. The Insurance Council of Australia has also established a scheme in which complaints from individual members of the public against general insurers can be referred to a tribunal. Although the basis of the scheme is ultimately one of determination rather than negotiated agreement, conciliation is an important element of this process.

*Environmental disputes:* these may arise in rural and remote areas in relation to matters such as land use, natural resources management, water, energy, air quality or toxins. These disputes come in many forms and encompass many issues. Whereas a dispute may raise environmental issues for one person, for another, the focus may be industrial, economic or lands rights issues. Environmental disputes - such as water use - can affect people many miles distant. This can make identification of the affected parties difficult and costly, and where State border intervene, legally complex, these disputes can also have significant public interest aspects.

Court annexed mediation is available in many Australian courts and tribunals. To the extent that environmental disputes come to those courts, mediation may be used in their resolution. Specialist courts and tribunals also exist to resolve many environmental disputes, particularly in the areas of site-specific planning and pollution. Provision for environmental mediation is now included in the legislation relating to the Resources Development Court of South Australia and the Land and Environment Court of NSW.<sup>150</sup> Mediation prior to hearing is also provided in the Western Australian Town Planning Appeals Tribunal. Also in Western Australia, under the *Agricultural Practices (Disputes) Act 1996*, disputes relating to odour, noise, dust, smoke, fumes, fugitive light and spray drift from an agricultural operation on agricultural land must proceed through a mediation process conducted by the Agricultural Practices Board before any common law or other action arising from the dispute can be taken.

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<sup>150</sup> Subsection 106(5) of the *Environment Protection Act 1993* (South Australia) and section 16 of the *Environment Resources and Development Act* (South Australia), Part 5A of the *Land and Environment Court Act 1979* (NSW).

Testamentary disputes: in rural areas these may give rise to distinctive and complicated issues. Certainly, in the past, it has not been uncommon for the most significant asset in the family estate, the farming property, to pass to the eldest son, notwithstanding the fact that the wife was still alive. In such circumstances it has been said that:

*‘A power imbalance could arise if the challenge to the will came from a woman because it would not only be a challenge to the particular terms of the will but also to the very essence of the gender-based power relationships within the family.’<sup>151</sup>*

As well as litigation, an increasing number of these disputes are being dealt with by mediation and it is an area covered by community justice centres.

Disputes with government agencies: it is to be expected that people in rural and remote areas may frequently become involved in a range of disputes with government agencies arising from issues such as land usage, pest control, farming subsidies and levies. Power imbalances may be a significant factor in such disputes.

**Are there any other types of disputes not mentioned here which are characteristic of rural and remote areas or which raise particular issues because of the location of the participants?**

## **Advantages of ADR in rural and Remote Areas**

8.20 ADR may have a number of advantages for the inhabitants of rural and remote communities.

### Cost, Ongoing Relationships

8.21 As with other groups considered in this Discussion Paper, ADR processes are also, potentially, cheap and quick and may assist the maintenance of ongoing relationships. This may be very significant in a small rural community where it may be necessary for disputants to continue to confront each other on a daily basis, where there may be essential ongoing dependencies and where both time and money may be in short supply.

### In Disputes involving Legal Issues, an Alternative to the Formal Justice System

8.22 It would be simply unrealistic to expect that all rural and remote communities could be catered for under the formal justice system. The practice of courts going on circuit does alleviate some of the problems, though not all, as many centres are not covered and people may have to travel considerable distances to

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<sup>151</sup> Richard Harris, ‘The Mediation of Testamentary Disputes’, (1994) Australian Dispute Resolution Journal, page 223 at page 224.

reach a central hearing location. Witnesses as well as the disputants themselves may be caught up in the process. As indicated above, for occupational reasons, many people may be very much restricted in their time and movements.

8.23 Many country people are placed at a significant disadvantage in an unfamiliar urban setting where they may have no personal contacts and where, in the court, they are required to cope with a formal 'culture' or set of procedures which may be very unfamiliar to them. Travel and accommodation (if required) may be expensive and ill-afforded by many. Costs may sometimes be compounded by adjournments

8.24 The greater flexibility of ADR may mean that distance and remoteness are problems to which solutions may more readily be found. If there are the resources available to send ADR service providers to disputants in a rural or remote location, this represents a huge advance on the service which can be provided by the formal justice system in this area.

8.25 The flexibility of ADR might also mean that other accommodations could be made, for example, arranging a mediation to take place, at a time and date that takes account of harvesting, milking, shearing or sale-yard commitments.

***To what extent is ADR presently used in rural and remote areas?***

***What dispute resolution processes are used and for which disputes?***

***What expansion/developments in the use of ADR would be possible or desirable?***

### **Barriers to Fairness in ADR for People in Rural and Remote Areas**

8.26 This is not to say, however, that there are no difficulties to be encountered in the use of ADR. Socio-economic factors, conservatism and problems of confidentiality and strong social pressures flowing from its smallness may complicate the provision of ADR services within a rural or remote community.

8.27 In view of the isolation of some communities, and the impossibility of achieving any degree of privacy, it may also be very hard for those in need of assistance to 'break out' and to seek help.

8.28 As noted, in close-knit, small and isolated communities people may also need to find a solution to a dispute which is acceptable not only to the participants themselves but to the community at large.

### Stereotyping

8.29 Dispute resolvers should be wary of stereotyping people living in rural and remote areas. Notwithstanding the general comments above, there are cultured, well read and well educated, broadly tolerant people in all sorts of communities, including those in rural and remote areas.

### Confidentiality, privacy

8.30 One of the attractions for many people is the comparative privacy of ADR processes such as mediation. In small rural communities, however, this element may be notably lacking. Because of the smallness of many geographically remote communities, it is inevitable that many disputes will be public knowledge well before measures are taken to redress them. For the same reason, even initial consultations may not go unnoticed. In cases where there is violence or the threat of violence, knowledge that the actual or potential victim has sought external help may precipitate violence against them: in other cases, it may 'warn off' the actual or potential perpetrator.

### Neutrality

8.31 The neutrality of the third party dispute resolver is regarded as an important element of ADR proceedings such as mediation and conciliation. Neutrality in the narrower context refers to the dispute resolver's background and the relationship which he or she has with the disputing parties. It relates to matters such as the absence of prior contact between the dispute resolver and the parties, no prior knowledge about the specific dispute and disinterest in the outcome. In the more immediate sense, it relates to even-handedness and an unbiased attitude towards the parties to a dispute.

8.32 The smallness of a rural community may mean that a dispute resolution service provider may be known to all the parties to a dispute and may have social and other contacts with the disputants in other contexts. This sort of contact may be unavoidable - for example, there may only be one general store, one pub and two hairdressers in a small urban community. It may be extremely difficult in this sort of situation to maintain the fact and the appearance of neutrality. The resultant problems can be fairly fundamental ones. For instance, a wine merchant may be actively discouraged from seeking the assistance of a mediator in a dispute with the local publican if he knows that the mediator is a regular customer at the pub and plays golf with the publican.

8.33 While one or both participants may waive elements of the neutrality requirement, in relation to prior contact with one of the participants for instance, the absence of neutrality is a factor which, nevertheless, the dispute resolver should be keenly aware of. Whether neutrality is waived in certain respects or not, it will be essential for the dispute resolver to demonstrate and to maintain his or her impartiality at all times.

8.34 For some disputants, the absence of neutrality will not be a problem. For others, it may be a decisive factor in not choosing ADR.

8.35 As indicated earlier in this paper,<sup>152</sup> neutrality in the more immediate sense can not be foregone without fundamentally altering the nature of the process.

#### Cultural difference

8.36 Cultural difference may also be a problem which needs to be confronted by dispute resolvers living and working in rural and remote areas. It has been observed that :

*'In many ways, the innate conservatism of country people sets them apart from urban people in much the same way as people from different ethnic, cultural and racial backgrounds'.*

*'We have people in Western Victoria who might be third, fourth or fifth generation Australians but who still have firmly entrenched but old fashioned and unpopular ideas about morality, sexuality or family life. Although I am not suggesting that these old fashioned ideas can or should be relevant to the outcome of a ... dispute, the sensitivities of the parties have to be taken into account ... in the same way as those of more recently arrived citizens from Muslim or Hindu or Eastern backgrounds.'*<sup>153</sup>

8.37 It may be that ADR training will need to be tailored to accommodate a cultural appreciation of the close-knit nature of small geographically remote communities.

8.38 As indicated in the Australian Bureau of Statistics' 1997 Yearbook Australia,<sup>154</sup> since 1976, population in rural areas has been increasing. This is due largely to people moving to rural areas surrounding cities, notably Melbourne and Sydney. Cultural differences between new and long term residents may give rise to difficulties. Country farming practices may not be well understood by these urban refugees. For example, the smell of a chicken farm or the noise of a crop duster may be tolerated by country dwellers but could be a source of great annoyance to an urban refugee recently removed to the country. Dispute resolvers need to be sensitive to these differences of outlook.

