

ALTERNATIVE CIVIL DISPUTE RESOLUTION

**A submission to the Victorian Parliament's Law Reform Committee
by the Victorian Multicultural Commission.**

Introduction

The *Victorian Multicultural Commission* (VMC) is an independent statutory authority that was originally established in 1983 under the name of the Victorian Ethnic Affairs Commission. Since then, the Commission has provided independent advice to the Victorian Government to inform the development of legislative and policy frameworks as well as the delivery of services to our culturally, linguistically and religiously diverse society.

The VMC is the main link between Victoria's culturally and linguistically diverse (CALD) communities and the Government, conducting more than 50 community consultations each year.

The 2006 Census tells us that 44% of Victorians were either born overseas or have at least one parent born overseas and that over 20% of Victorians speak a language other than English at home.

The challenge for *Alternate Dispute Resolution* (ADR) mechanisms is to develop sufficient flexibility in service delivery arrangements to ensure culturally and linguistically diverse individuals and communities know how to find and use them. As a minimum, ADR program usage and outcomes for CALD people ought to be comparable with usage and outcomes for the broader community.

This is achievable through responsiveness, communication, accountability and leadership. ADR needs to be accessible, fair and responsive to the individual needs of CALD clients. Channels of communication with stakeholders need to be open and effective; reporting and review needs to be transparent and effective. Where one or more individual cases point to a systemic shortcoming in an aspect of government programs or services, ADR service providers need to give leadership in identifying and addressing issues arising.

Issues

ADR programs need to be responsive to cultural and linguistic diversity in Victorian communities. Natural justice requires that a Victorian with no or low English proficiency or with a different cultural heritage should have an equal opportunity to:

- (a) access ADR programs and services;
- (b) find the service usable; and
- (c) obtain an equitable outcome.

The regular range of disputations experienced by members of the wider community can be compounded for CALD communities, especially the more recently arrived. Compounding factors can include a lack of familiarity with Australian law, institutions and norms and the stresses that overlay the resettlement process, particularly for refugees.

By way of example, our African-Australian communities who have recently arrived under the Federal Government's Humanitarian Program have been raising ADR issues in various consultations and other forums for some time; particularly in the area of family mediation.

As with earlier waves of migrants and refugees, many sections of this wider African-Australian grouping are experiencing acute dislocation of their traditional social and community values and practices which (when not addressed sensitively) can give rise to compounding tensions and conflict.

Leaders and representatives of these new and emerging communities sometimes find themselves in disputation over the establishment, development and direction of their fledgling community organisations. VMC sees ADR playing a valuable facilitative role in this sort of circumstance where there is the potential for it to otherwise become litigious. Protocols for this need to be explored between Consumer Affairs and ADR agencies.

Possible options for the future

Cross Cultural Training for practitioners

Cross-cultural understanding on the part of ADR program designers and practitioners is crucial. This includes an understanding of traditional community values, family roles, pre-arrival refugee experiences, the cultural appropriateness of interventions options and training on effective use of interpreters.

ADR Community Education options

Generally speaking, traditional bilingual information strategies such as printed or web-based translations whilst useful must essentially be part of a multifaceted communication and engagement strategy. For example, such material presented in ethnic community newspapers can often be more effective. Generalising again, information dissemination on ethnic community radio is even more likely to register with the target audience who are known to prefer this medium.

Generally speaking, the optimal medium by communities is face-to-face information dissemination i.e. community information sessions with either a bilingual presenter or an interpreter. These can take the form of information sessions for the community at large, or sessions for community leaders, representatives or community-based service providers for wider dissemination by them through their respective networks. For example there are some from the African and other communities who work in Migrant Resource Centres,

community health centres and other NGOs who are well placed to effectively disseminate advice to a wider audience. One strategy for ADR service providers would be to target this influential group and skill them up as information providers and referral intermediaries.

Use of Interpreters

For clients with low or no English language proficiency, a minimum requirement is for mediators to offer clients an interpreter. Program managers need to ensure their service delivery officers (including telephone receptionists) are proficient in the effective use of interpreters; for example that they are periodically required to undertake training in working with interpreters. Such training is available through various language service providers and other agencies.

Generally speaking, the most common form of accessing an interpreter is over the telephone where appropriate telephony is available (i.e. a three-way facility); or alternately using a video-conferencing facility allowing the three parties to view each other. However, given the complexities of a mediated dialogue between parties, a physically present (or "on site") interpreter is the best option for ensuring the mediator has the best chance of picking up on the atmospherics between the two parties; and for that matter, the atmospherics between the parties and the interpreter.

One option for ADR program providers to consider would be to offer specialist training to targeted language providers through VITS or TIS National with an MOU allowing priority access to those interpreters skilled in operating in an ADR environment.