#### Power Imbalance

8.39 Whilst such disputes may run the whole gamut of subjects relevant equally to city dwellers, people in rural communities may also be involved in a range of disputes where there is a significant power imbalance between the participants and

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<sup>152</sup> See Chapter 2.

<sup>153</sup> Michael Dunne, Byrne Jones and Torney, 'Practising Family Law in Provincial Victoria', 25 September 1994, Family Law Services Newsletter, page 10 at page 11.

<sup>154</sup> At page 78.

significant attitudinal differences involving livelihood or lifestyle. Such disputes include environmental disputes with mining or processing companies, disputes with large pastoral or agricultural companies and disputes with government agencies. As well as disputes between mining companies and farmers, or environmentalists, there are also frequent disputes between those who rely on the mine for their income and/or prosperity (such as local traders), and those who want to see the mine closed. In recent times, many rural people have also been involved in disputes with their financial institutions.

8.40 As noted above, the *Farm Debt Mediation Act 1994* (NSW) makes provision for the mediation of some of these latter disputes. Notwithstanding the likelihood of significant power imbalances arising as a result of economic disparities between the participants, the problem of power imbalance has not been addressed in the legislation, and representation has been discouraged for all participants.<sup>155</sup> This power imbalance may be further compounded, moreover, by the probable 'repeat player' status in the proceedings of the representatives of the financial institution who may have assumed this role on many previous occasions. They may not only be familiar with the mediation process, but also with the mediator. This may give them a significant advantage over the farmer, who is likely to be a 'first-time' player.

8.41 Unless these power imbalances are addressed by dispute resolvers, they may encourage outcomes which are unlikely to satisfy the needs and the expectations of less powerful participants. In some instances in rural and remote areas, power imbalances may follow from prevailing community attitudes. A woman seeking to assert her rights in a predominantly male domain, may, for example, be significantly disempowered.

8.42 In view of the enormous economic implications, the more powerful participant in environmental or mining disputes may be prepared to spend large sums of money and to choose a dispute resolution process which maximises the disadvantage of the less powerful participant.

### Violence

8.43 As noted earlier in this Chapter, violence may be a significant factor in some rural and remote areas. In many instances, ADR will not be appropriate in disputes involving violence.

### Access and Information

8.44 Because a higher percentage of people in rural and remote areas may be poorly educated, they may be less likely than city dwellers to have ready access to services information of the sort which could assist them in the event of becoming involved in a dispute. Advocacy services may not exist in rural and remote communities, or may be stretched to the limit. Ignorance of the services available,

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<sup>155</sup> Tom Altobelli, 'Mediation Prescribed for Farmers and their Creditors', (1995) *Law Society Journal*, page 37 at page 39.

the non-accessibility of such services in view of their central location in a town or community, or, in the worst case, the non-existence of appropriate services, are all factors which may effectively prevent the delivery of fair and appropriate dispute resolution services.

8.45 The nature of their employment may mean that it is impossible for some people to travel to other centres at certain times of the year. Even when it is possible to leave the farm for a day, it may be a daunting prospect for a client to have to travel three or four hours or more to keep a dispute resolution appointment.

8.46 The comparative conservatism of rural and remote communities may also mean that some people may find it more difficult to take action to defend their rights in areas such as those of sexual or racial discrimination.

#### Inexperience

8.47 In rural and remote areas, the demand for dispute resolution services with respect to particular types of disputes will be much lower than in high density population centres. The range of disputes handled by a single dispute resolver may also be high. As a result, dispute resolvers may need to exhibit great adaptability and to possess high levels of experience. In rural and remote areas, it may be difficult, however, to obtain access to highly skilled dispute resolution service providers.

#### The Privatising Effects of ADR

8.48 There may also be disputes involving issues of concern to the community at large. Where, for instance, there are environmental issues involved in a mining dispute, it may be very important that these issues are widely aired and that a solution is found which accords with that of the majority of Australians rather than the parties to the dispute alone. The privacy of ADR proceedings may effectively bury such issues.

8.49 It is possible too that in an environmental dispute, the community may need to be represented by someone (who may well be a non-local) who can represent its long term interests to best effect. Care must be taken to ensure that *all* interested parties have an opportunity to protect their interests.

**WHAT OTHER BARRIERS ARE THERE TO FAIRNESS AND JUSTICE IN ADR FOR PEOPLE LIVING IN RURAL AND REMOTE AREAS?**

## **STRATEGIES TO ADDRESS BARRIERS TO FAIRNESS AND JUSTICE IN ADR FOR PEOPLE IN RURAL AND REMOTE AREAS: SOME POSSIBLE APPROACHES**

8.50 To increase the quality of both the ADR services offered and the dispute resolvers who deliver them to those Australians living in rural and remote areas, the following suggestions are made.

### **Quality and training of ADR service providers**

8.51 As suggested by the types of disputes in which people living in rural and remote areas may become involved, an ADR service provider is likely to encounter many complex and demanding issues. Bearing this in mind, it might be considered that dispute resolvers need to be highly trained and to be competent across wide areas in order to deal with the multiplicity of demands placed on them by a small community.

8.52 This may be neither possible nor required. Indeed, it has been suggested that what is required is:

- More than the usual amount of honesty (since here will be few if any of the normal safety nets);
- Flexibility within a solid and well-rounded person;
- The ability to withstand the pull of strong emotional fields;
- Empathy with the positive side of rural conservatism (security and stability).<sup>156</sup>

8.53 Training also needs to alert dispute resolvers to the consequences for dispute resolution of the broad features of rural and remote society - such as the inevitable erosion of their professional boundaries. Care should be taken however, not to stereotype members of rural and remote communities, to take account of the diversity of such communities and to be sensitive to evolving social patterns occurring for example, through the pervasive influence of the electronic media.

### **Providing Backup for Dispute Resolvers**

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<sup>156</sup> Crago, Sturmey and Monson, op cit note 144, at page 71.

8.54 Some complexities, for example, maintaining neutrality and impartiality in a small rural community may be beyond the reasonable capacity of a single ADR dispute resolver to accommodate. Particularly in situations where they are working alone in isolated regions, where they are new to an area or simply, lacking in experience, it is suggested that dispute resolvers might welcome some form of supervision or support.

8.55 To overcome this problem, it might be possible, in some areas, to hold periodic meetings of dispute resolution providers. It has been noted in this regard by one rural counsellor that:

*'I consider that the real danger in having friends as clients would be to be totally dependent on them for any support and human interaction, which would be to create a sort of 'family', with myself as 'parent'. What keeps me honest and what feels healthy is to have my peer supervision groups and friends who challenge me as equal, and to maintain my relationships with people who are not connected with my work.'*

*' .... our peer supervision group has provided for our members benefits similar to those which a therapy group provides for clients. Seven counsellors who work autonomously in our various communities meet monthly for clinical supervision.'*

*'Being visible in this group is another layer of accountability, as I find the scrutiny of my peers the most challenging. It is also an important validation and strengthening of the principles by which we work, in the absence of validation by other professionals in our local communities.'*<sup>157</sup>

8.56 Where this sort of support is not possible, the solution might be to have dispute resolvers work in pairs.

8.57 It might also be possible to establish a 'back-up' network of experts and information in particular areas whom the dispute resolver could approach for assistance and advice. To overcome problems of distance, communication of back up information could be undertaken with the assistance of information technology. Imaginative and thoughtful use of technology will make other communication options available for ADR disputants and practitioners alike.

**Suggestions are sought as how a 'back-up' information service could be developed, and the sorts of information and expertise to which it should provide access.**

8.58 Government and other bodies might also be encouraged to develop multi-services programs to maximise the use of available resources in rural and remote communities.

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<sup>157</sup> Ibid, page 66.

## **Responding to Neutrality Issues**

8.59 Panels of ADR service providers might be able to be developed to cover large and remote geographic regions. Sometimes, even then, it may be impossible to secure the services of a mediator who is unknown to one or other of the participants. In these circumstances, the dispute resolution process should proceed only if the participants are satisfied that a fair outcome can be achieved and that the ADR service provider will be able to maintain his or her neutrality in the proceedings.

## **Responding to Power imbalances/Violence**

8.60 Dispute resolvers should be aware of the significant power imbalances which may flow from socio-economic discrepancies between the participants. These will exist, for example, in disputes involving large mining companies, pastoral companies, government and financial institutions. Dispute resolvers need to be aware also of power imbalances which may arise in family and family business disputes as a result of the innate conservatism of some rural communities, particularly in relation to gendered issues.

8.61 For strategies for addressing this sort of imbalance, see the suggestions made in the following Chapter (Chapter 9, Socio-economic Power Differences - Individuals and Bodies (Incorporated and Unincorporated)). Whilst it may be unrealistic to deny the right of individuals to take on large corporations in mediation and conciliation proceedings, dispute resolvers should explain to them in clear terms, the disadvantages which are likely to follow from the significant power imbalances inherent in such a dispute.

8.62 Service providers should be particularly wary of the potential for violence in rural communities. In many respects, the suggestions made with respect to violence in Chapter 3 - Gender - Alternative Dispute Resolution for Women and Men, are equally relevant here. Likely community responses may provide an added dimension however in rural and remote communities. In some circumstances, to ensure their protection, it may be necessary for a service provider to recommend that one or other party in a violent relationship move from a rural or remote community.

## **Cultural and gender issues**

8.63 In view of the close-knit and conservative nature of many isolated communities, it may sometimes be necessary to involve people in ADR negotiations other than those immediately involved in the dispute.

8.64 Furthermore, in some situations, service providers might need to explore specific relationship issues in a broader family and community context, and to consider the sort of outcome that is likely to be supported by the community at large, not just the parties to the dispute. In saying this, it is recognised that in some communities, people may side (much more markedly than would be possible in a

larger community) with one participant and not give a fair chance to the other. In some situations, a fair solution and one which coincides simultaneously with general community views may not be achievable. Dispute resolution service providers need to be trained so that they are able to assist people when an agreement does not accord with community standards or expectations.

## **Access and Information**

### *Access*

**8.65** To require people to travel long distances to unfamiliar destinations may be extremely alienating and disempowering. Where possible, an effort should be made to localise the provision of ADR services. This will enable bridges to be built with a community as a whole.

**8.66** As noted in the Final Report of the Review of the Commonwealth/State Disability Agreement:

*‘Many of the issues that arise for people with disability-related needs in remote Aboriginal communities arise for all Australians living in remote and rural communities. It may be the case that these issues and the kinds of effective service they indicate, suggest a wider vision for services that are closer to the ground and more embedded in the informal capacities of people’s communities in urban, as well as in remote and rural, Australia.’<sup>158</sup>*

It is noted further that:

*‘Where an imaginative and appropriate service response has begun to develop for remote Aboriginal communities as for non-Aboriginal Australians in remote and rural locations, it is because the same principle is followed: the local community is seen as the central resource for the development of the service and as the central point of reference for determining what is relevant and will work. Just who comprises the local community and how it will determine what is relevant and will work depends of course on the local community in question.’<sup>159</sup>*

**8.67** All people in rural and remote areas could perhaps benefit from being involved in the development of a dispute resolution service which effectively meets their community needs and requirements.

### *Information*

**8.68** ADR service providers should seek to inform people in rural and remote areas of the services which they can offer. The provision of information is an important way of empowering people living in such areas.

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<sup>158</sup> At page 53 of the Report.

<sup>159</sup> Ibid.

## Avoiding the Privatising Effect of ADR

8.69 As mentioned elsewhere in this Discussion Paper, some disputes may be of such public importance that they should be dealt with openly so that they can be subjected to public comment. Disputes involving environmental issues or which are reflective of widespread community problems might fall within this category.

8.70 However, ADR processes may also offer significant benefits for the resolution of such disputes which can involve:

*'... competing claims of government regulators, advocacy groups, industry, local community needs and affected property owners.'*<sup>160</sup>

8.71 Litigation, it is said, could:

*'... tie up a project for years on procedural matters (on matters of standing and evidentiary rules, for example) unrelated to its merits and impact on the environment. Mediation involving all interested parties can enable a compromise that addresses substantial issues eluded by protracted litigation.'*<sup>161</sup>

**Are the suggestions made in Chapter 1 (paragraph 1.49) an adequate response to privatisation concerns for disputes involving people in rural and remote areas?**

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS. WHAT OTHER STRATEGIES MIGHT BE ADOPTED TO ENSURE FAIRNESS AND JUSTICE FOR MEMBERS OF RURAL AND REMOTE COMMUNITIES?**

<sup>160</sup> Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns', (1990) 2 Journal of Dispute Resolution, page 347 at 353.

<sup>161</sup> Ibid.



## **CHAPTER 9**

### **SOCIO-ECONOMIC POWER DIFFERENCES - FOR INDIVIDUALS AND FOR BODIES (INCORPORATED AND UNINCORPORATED)**

#### **INTRODUCTION**

9.01 According to the Australian Concise Oxford Dictionary:

*“ ‘Socio-economic’ means relating to or concerned with the interaction of social and economic factors”.*

9.02 In this chapter, it is proposed to focus upon the consequences of disparities of economic strength between disputing parties for the fairness and justice of dispute resolution proceedings and outcomes. Individuals, business and government bodies will be considered.

#### **THE GENERAL EFFECT OF SOCIO-ECONOMIC DIFFERENCE**

9.03 At the individual level, there are marked disparities in our society between those of greater and lesser financial means. The benefits of being an affluent member of society are wide-ranging, including things as diverse as access to higher levels of education, powerful business and social contacts, superior housing in more desirable areas, the choice between private and public health care and, generally, a broader and more varied life experience. Stature and credibility may also be significantly affected by a person's socio-economic status.

9.04 Many people at the lower end of the socio-economic scale will be members of the other groups with which we have dealt in this Discussion Paper - people with disabilities, members of cultural minorities, people from rural and remote areas, the young and the aged, for example. Similarly, a high per centage of small business operators are members of social minority groups. Some individuals may not be 'poor' in an individual sense, but when they come into dispute with a corporate giant, they will be at a significant economic disadvantage.

9.05 Comparative financial strength and weakness is equally important and its effect just as profound for business. In a dispute with a smaller business or with a member of the public, a large corporation or government body will often have a significant advantage as a result of its economic bargaining power. Conversely, although a small or medium sized business will be much the weaker participant in economic terms in a dispute with BHP or with a government agency, it is likely to be the stronger participant in many customer disputes.

9.06 At its most fundamental, at all levels, the difference is one of power – money provides individuals and business corporations alike with the ability to purchase experience and advice and to exert influence. Economic might is not invincible however. For instance, a weaker party economically may be able to claim the moral high-ground and use the media to achieve what they need for instance. Further, a person or organisation with power may not be aware of that power or may choose not to use it.

## **SOCIO-ECONOMIC DIFFERENCE AND DISPUTE RESOLUTION**

### **Types of Dispute in which Socio-Economic Difference may be a Factor**

9.07 The range of disputes in which the economic diversity of the participants may be a factor is essentially unlimited. Disputes may be between: individuals of differing economic strength; individuals and businesses or government agencies; small and large businesses; businesses and government agencies. Some of the sorts of disputes between these participants in which there may be large socio-economic differences include: commercial (such as disputes about supply contracts or customer services); equal opportunity; product liability; worker's compensation; insurance; discrimination in employment ; landlord and tenant; financial (with banks and government agencies for example); environmental; occupational health and safety; personal.

### **Advantages of ADR from a Socio-Economic Perspective**

9.08 The comparative cheapness of ADR is, of course, an advantage for everyone who uses it. For those of limited financial means, and for many smaller businesses, however, the comparative cheapness of ADR may make it the only practical dispute resolution option. As noted in the Sackville Committee's report, '*Access to Justice: An Action Plan*':

*‘Poorer people, regardless of race or gender, are seriously disadvantaged in gaining access to legal services, since this usually depends on financial resources beyond their reach unless they can obtain legal aid.’<sup>162</sup>*

and,

*‘Lawyers’ fees constitute a major cost for most people seeking access to the justice system. The prospect of an expensive bill for their lawyers’ fees, and possibly another large bill for their opponent’s lawyers in the event of losing a contested case, is enough to deter many people from pursuing and defending their legal rights.’*

*‘It is no secret that to pursue a dispute through the courts is beyond the means of a large number of Australians’.<sup>163</sup>*

**9.09** In some circumstances, avoiding litigation and keeping a ceiling on costs may also be as financially important for a large corporation as it is for a weaker opponent. Delays in formal court proceedings, may, for example, cost a mining company involved in an environmental dispute many thousands of dollars per day. For many, irrespective of economic strength, a compromise or agreement may be much preferred to the adversarial proceedings of the formal justice system and the emphasis upon ‘winner take all’. Indeed, for small to medium sized businesses, this has been reported to be the most desired characteristic in a dispute resolution process.<sup>164</sup>

**9.10** From a business perspective, ADR has a number of ‘user friendly’ features. For small and financially vulnerable businesses, these features may offer a means of business survival. For the more powerful, including some government agencies, they may simply make ‘business sense’. These features include:

**A quicker result:** The frequent slowness of court proceedings may impose particular economic pressures upon businesses with limited financial capacity. For many, it is not possible to risk protracted disputes with persons or organisations upon which they may be dependent for their livelihood. Small businesses may not have the capacity to engage in lengthy disputes with a more economically powerful business partner. For example, the small supplier of a specialist component part to a large manufacturing company is likely to want to resume good relations as soon as possible in order to survive.