Use of Bilingual Mediators

Availability of professional bilingual mediation would be a preferred model combining interpreting, cross-cultural and mediation skills in the one service provider.

However this model would present some of the challenges and issues facing interpreting services such as availability of suitably qualified prospective candidates in new and emerging communities, confidence about professionalism and confidentiality, inter-ethnic tensions etc.

Development of this sort of model would need to address these challenges. Consideration might also be given in this context to a role for recognised elders in the respective communities. A common pool of trained mediators from CALD communities would assist.

Conclusion

Alternative dispute resolution can be quite consistent with cultural practices within many of Victoria's migrant and refugee communities. As such the VMC strongly supports moves by ADR agencies to remove barriers to their services

and related inequities arising from cultural and linguistic differences. Program design and service delivery by ADR agencies should fully reflect Victoria's significant demographic and cultural diversity. Program performance and service standards for CALD clients ought to be an integral component of management and staff performance assessment and development.

CALD client uptake of ADR should reflect Victoria's demographic reality. In the medium term there ought to be a priority focus on whether ADR uptake and outcomes by and for CALD communities is commensurate with the wider community; and if not, why not.

The VMC urges due consideration be given to addressing the following requirements needed to achieve access and equity:

- greater liaison and consultation with CALD communities;
- cross-cultural training for practitioners;
- information dissemination about ADR services to CALD communities;
- quality data collection on take-up of services; and
- review and evaluation of outcomes.

Strong recommendations by the Law Reform Committee are needed to ensure ADR programs and services are accessible and equitable for our significant and growing migrant and refugee communities.

Appendix 1

The Role of VMC

The Victorian Multicultural Commission (VMC) now operates under the Multicultural Victoria Act 2004 which conveys the Victorian Government's commitment to recognise the social, cultural and economic contribution of cultural and linguistic diversity to Victoria and enhances the accountability of government departments to all Victorians.

Objectives & Functions

The VMC's objectives and functions, as specified in the Multicultural Victoria Act (MVA) 2004 are to:

Objectives

- promote access by Victoria's culturally and linguistically diverse communities to services made available by governments and other bodies;
- encourage all of Victoria's culturally and linguistically diverse communities to retain and express their social identity and cultural inheritance;
- promote co-operation between bodies concerned with multicultural affairs;
- promote unity among Victoria's culturally and linguistically diverse communities; and
- Promote a better understanding within Victoria of Victoria's culturally and linguistically diverse communities.

Functions

- ensure that the objectives of the Commission are met to the maximum extent that is practicable;
- investigate, report and make recommendations to the Minister on any aspect of multicultural affairs referred to it by the Minister;
- advise the Minister on factors inhibiting the development of harmonious community relations and on barriers to the participation of Victoria's culturally and linguistically diverse communities in the social, cultural, economic and political life of Victoria;
- consult with relevant bodies and people to determine the needs of Victoria's culturally and linguistically diverse communities, including needs in relation to matters covered by any report prepared by the Minister under section 21 (of the MVA); and
- Maintain and further develop harmonious community relations between all relevant groups in the context of Victoria's culturally and linguistically diverse society.

Appendix 2

Extract from a related literature review provided by Myriad Consultants and reproduced with permission.

International perspective

An international and local literature search undertaken on approaches to mediation when working with African communities, revealed that, whilst some research has been completed around mediation and counselling within these communities, very little attention has been focused on family mediation in

particular. Apart from some research undertaken in Canada and South Africa, there appears to be no literature available on this issue within immigrant contexts. This section provides an overview of what little research exists to date.

Research undertaken by Cheboud and France (2003)¹ around issues and challenges confronted when working in counselling and mediation type environments with a range of African communities, focused primarily on the integral role that cultural awareness plays in the effectiveness of such programs. Their research found that training for counsellors and mediators needed to emphasise the crucial and complex role that cultural empathy plays in becoming competent. This is also supported by research by Ridley and Lingle (1996)² who refer to cultural empathy as:

“...learned ability of counsellors to accurately gain an understanding of the self-experience of clients from other cultures – an understanding informed by counsellors’ interpretation of cultural data. Cultural empathy also involves the ability of counsellors to communicate this understanding effectively with an attitude of concern for culturally different clients” (p.32).

Cheboud and France (2003) further argue that competence can be achieved by learning how to empathise and then decoding meanings embedded in the given culture, therefore enabling a response that is culturally appropriate. They emphasise that this can only be achieved if the counsellor is able to differentiate between self and other from a cultural perspective.