**Wider range of remedies:** ADR provides those who use it with a wider range of remedies and permits them to take commercial rather than legal considerations into account when developing the terms of an agreement. For instance, contracts can be renegotiated, and consideration given to long term business relationships and the need to ‘save face.’

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<sup>162</sup> Page 33 of the Report

<sup>163</sup> Page 149 of the Report.

<sup>164</sup> University of Technology, Sydney, Final Research Report for Department of Industry , Science and Technology, ‘Migrating ADR to Small and Medium Sized Enterprises’, February 1996, page 100.

### An element of an overall dispute management strategy

Increasingly, the emphasis in the business world is upon dispute prevention, management and resolution apart from the legal system.<sup>165</sup>

Of ADR in corporate America, it has been said that:

*'... every sign points to a growing appreciation and acceptance of alternative dispute resolution, not just as an alternative to litigation, but as an integral part of legal and business planning in an ever widening range of industries.'*

*'Parties can agree at any point to use ADR to resolve a conflict of almost any significance. ADR is now applied in almost every aspect of modern business and is incorporated into day-to-day contracts, such as purchases, leases, property matters, licensing arrangements, employment contracts, partnerships, franchises and joint venture agreements.'*<sup>166</sup>

It has been suggested that a similar position exists in Australia with respect to major business and that the time is ripe for a similar response in the small business area.<sup>167</sup>

No adverse publicity or media coverage: The possibility of adverse publicity is also a very important concern for most businesses. Such publicity may be extremely damaging both economically and to their image as a corporate citizen. This may also be an important consideration for some government agencies.

Confidentiality : This may be particularly important where it is not wished to disclose business practices or connections.

Control over and ownership of dispute: ADR allows businesses to tell their own story and shape their own agreements. ADR also allows the most appropriate method of dispute resolution to be chosen having regard to the nature of the dispute and the participants. Participants may also take charge at the procedural level, setting their own dates for negotiation and for the delivery of documents.

Maintenance of goodwill: For many businesses, the enhancement or restoration of relationships damaged by the dispute is essential for their very survival. The consensual nature of ADR facilitates this.

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<sup>165</sup> Jennifer David, 'Dispute Resolution in the 21st Century', 1995, page 1.

<sup>166</sup> Jennifer David, 'ADR and Small Business', (1996-97) 3 Commercial Dispute Resolution Journal, page 231.

<sup>167</sup> Ibid.

## Socio-Economic Difference and Barriers to Fairness in ADR

9.11 However, notwithstanding the apparent advantages, where there are large economic discrepancies between people and bodies, there are areas where ADR procedures may run into difficulties.

### *Power Imbalance*

#### *Economic bargaining power*

9.12 This is probably the single most significant factor. Where there are socio-economic disparities between the parties to a dispute, there are also likely to be power imbalances between them as a direct result of the superior bargaining power enjoyed by the financially stronger party. For that party, for example, delays may not be critical, any number of issues may be able to be raised, and professional advice and assistance may be readily sought and obtained.

***Given the likely power imbalances, in disputes between large corporations and customers, can ADR result in agreements that are in the best interests of both participants?***

#### *Identifying Power Imbalance*

9.13 However, as noted above, it will not always be in the hands of the financially stronger participant that power resides. In environmental disputes for example, public and/or political opinion may strongly support environmental groups. In the longer term, it may be sounder commercially, for the developer or the mining company to pay attention to such views. In such circumstances, it has been said that 'moral power' flows from an appeal to widely held values.<sup>168</sup>

9.14 Power may be socially constructed and 'congealed' in institutions.<sup>169</sup> Socio-economically powerful bodies such as banks, insurance companies and government agencies may be repositories of such power. Even here, however, the amount of power may fluctuate. In times of economic downturn, the power of such bodies may be eroded, and in such circumstances, it may be the customer rather than the service provider with whom power resides. For example, in disputes between lessors and lessees, it may be the lessee rather than the lessor who holds the balance of power.<sup>170</sup>

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<sup>168</sup> Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation', CW Moore (ed), *Practical Strategies for the Phases of Mediation*, Mediation Quarterly, No 16, ' Francisco: Jossey-Bass, Summer 1987, page 75 and following.

<sup>169</sup> Nan Seuffot, 'Locating Lawyering: Power, Dialogue and Narrative', (1996) 18 SLR page 523 at page 529.

<sup>170</sup> Paul Prindable, 'Is Mediation an Alternative in Commercial Lease Dispute Resolution?', (1994) Australian Dispute Resolution Journal, page 99 at page 103.

### *Repeat Players*

9.15 In many disputes, problems of power imbalance will be further compounded by the fact that the stronger participant financially, the bank or the insurance company for instance, will be a 'repeat player'. Those representing them may have done so on many occasions. As a result, the stronger party may not only be familiar with the mediation process, but also with the mediator.

9.16 This dynamic may be exacerbated in rural and remote areas - for example, in the resolution of farm debt disputes - since the number of available mediators may be small. This may give the bank a significant advantage over the customer, who is likely to be a 'first-time' player. The 'first-time' player's trust of the dispute resolver may be seriously eroded. Trust is a very important element in disputes involving extremes of bargaining power, where there may be a discernible lack of trust between the participants.

### *Legal Advice*

9.17 Disparities in economic wealth may mean that one participant in a dispute has access to legal or other professional advice and the other does not. If they elect to proceed, those who are unrepresented may be placed at a significant disadvantage and there may be the danger of an outcome that is not fair to the weaker participant.

### *Presentation*

9.18 Power imbalances may also be exacerbated where socio-economically more vulnerable members of society have low self-esteem and relatedly poor presentation skills. Although ADR is generally regarded as an empowering process, low self-esteem may mean that some participants also have a defeatist attitude, particularly if they are in dispute with a large corporation or government agency.

### *Cost of Legal Representation*

9.19 Notwithstanding the important cost advantages referred to above, ADR is not entirely cost free. This is the case, for example, when legal advice is required and representation in the proceedings is desirable. Individuals and small business are likely to be particularly disadvantaged in this regard: dispute costs are a contingency built into the running costs of most large businesses and organisations. In the past, these expenses have also been tax deductible.

9.20 Even if a disputant is convinced of the strength of his or her complaint, the cost of being represented in ADR proceedings may be sufficient to discourage them from proceeding. As distinct from the formal justice system, where the losing party generally pays the costs of both parties, in ADR, in the absence of specific

arrangement in the settlement agreement, each participant is responsible for their own costs.

9.21 Where legal advice is obtained moreover, as in situations where recourse is had to the formal justice system, there may be significant discrepancies between the quality of the legal advice and assistance accessible to wealthy people and businesses and to poorer members of the community. On the one hand, a wealthy disputant may have access to a team of lawyers, and be able to hire the pre-eminent practitioner in the relevant field. A person of limited means, however, may be likely to be able to employ only a junior solicitor lacking in experience and expertise in the requisite area.

### Access and Information

#### *Individuals*

9.22 Lack of financial resources may preclude the proper exploration of appropriate options for the resolution of a dispute. Often this may result in redress not even being sought by a financially weaker person, who may endure unfairness, believing that they have no chance of success.

9.23 Some socio-economically disadvantaged people may also have low educational and literacy levels. These people may have little knowledge of how to go about obtaining relevant information, and may not be able to assess the options available to them even when they do have the necessary information to hand.

#### *Business*

9.24 Particularly in some larger businesses with hierarchical structures, cultural barriers may impede access to ADR. There may for instance, be:

- A view that decisions can only be made by someone in authority;  
An emphasis upon punishment and discipline rather than on consensual decision making;
- An entrenched culture of winning being more important than solving the problem;
- A culture of not admitting mistakes;
- A perception that disputes must be investigated and a decision made rather than a consensual agreement reached.

9.25 Information about ADR may not be readily available. It has been found, for instance, that whilst small to medium sized businesses have a general awareness of ADR, they may not have an:

*'... in depth knowledge of either the processes or the whole ADR area...'*<sup>171</sup>

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<sup>171</sup> Jennifer David, op cit note 166, page 238.

and that this:

*'... may create a serious barrier in migrating ADR to (them) as there may be a belief that small to medium sized business enterprise owners already know about ADR'.<sup>172</sup>*

9.26 Additionally, information provided to small to medium businesses by industry associations by their solicitors, particularly small firms or rural practitioners, may be limited.

9.27 More fundamentally, the operating hours of many small businesses may be long and irregular. There may be no support staff 'to back up' so as to permit someone to take time-off to attend dispute resolution proceedings. Additionally, it has been estimated that around 21% of small businesses (some 180,000) are owned or operated by people from non English speaking backgrounds.<sup>173</sup> The barriers to ADR identified in Chapter 4 of this Discussion Paper (Minority Cultural Groups in Australian Society) will be equally relevant to these people.

#### *Authority*

9.28 This may be an important issue in disputes involving hierarchical business and government bodies. In some instances, large organisations may be reluctant to delegate to individuals the power to enter into agreements on the organisations' behalf. Even when they do have the authority, some individuals may be reluctant to enter into agreements which may subsequently be found to be 'wrong' or in some other way, not to the best advantage of the organisation. Care needs to be taken to ensure that people engaged in negotiations have the authority necessary to enter into an agreement.

#### *Appropriateness of ADR*

##### *A free and informed choice*

9.29 To avoid adverse publicity, such as where issues of occupational health and safety or product liability are involved, considerable pressure may be imposed upon a socio-economically weaker party to enter into mediation. For financial reasons, the weaker party may have no real choice in the matter, and may enter a process in which they are at a considerable disadvantage. Sometimes, large businesses may be prepared to offer significant economic incentives to induce a disputant into accepting the private settlement of such a matter.

9.30 It is of course also true that such inducements and settlements occur regularly in the context of litigation.

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<sup>172</sup> Ibid.

<sup>173</sup> See ACCC *Benchmarks for Dispute Avoidance and Resolution*, AGPS, October 1995, pages 16 and 17 in this regard.

## Privatisation of Issues of Public Concern

9.31 Arguably, compromise solutions may not be appropriate in some disputes. Although other disputes may not appear in themselves to raise issues of public concern, they may, nonetheless, in combination, be indicative of important social trends.

9.32 In environmental disputes, there may be wider philosophical and moral issues at stake for society as a whole. It may not be in the public interest to consider the issues at stake in such disputes behind closed doors, or to allow only those directly involved in the dispute to develop their own compromises and solutions. Settlement of some product liability claims could impede needed development in the law or suppress information about public health risks. In such cases, to attempt to avoid adverse publicity, excessive economic incentives may be offered to the weaker person in socio-economic terms to encourage an ADR settlement.

**What are the ethical obligations of a dispute resolver in situations such as this?**

**How do they differ from those of a legal representative for a party?**

## Bias

### *Personal Bias/Stereotyping*

9.33 We all derive from particular socio-economic backgrounds. According to their own experiences, dispute resolvers may feel far more comfortable with a disputant from a broadly similar socio-economic background to their own than with someone from an unfamiliar background. This may encourage them, albeit unconsciously in some instances, to afford greater credibility to the former at the expense of the latter.

9.34 Sometimes, personal bias may focus upon the more powerful party economically, particularly where, that party is a large corporation or government agency. Many people are loathe to see the little person, the 'battler', lose out to a wealthy and powerful adversary. This may be especially the case after the cases of the 1980s, when many ordinary people lost significantly at the hands of large and unscrupulous business corporations. Stereotypically, credibility, integrity and respectability remain problems for big business.

9.35 Where one of the participants is a 'repeat player' in the ADR process (see above), they may have been involved in other dispute resolution proceedings with the same dispute resolver. The other participants in the proceedings may perceive this familiarity and construe it as bias. Despite the fact that it is unfounded, such a misconception can be nonetheless damaging to the trust between the participants and the third party which is an important element of ADR.

## **WHAT OTHER BARRIERS ARE THERE TO FAIRNESS AND JUSTICE IN ADR IN CASES OF SOCIO-ECONOMIC DIVERSITY?**

### **STRATEGIES TO ADDRESS BARRIERS TO FAIRNESS AND JUSTICE IN ADR PROCEEDINGS AND OUTCOMES IN CASES OF SOCIO-ECONOMIC DIVERSITY: SOME POSSIBLE APPROACHES**

9.36 As suggested elsewhere in this Discussion Paper, dispute resolver training is an essential ingredient in any strategy to address the barriers to fairness and justice in ADR. The socio-economic area is no exception to this rule. Set out below however, are a number of specific suggestions as to the content this training might assume having regard to the particular problems identified in this Chapter. The suggestions are not intended to be exhaustive.

#### **Power imbalance**

9.37 As noted above, for socio-economic disputes, power imbalance is probably the most significant factor. In cases where there are significant power imbalances between the participants, it has been said that this is not a reason for rejecting ADR, but that:

*‘..... rather it makes it a case that such parties are given sufficient support in terms of funding and other resources so as to enable them to participate effectively in the process.’<sup>174</sup>*

#### **What sources of funding for effective participation are/should be available?**

***If the Government or a socio-economically stronger participant mandates ADR, should they be obliged to pay for measures to promote effective participation by the other participant(s)?***

#### *Training*

9.38 Training should be provided to assist dispute resolution providers in the recognition of imbalances where they exist and in the ways in which they might be addressed. In many disputes, a third party neutral can be of great assistance in eliciting facts, identifying the interests of the participants and in generating options.

<sup>174</sup> Trevor and Trudy Atherton in an article entitled ‘Mediation Disputes over Tourism in Sensitive Areas: Part II: Adapting and Applying Dispute Resolution Techniques’, (1994), Australian Dispute Resolution Journal, page 135.

The third party will need, however, to have significant background knowledge in the area to counter the information and resource discrepancies of the participants.

#### *Economic Bargaining Power*

9.39 Care should be taken to ensure that unlawful means of coercion, for example, actions that would be unlawful under the Commonwealth *Trade Practices Act 1974*, are not being threatened. If this is the case, it may be necessary to suspend the proceedings.

#### *Identifying Power Imbalance*

9.40 It is important, in coming to each dispute, that a dispute resolver makes a careful assessment as to the participant with whom the power rests, and that they recognise that power may lie with both participants at different times in relation to different elements of the dispute.

#### *Repeat Players*

9.41 Dispute resolvers need to be very aware of their interaction with both participants. They should be sensitive to the fact that even a seemingly innocuous gesture may be construed as favouritism of the other participant. Procedurally, they must be scrupulous in the maintenance of substantive fairness between the participants.

9.42 In some cases, it might be useful to use a co-mediation model to enable greater attention to be paid to the needs and requirements of the first-time participant.

#### *Government/Industry Intervention*

9.43 In some areas, government and business has itself intervened to assist socio-economically weaker people in disputes with more powerful opponents. The Life Insurance Complaints Board, the General Insurance Claims Review Panel, the Australian Banking Industry and the Telecommunications Ombudsmen are illustrative. Benchmarks developed by the Federal Bureau of Consumer Affairs to apply primarily to nationally-based customer dispute schemes such as these represent a useful adjunct to those schemes. The Benchmarks are intended to encourage good practice amongst those intending to set up schemes and objective guidance for existing schemes and, they are also intended to act as a guide for consumers in giving them some idea what they should expect from such schemes.

9.44 Industry Codes may also be of assistance. Since 1993, the banking industry has operated under a voluntary code of practice which governs all aspects of the banks' relationships with their private retail customers. The Government recently announced its support for the recommendation made in the House of Representatives Standing Committee on Industry, Science and Technology' May 1997 report, *Finding a Balance - Towards Fair Trading in Australia*, that the application

of both the Code of Banking Practice and the Australian Banking Industry Ombudsman Scheme should be extended to small business, on the ground that it:

*'... cannot reasonably be expected to comprehend the complexities of financial documentation and who cannot afford costly legal advice ...'*<sup>175</sup>

Amendments have also been foreshadowed to the Commonwealth *Trade Practices Act 1974* to allow for the mandatory or voluntary prescription of industry codes so as to make their provisions legally enforceable.<sup>176</sup>

9.45 The Government also has announced the establishment of an information program for small business on alternative dispute resolution and the appointment of a Dispute Resolution Adviser for the franchising sector as part of an overall strategy designed to raise awareness on fair trading issues.<sup>177</sup>

9.46 In a number of States, legislation exists designed to seek to reduce power imbalances between landlords and tenants. In NSW, a voluntary 'Retail Tenancy Leases Code of Practice' jointly sponsored by the Building Owners and Managers Association of Australia Limited NSW Division and the Retail Traders Association of NSW, came into effect on 1 January 1992.