“Cultural sensitivity requires ability to accurately understand cultural information from the client and includes the following processes: perspective taking (walking in the other’s shoes), experience vicariously (how the client feels things) and being able to respond expressively to client issues.” (p.2)

They also suggest a range of strategies that can be utilised by non African counsellors and mediators to enhance cultural sensitivity and effectiveness. These include:

- Being aware of the historical and current experiences of African families
- Considering value and cultural differences and how the mediator’s / counsellor’s own personal values influence the process
- Being aware of cultural variations in communication including both verbal and non verbal communication
- Considering the complexities around extended family and community influences on the situation

¹ Cheboud, E & France, H, “Counselling African Canadians: Issues and Challenges”, 2003

² Lingle, D.W., & Ridley, C.R. (1996) Cultural Empathy in Multicultural Counseling. In J.C. Draguns, P.B. Pedersen, W.J. Lonner, J.E. Trimble (Eds.), *Counseling Across Cultures* (4th ed.). CA: Sage.

- Considering the cultural appropriateness of proposed interventions

An African Mediation and Community Service (AMCS)³ has also been established in Canada, reflecting the need for a culturally appropriate approach to mediation within these communities. Participation in mediation services provided by the agency is voluntary and is undertaken by trained community volunteers. Mediation services are growing within Canada in recognition of their capacity to reduce litigation, improve client satisfaction and reduce courtroom cases. In their service provision literature the AMCS state that their approach to mediation is reflective of how these communities have operated throughout history, acknowledging that modern approaches to mediation

"...have roots in ancient traditions of problem solving valued for centuries in a variety of cultures...around the world."

The service is further committed to reducing the need for mediation and conflict resolution by addressing the underlying causes which lead to these situations. They provide educational programs for African immigrants and refugees around preventing family violence and crisis and spousal relationships.

In her work around counselling African communities, Makhale-Mahlangu (1996)⁴ examines African 'characteristics' and the implications of these in 'western theories' of psychology. She argues that these characteristics are

"deeply and innately embedded in the African persona."

and that approaches to engaging African communities around counselling or mediation from a western perspective are not relevant and need to address the social and cultural reality of these communities.

"Eurocentric theories of human behaviour and coping...can never be fully relevant to a society whose reality is that of dispossession, exploitation, and violence."

The range of challenges in working with African communities, as identified by Makhale-Mahlangu (1996) include:

- Language; terms and concepts such as counsellor and mediator do not exist as such within many African cultures.
- Time; appointment keeping systems are unfamiliar to many African communities with beliefs based on timelessness and individual activity controlled by a collectivist culture.

³ African Mediation and Community Services, Ontario Canada, City of Toronto (funded by the National Crime Prevention Strategy) www.metros.ca/amcs

⁴ Makhale-Mahlangu, P. "Reflections on trauma counselling methods" Centre for the study of violence and reconciliation, Johannesburg, South Africa 1996

- Respect for elders; they are considered to be the bearers of wisdom and deferred to for decision making in most areas of life.

In situations involving family violence, Makhale-Mahlangu (1996) looks at traditional approaches to addressing these issues, demonstrating the vastly different approaches to western concepts.

“in the Afrocentric Model of therapy/ counselling, a more symbolic method is used, that is a ritual in which the dispute of a couple is taken outside of the home and is then sprinkled with water or ash. The ash symbolises the burial of the bad vibes that existed, and the water quantifies the cleansing and removal of bad elements. The symbolism of this ritual is more assuring to the victim because the issues were resolved more publicly, and so the assumption is that the behaviour will be curtailed because there were witnesses, especially family, to witness the repentance and forgiveness.”

Finally, she argues that the collectivist culture of African communities cannot be ignored in models of counselling and mediation. Her research has revealed that most African clients believed that support from others was the most effective element in coping and resolving issues.

“In order for our intervention to be effective, there is a dire need for us to understand and be sensitive to the cultural ethos inherent in those whom we serve. It is important for us to learn from those we serve and be willing to be truly empathic by allowing ourselves to enter their world with respect and value for who they are.”

3.1 The Australian context

Since 2004, the Family Court of Australia has required parties to use services such as mediation and conciliation to attempt to resolve disputes, as opposed to going to Court. From July 2007, individuals are also required to attempt to resolve disputes about parenting matters using family dispute resolution services before applying to court for a parenting order. There are, however, a range of exemptions to these requirements in situations involving child abuse or family violence.

Although these initiatives of the Family Court have been very successful in many situations involving family breakdown, the application of these programs for the range of African communities has not been as straightforward, with many services now exploring approaches to mediation which take into account the range of cultural complexities confronting mediation services working with African communities.

This section looks at a range of recent Australian research relevant to this issue.

The Legal Services Commission, in partnership with the Migrant Resource Centre of South Australia undertook a research project⁵ in 2004 to improve understanding around Australian family law within a range of culturally and linguistically diverse communities. African communities involved in the project included Sudanese, Eritrean, Ethiopian, Somali, Tanzanian, Congolese, Sierra Leonean and Liberian communities.