### **Cost of Legal Representation**

9.47 In some conciliation processes, provision is made to overcome this difficulty: for example, the Equal Opportunity Acts of South and Western Australia respectively provide for the Commissioner to assist the complainant in the presentation of a case before the tribunal.<sup>178</sup> Under the NSW Farm Debt legislation, legal representation for both parties is not encouraged. A similar approach is advocated with respect to retail tenancy mediations in the *'Finding a Balance - Towards Fair Trading in Australia'* report.<sup>179</sup> Elsewhere, a complainant may queue for legal aid or, in appropriate circumstances, turn for assistance to an advocacy service.

9.48 In the case of small business, an industry association may become involved. In the absence of a representative body or an advocate, however, it may be necessary to secure financial assistance for the weaker participant to enable them to obtain professional advice and assistance. The way in which this could be done is not clear, having regard, especially, to the fact that legal aid is unlikely to be available in most instances. Combinations of facilitated early neutral evaluation and mediation have been used and may have much potential in such disputes.

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<sup>175</sup> See page 154 of the Report.

<sup>176</sup> Press Release by the Hon Peter Reith MP, Minister for Workplace Relations and Small Business and Leader of the House of Representatives, September 1997.

<sup>177</sup> *Ibid.*

<sup>178</sup> These provisions have provoked much debate, however in terms of conflict of interest and perceptions of bias.

<sup>179</sup> Recommendation 2.3, page xxvii and paragraphs 2.58-60 of the Report.

9.49 Consideration could be given to the development, where possible and appropriate, of pamphlets, videos, or booklets setting out people's basic legal entitlements in those areas. Areas covered would depend upon the certainty or the complexity of the law in the area and the demand for the information from disputants.

9.50 In complex cases, it has been suggested that dispute resolvers might provide services:

*'... involving legal or scientific expertise.'*<sup>180</sup>

9.51 Expert appraisal or expert determination<sup>181</sup> might also be appropriate in such circumstances. An extension of this idea could be to develop a pool of mediators with expertise in particular areas who could be turned to when disputes in those areas arose. However, although this could greatly reduce the need for legal representation or other outside assistance, it might seriously jeopardise the neutrality of the dispute resolver.

9.52 Importantly also, mediators should be able to direct disputants to resources and support services that may assist them, such as legal advice, counselling, mental health, medical, advocacy or community services.

## Access and Information

### *Individuals*

9.53 Predictably, cost is a major factor here, particularly for individuals. To address this, it is suggested that ADR service providers should consider developing informational material about ADR, including the various sorts of ADR, and about the sorts of services they provide. The assistance of advocacy, legal advisory and welfare agencies could be sought in circulating this material.

### *Business*

9.54 A range of strategies has been suggested for providing information about ADR to small to medium business enterprises.<sup>182</sup> Whilst it is not proposed to set them out in detail, they include suggestions that:

- industry associations should make available to their members a whole range of dispute resolution and management services;
- Government encourage the development of an ADR service for small to medium business enterprises either through existing agencies or by creating a new service which makes available a dispute resolution service

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<sup>180</sup> R J Fowler, 'Environmental Dispute Resolution Techniques - What Role in Australia', (1992) 9 EAF, page 122 at page 123.

<sup>181</sup> Definitions of both these terms and of 'expert mediation' appear in Appendix A to this Discussion Paper.

<sup>182</sup> Jennifer David, op cit note 166, page 240 and following.

- tailored to the needs of this group and which will give advice on which process would be appropriate for individual disputes;
- industry associations should make available a whole range of dispute resolution and management services available to their members;
  - industry codes of practices and other structural procedures should include consensual processes;
  - industry associations conduct ADR seminars and workshops on a regular basis for their members; and
  - there be education of the legal profession, through it representative bodies, of the ADR processes that are available for small to medium businesses.<sup>183</sup>

## **Appropriateness of ADR**

### *Choice*

9.55 Dispute resolvers need to be satisfied that people have come to ADR willingly and have not been coerced. This may not always be apparent. One strategy might be for dispute resolvers to take particular care to ensure that participants in ADR have had access to all the information they need to make an informed choice. Of course, in some case, knowledge of the available options may not necessarily make them any more accessible. The ‘choice’ for some people may be ADR or nothing. Perhaps in these circumstances, the dispute resolver should be satisfied that the participant will be no worse off through adopting ADR than they would be if they were to do nothing.

9.56 Relevantly also in this regard, dispute resolvers need to be aware that compromise solutions are being sought through ADR. Although a financially weaker participant may agree to use ADR, thereby securing much less in compensation than they might be able to recover through the formal justice system, there may be other ongoing considerations that will sufficiently compensate that person for that outcome.

### *Privatisation of issues of public concern*

9.57 As mentioned elsewhere in this Discussion Paper, some disputes may be of such public importance that they should be dealt with openly so that they can be subjected to public comment. As noted above, disputes involving occupational health and safety issues or issues of product liability, which are matters of widespread public interest and well being, fall within this category.

**Are the suggestions made in Chapter 1 (paragraph 1.49) an adequate response to privatisation concerns for disputes involving socio-economic diversities?**

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<sup>183</sup> Ibid.

## **Personal Bias/Stereotyping**

9.58 Training programs are required to increase dispute resolver's self-awareness and understanding of their own experience and standpoint and the related impact upon disputes and the disputants.

9.58 As mentioned above, weaker participants socio-economically may also be members of one or more of the other groups considered in this Discussion Paper. Personal bias may be complicated by these intersections of identity.

## **Dispute management strategies**

9.60 In addition to seeking to reduce the power imbalances and biases between the parties to dispute resolution proceedings, another strategy of considerable use, particularly in the context of socio-economic diversity, is to seek to manage disputes before they get to the stage of ADR proceedings or even earlier, to take positive steps to prevent them occurring at all.

9.61 Codes of conduct, training programs and the development of mechanisms to ensure the standard of service delivery are devices which are used extensively in the aged-care context. It is suggested that, where possible, such devices should also be used or encouraged in situations where there are ongoing relationships between economically powerful organisations and economically weak or otherwise marginalised members of the community. Dispute minimisation or prevention and dispute management should, ideally, be part of an overall service package.

9.62 Essentially, in terms of business relationships, what is really being talked about is good management practice - full disclosure and the negotiation of fair and reasonable contracts, for example. It might also involve the establishment of in-house complaint handling areas staffed by persons with good inter-personal skills and training in dispute resolution procedures. Dispute management aims to prevent disputes arising and to manage those that do arise and resolve them in ways that meet the needs and interests of all the participants to the greatest possible degree. In this way, it is sought to minimise costs and stress on the participants and to encourage the continuation of long term relationships.

9.63 Partnering is a process which well illustrates the essential elements of dispute management. It is being used, increasingly, by parties to long term contracts or agreements. It is a process which focuses upon the definition of mutual goals and objectives, improved communication, the identification of potential problems and the development of formal problem solving and dispute resolution strategies.

9.64 In August 1996, the Prime Minister announced that a framework for Government Service Charters would be developed as part of the Government's reforms to promote a more open and customer-focused Commonwealth Public Service. All portfolios dealing with the public have agreed to develop Service Charters for their departments, agencies and utilities, and a timetable has been set in that regard. The Charters will cover such things as customer service standards,

customer rights and responsibilities, and complaint handling procedures. As such, the Charters will be reflective of management strategies in operation in other areas.

**NADRAC WOULD WELCOME VIEWS ON THESE SUGGESTIONS. WHAT OTHER STRATEGIES MIGHT BE ADOPTED TO ADDRESS BARRIERS TO ADR ARISING FROM SOCIO-ECONOMIC DIVERSITY?**

**PART III: RECOMMENDATIONS FOR POLICY MAKERS AND  
GUIDELINES FOR PRACTITIONERS**



## **CHAPTER 10**

### **TOWARDS RECOMMENDATIONS FOR POLICY MAKERS AND GUIDELINES FOR PRACTITIONERS**

#### **INTRODUCTION**

10.01 Consistent with NADRAC's Charter, the purpose of this Discussion Paper is to canvass with policy makers and practitioners the path that might best be taken to ensure that all those who come to ADR will be provided with procedures and outcomes that are fair and just and suitable to their needs.

10.02 As discussed in Chapter 1, fairness and justice in ADR need not necessarily equate with justice under the formal legal system. However, unless it is fair at the procedural level and people are satisfied with its outcomes, ADR cannot claim either to be a true alternative to the formal justice system or a fully fledged dispute resolution mechanism in its own right. It will be, at best, peripheral. In that event, ADR will only serve to further marginalise and disempower many of the minority and disadvantaged groups commonly referred to it and for whom it might otherwise offer a viable dispute resolution option.

#### **CHALLENGES FOR ADR - PROBLEMS AND SOLUTIONS**

10.03 In Chapters 3 to 9, (gender, cultural grouping, age, disability, sexual preference, geographic location and socio-economic status), an assessment is made of the fairness and suitability of ADR processes and outcomes for particular user groups.

10.04 A number of challenges to ADR, and to dispute resolvers in particular, have been identified:

##### *Individual Attitudes and Values of Dispute Resolvers*

10.05 These include:

- Personal bias (actual and perceived);
- Stereotyping; and
- Paternalism.

10.06 Bias can destroy the trust necessary between the participants and the dispute resolver in ADR proceedings and can seriously jeopardise the fairness of ADR procedures and outcomes.

10.07 Stereotyping and paternalism can also jeopardise fairness by by-passing the individual and actual needs and interests of each participant. Instead of being an empowering process, in these circumstances, ADR can be a disempowering experience.

Problems arising for/between the Participants as a Result of Elements of ADR Process

10.08 The emphasis upon direct negotiation in processes like mediation and conciliation is likely to give rise to interactive discrepancies between the participants which will, in turn, become power imbalances. These may be generated by factors such as socio-economic difference or physical dependence, or through inequalities in the negotiation process arising from things such as unequal communication/negotiation skills, or differing levels of confidence, self esteem or understanding. Violence may also seriously affect the quality of ADR negotiations, and seriously undermine the 'quality' of the agreement reached.

10.09 ADR service providers need to be aware of these issues as they impact on particular social groups and to develop policies and protocols to address them.

Systemic and Related Problems

10.10 These include:

- Bias (substantive {direct or indirect}, or procedural);
- Cultural bias;
- Power imbalance;
- Violence;
- Access to information and advice;
- Privatisation of Issues.

10.11 The expertise of ADR service providers with a range of ADR techniques and their capacity to address systemic problems is vital to achieving substantive equality between the parties to a dispute. In the absence of substantive equality, ADR will not be fair procedurally. Nor is it likely to be fair in terms of outcome. In some respects, 'standard' ADR models are not compatible with the beliefs and practices of some minority groups - for instance, Indigenous Australians.

10.12 The private/confidential nature of the ADR proceedings is likely, in some circumstances, to lead to the privatising of issues which should be matters of public attention and concern. ADR providers and policy makers need to be aware of this problem and greater attention needs to be given to ways to address it.

### Problems of Information and Access

10.13 Women and members of minority groups may benefit significantly from appropriate and sensitive ADR services. However, they cannot do so unless they know about and can access those services.

10.14 The following are amongst the problems which have been identified in this regard:

- Lack of information;
- Physical access problems;
- Culturally inappropriate or ineffective means of information distribution;
- Fear of conflict, intimidation, suspicion of government and related authorities;
- Physical/mental impairment; and
- Cost.

## **A RESPONSE FOR POLICY MAKERS**

10.15 The following suggestions are canvassed in this regard. They are not intended to be exhaustive.

### **1. Dispute Resolution System Design**

10.16 Each dispute Resolution provider is afforded a unique opportunity by ADR to assess and to develop a dispute resolution service which fully accommodates the needs of its users.

10.17 The steps which might be taken by an ADR service provider in designing a dispute resolution system include:

- Researching of the kinds of disputes involved, their number, the nature of people likely to use the system, the recurrence of some sorts of disputes, and the likely costs.

- Consulting with potential users of the system at all levels, including potential users and ADR dispute resolvers.
- Designing the system.
- Consulting on the designed system.
- Implementation and publicity.
- Independent objective evaluation to determine whether the scheme meets its objectives.

## 2. Training

10.18 Training to ensure that dispute resolvers are able to recognise and to respond to all the relevant aspects of the identity of disputants would seem highly desirable. Dispute resolvers are faced with a multitude of choices in ADR as to the procedures which should be adopted and the extent to which they should become involved in the proceedings in order to ensure the well-being of the participants.

10.19 The following are amongst the areas in which training should occur:

### Self Awareness

10.20 Awareness programs such as those already operating in some areas of the formal justice system with respect to gender and culture should be amongst the training requirements for ADR dispute resolvers.

### Understanding of the participants

10.21 Dispute resolvers need to understand the participants and their assumptions and beliefs. Continuing education and interaction with the group in this regard is highly desirable. In some cases, for example, with respect to persons who are physically and mentally disabled, additional specialised training programs may be required.

### Power

10.22 It can be dangerous to draw general conclusions as to where the balance of power is likely to lie in any dispute. Training is required to ensure that dispute resolvers have the skills necessary to address the dynamics of power including changes in power, the unwillingness of some people to use it, to recognise its existence or to relinquish it in appropriate cases.

## Violence

10.23 Violence may give rise to extreme power imbalance and is a serious problem for ADR. Training is required to ensure that dispute resolvers can identify it when it exists and take appropriate action in response to it. Dispute resolvers need to be familiar with laws and guidelines designed to assist the victims of violence.

## Modifications to dispute resolution procedures

10.24 Training in some of the more general techniques that can be used to modify procedures would be useful - for example, dispute resolvers need to be aware of the range of mediation and conciliation processes available: therapeutic, co-, shuttle, victim offender and expert. They also need to be aware of the benefits of the sorts of modifications which can be made within a process: for instance, shortened sessions, seating arrangements, venue etc.

## Accommodations

10.25 When making modifications to accommodate the particular needs of the participants and to redress power imbalances, dispute resolvers need to be able to recognise and to accommodate cultural and other needs in a sensitive manner. Training designed, for example, to heighten dispute resolution service providers awareness of cultural requirements, and requirements arising as a result of age, disability or socio-economic diversity would be useful in this regard. Training should alert dispute resolvers to the need to make a specific assessment of the needs of the participants themselves and not to rely on stereotyped views and assessments of a participant's needs.

10.26 Dispute resolvers need to know how to work with interpreters and advocates and maintain sufficient contact with the actual disputant. They also need to consider such matters as seating arrangements and rest breaks. Training, such as that currently provided for service providers in the formal justice system with respect to interpreters, would also be most useful.

## Training/expertise

10.27 In view of the huge social diversity in our society, consideration needs to be given to the need for specialisation by dispute resolvers in particular fields. This might increase the level of service and the expertise for particular groups and for particular sorts of disputes.

### 3. Access to ADR Services

#### Groups for whom access is a problem

10.28 Programs need to be developed to encourage dispute resolvers to work with members of minority and marginalised groups such as those considered in this Discussion Paper in order to develop ADR processes which are acceptable to those groups. Already attempted successfully with some Indigenous Australian groups, this process should be expanded and extended to include other cultural minority, poor and marginalised groups.

10.29 Such programs could also do much to counter the feelings of alienation and suspicion often harboured by such groups for government bodies or formal institutions or agencies.

#### Information network

10.30 As an adjunct to the training suggested to improve the fairness and justice of ADR service delivery, it is also suggested that consideration be given to the establishment of a national ADR information network. The purpose of this network could be to enable service providers to share useful practical information about dispute resolution techniques having regard to the needs of particular groups in our society.

#### Public Education

10.31 One of the problems referred to in this Discussion Paper has been the fact that many groups do not have the information they need to make an informed decision as to how best to deal with a dispute.

10.32 To address this, it is suggested that ADR service providers should consider developing informational material about ADR, including the various sorts of ADR, and about the sorts of services they provide. The assistance of advocacy, legal advisory, business and welfare agencies could be sought in circulating this material. Ideally, the informational material should be developed in consultation with members of the groups most in need of it: for example, the poor, members of cultural minority groups, Indigenous Australians, young persons and the aged, and should be disseminated in the most appropriate way for each group. However, information about ADR should be available, more generally, to *all* Australians.

10.33 It might also be of assistance if a handbook were developed setting out the advantages and disadvantages likely to be encountered in taking particular sorts of disputes to ADR. These sorts of considerations are particularly important where there is a power imbalance between the participants and unjust outcomes are more likely to occur.

#### **4. Cost**

10.34 The comparative cheapness of ADR makes it an attractive alternative to the formal justice system for many people. However, there are still some costs associated with ADR. Consideration needs to be given to how those costs can be minimised for those who cannot afford them. Issues for consideration include the extent to which legal representation should be permitted, and the extent to which Legal Aid should be available for ADR users.

10.35 Consideration should be given to the development, where possible of appropriate pamphlets, videos, or booklets setting out people's basic legal entitlements in relevant areas. Areas covered would depend upon the certainty or the complexity of the law in the area and the demand for the information from disputants.

10.36 For those who encounter difficulties with the face-to-face negotiations which are a feature of ADR proceedings, further examination of a role for advocates beyond that of assisting groups such as older people, children and people with disabilities, might be desirable.

#### **5. Social Trends of Public Concern and Interest**

10.37 Where appropriate, to the extent that they are able, having regard to considerations of confidentiality, dispute resolvers should bring to public attention any concerns which they may have about particular social trends and patterns which they have become aware of in the course of their work.

10.38 Within the limits of confidentiality, agencies could produce information about the amount and nature of their work and the issues raised by that work. Alternatively, in disputes involving public interest issues, greater accountability should be encouraged.

#### **6. Associated Services**

10.39 Dispute resolvers need to be familiar with the large range of legal, advocacy and other services available to assist members of particular groups. Where necessary they should refer people to those services. Where they do not exist, the development of informal links between these agencies and dispute resolution agencies would be useful. Dispute resolver training in the availability and the use of advocates, interpreters etc would be desirable.

#### **7. Recruitment of Members of Minority Groups**

10.40 To address cultural concerns, the recruitment of members of minority groups by dispute resolution service providers is not, in itself, enough if they are

cultivated to follow the model and assumptions of the service provider. Minority group members need to be able to move within existing frameworks, and to develop appropriate responses to the cultural limitations of existing procedures. Members of minority groups need to be used as a resource to assist in the development of services sensitive to the needs of the group from which they come.

## **8. Advocates, Legal Representatives, Interpreters etc**

10.41 To ensure that these facilitating groups understand the role that they are required to play in assisting the participants in an ADR negotiation, consideration should be given to the development of appropriate informational material and training mechanisms.

## **TOWARDS PRACTICE GUIDELINES**

10.42 Although, naturally, there are differences of emphasis in each of the seven Chapters, on the basis of the concerns identified, the following Guidelines are suggested for ADR practitioners. They are intended to be indicative rather than exhaustive, and to provide a starting point for debate, discussion and the development of training policy.

### **1. Assessment**

10.43 At the outset of proceedings, dispute resolvers should consider carefully the aspects contributing to the identity of each of the parties to the dispute.

10.44 Dispute resolvers should endeavour to make a balanced assessment of the whole of the identity of each of the participants. They should not focus upon one or more aspects of a participant's identity to the exclusion of others. For example, a person who is physically disabled may also be poor, black, highly educated and male. All these factors need to be taken into account in an assessment of that person.

10.45 In making this assessment, ADR dispute resolvers should endeavour not to be influenced by:

- Personal prejudice or bias;
- Stereotyped views and responses to particular social groups; or
- Paternalistic views as to the needs and capacities of particular groups.

10.46 This initial assessment should be followed by an assessment of the ways in which the various aspects of peoples' identities are likely to interact with the ADR process and the biases that are likely to occur; the way the suitability of ADR

processes and/or which modifications or adjustments may be required to ensure that the proceedings and their outcome are satisfactory to the participants.

10.47 In making this assessment, regard should be had to:

- the nature of the dispute;
- the requirements of the dispute resolution process and the demands it makes on the participants;
- the capacities of each of the participants in the context of the requirements of the dispute resolution process;
- the likely interaction and the power balance between the participants; and
- the potential for dispute resolver and systemic bias, the perception of bias or actual bias.

10.48 Dispute resolvers need to ensure that they are sensitive to the beliefs, feelings, practices and understandings of the parties to a dispute which may make them uncomfortable with elements of 'standard' ADR practice. For example, for some Indigenous Australians, the confidentiality of ADR proceedings may be neither wanted nor desired. Dispute resolvers should discuss such matters with the participants.

10.49 In this assessment phase, having regard to considerations such as power imbalances between the participants, issues of violence and abuse, the willingness and capacities of the participants themselves, the issues involved in the dispute and the remedies which might otherwise be available to a participant, dispute resolvers also need to make an initial assessment in each case as to the appropriateness of ADR. Where ADR is inappropriate, appropriate referrals should be made elsewhere.

## 2. Modifications and Accommodations

10.50 Its flexibility is one of the greatest advantages of ADR. Dispute resolvers should use it to the full in their response to problems identified during the assessment phase.

10.51 On the basis of their initial assessment, dispute resolvers may need to make modifications to procedures within ADR processes to address any problems which they have identified. As well as power imbalances, modifications may also be necessary to accommodate the cultural requirements of certain groups in intra-cultural disputes.

10.52 In making changes, dispute resolvers should be sensitive to the elements of each ADR process and of the particular demands which it is likely to place upon

each participant in a dispute. In mediation and conciliation for example, an assessment will need to be made of the capacity of the participants to identify disputed issues, to develop options, consider alternatives and to endeavour to reach an agreement through a process of negotiation with the other person. To meet these demands, disputants will require communication skills, the capacity to read, the capacity to understand, and the capacity to remember.

10.53 Particularly where modifications are made in response to power imbalances between the participants, dispute resolvers may need to work with stronger participants to ensure that they understand the reasons for and accept changes. As a matter of good practice, however, in all cases, dispute resolvers should consult with the participants as much as possible.

10.54 As indicated in preceding Chapters of this Discussion Paper, it can be dangerous to draw general conclusions as to where an imbalance is likely to lie in any particular dispute. Power imbalances can change from situation to situation. To the extent possible, dispute resolvers must carefully weigh the elements of each dispute to determine whether a power imbalance exists and, if so, where it lies. The process should be repeated when additional considerations arise during the course of the negotiation process.

10.55 In some cases, in addition to considering modifications to ADR procedures, dispute resolvers will need to consider which ADR process is likely to be most appropriate. As indicated, for example, in Chapter 9 of this Discussion Paper, in some business disputes, fast track arbitration may offer a better option than mediation in so far as it focuses upon the resolution of the problem rather than consideration and discussion of the issues in dispute. In some situations, further discussion of the issues could result in an escalation and expansion rather than the resolution of a dispute.

#### Accommodations

10.56 Accommodations will also be required in some cases to ensure access to the process. In cases of physical or mental disability, extreme youth and old age, other sorts of accommodations may be required. Accommodations may also be needed where a disputant has caring or other responsibilities.

### **REQUEST FOR COMMENT**

<p><b>COMMENT IS SOUGHT ON THE FOREGOING AND UPON THE MORE SPECIFIC CONCLUSIONS DRAWN AND SUGGESTIONS MADE IN CHAPTERS 3 - 9 OF THE DISCUSSION PAPER.</b></p>
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**10.57** This Discussion Paper is only a beginning. It is NADRAC's intention that it provide the catalyst for much more consideration and debate in this important area resulting in improved dispute resolution service for *all* Australians.



## APPENDIX A

### ALTERNATIVE DISPUTE RESOLUTION DEFINITIONS

#### Foreword

The following definitions are taken from the NADRAC *ADR Definitions Paper*.

The definitions paper was developed primarily to assist NADRAC in its advisory role to the Federal Attorney-General.

The definitions contained in the paper are 'benchmark' definitions which will enable ready comparisons to be made, regardless of the range of names which might attach to particular ADR processes. The intention is not to impose particular definitions of dispute resolution processes, but to encourage a shared understanding of the particular process under consideration or discussion.

Because ADR processes and procedures are constantly evolving, the NADRAC definitions can do no more than reflect the current ADR climate. They will need to be updated on a regular basis to embrace new developments and usages.

#### The Definitions

**Therapeutic mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement, and in this process seek also to resolve intra-personal and inter-personal difficulties in their relationship. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Community mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), chosen from a panel representative of the community in general, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but

may advise on or determine the process of mediation whereby resolution is attempted.

**Co-mediation** is a process in which the parties to a dispute, with the assistance of two neutral third parties (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Shuttle mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the process.

**Victim-offender mediation** is a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Expert mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Statutory conciliation** is a process in which the parties to a dispute which has resulted in a complaint under a statute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement which accords with the requirements of that statute.

The general term conciliation may be further defined by the addition of one or more of the descriptors given above for mediation: therapeutic, community, co-, shuttle, victim-offender or expert, or by the addition of descriptors referring to the agency within which conciliation is undertaken (for example, Human Rights and Equal Opportunity Commission, Industrial Relations Court), or by agency-specific descriptors (for example, conciliation counselling in the Family Court). Each agency should be able to define conciliation more specifically insofar as its practice differs from the general definition given above.

**Facilitation** is a process in which the parties (usually a group), with the assistance of a neutral third party (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a neutral third party (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Mini-trial** is a process in which the parties present arguments and evidence to a neutral third party who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

**Dispute counselling** is a process in which a third party (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice regarding the issues which should be considered, possible, probable and desirable outcomes and the means whereby these may be achieved.

**Arbitration** is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination.

**Expert appraisal** is a process in which a third party, chosen on the basis of his or her expert knowledge of the subject matter of the dispute, (the expert appraiser) investigates the dispute and provides advice as to the facts of the dispute and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

**Expert determination** is a process in which the parties to a dispute present arguments and evidence to a neutral third party chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) who makes a determination.

## **APPENDIX B**

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