Consultations with these communities attempted to gauge information on the range of cultural and religious implications around dealing with family issues. The study found that:

- The concept of extended family is universal in all communities in Africa and includes parents, children, siblings, aunts, uncles, nieces, nephews, grandparents, great grandparents, first and second cousins. It also includes those living under the same roof as well as those connected by blood or marriage.
- There is a hierarchical relationship within the family and the boundaries of responsibility are determined by this hierarchy.
- Children will recognise the authority of an uncle over them as much as the authority of a father.
- Kinship is more valuable than money and people expect to rely on their family for support.
- The reputation of family is all important and each person is viewed primarily as a representative of his or her family rather than as an individual. Therefore, if a person behaves badly, the entire family will lose respect in the eyes of the community.

These cultural factors obviously have a significant impact on the way family issues are addressed and resolved and highlight that in African communities, involvement of parties in mediation extends way beyond the two individuals directly affected.

“Equal rights are unknown in most African societies as the husband is the authority figure...the priority for the family is survival not conflict resolution.”

The research project found that within Sudanese communities in particular, a man's social status and prosperity is represented by having many wives. Although this is illegal in Australia, it is not uncommon for Sudanese immigrants to bring one partner as their wife and the others as extended family. These marriages involve a 'bride price' which is usually paid to the woman's family in cattle. Many of these marriages are arranged between families and clans who make every effort to ensure that the marriage will not break down as this impacts the extended family.

In relation to separation, the study found that:

⁵ Legal Services Commission South Australia “Report on the African Communities Consultation for the Family Law CALD communities project”, August 2004

- In South Sudan, primarily among the Dinka and Nuer tribal groups, the parents of the bride must return the 'bride price' if there are no children from the relationship. Where children are involved, they remain with the father unless they are very young.
- Women are expected to first turn to the husband's family to help resolve the situation before approaching their own. A community elder will then be consulted if neither family can resolve the issues.

"In Sudan, the woman should never leave home without permission and when she leaves she must go back to her parent's house."

Whilst separated couples almost always reconciled after separation in their home country, this was not the case within the Australian context.

"When there are Centrelink benefits available, the wife may not want to reconcile if she can have the children and the money."

The research further found that divorce settlements in Australia had repercussions in the home country, especially where either individual wanted to remarry within the community. If, for example, the woman decided to leave the husband, her family would be expected to return the 'bride price'.

This study also looked specifically at family mediation and found that the term mediation is used in the traditional counselling process where community elders play an integral role in family dispute resolution.

"In the Sudan, generally the husband and wife both sit in front of the elders to describe their problems. The elders would never lecture a man about his behaviour in front of his wife but may do so when she is not present."

Mediation is almost always undertaken by families, religious or tribal elders with the key aim of reconciliation. If this approach fails, the matter is referred to the village court as a final option.

"Australian style counselling and mediation is not seen to be acceptable to many of the participants from African communities as they believe it may not be conducive to the prevention of the separation of families."

Community members consulted in the research argued that mainstream approaches to mediation were not appropriate for African communities as they did not understand traditional roles and the complexities around the concept of family.

"Mainstream mediation is not trusted. The community, family and leaders have an interest in the survival of the marriage."

In summary, the research highlighted that there is an increasing demand for services to be aware of African cultures including the diversity within each group, religious influence and the role of extended family in mediation and

counselling. It also highlighted that there are a number of community assumptions which need to be addressed including:

- The belief that in Australia women have more rights than men
- The 'best interest of the child' concept in family law erodes the authority of parents, family leaders and elders.

Western Australia's Department of Community Development has also completed research⁶ around African communities and family issues. Although the research focused specifically on the issue of domestic violence, it provides considerable insight into African cultures, beliefs around family and how these concepts are impacted within the Australian context.

Although the range of African communities consulted in this research agreed that domestic violence was seen as unacceptable by individuals and their communities as a whole, the report stated that:

"a number of comments were made regarding the extent of the belief in African communities that discipline and reasonable punishment of women and children was acceptable. The idea that some of this behaviour may be seen as domestic violence was new and challenging for many."

Domestic violence was considered to refer to physical violence but not psychological abuse, verbal abuse, sexual abuse and child neglect. Domestic violence was also considered to be a private family matter with feedback suggesting some communities were surprised that 'outsiders' wanted to interfere.

The WA project suggested that domestic violence and family breakdown in a range of African communities was far more prevalent in Australia and was being influenced by the range of complexities confronting African families settling into a vastly different cultural context. Factors that increased vulnerability of families included:

- Financial pressures and especially insecurities developed by men who could not access employment; this undermined the traditional breadwinner role and resulted in anger and frustration.
- Changed balance of power when women are the financial providers.
- Difficulty in adjusting to language barriers, isolation and separation from extended family.
- Differences in gender roles:

"Women in Australia are perceived to have different rights, opportunities and freedoms which are seen by African men and many of the African women as having a negative impact on the family."

- Unattended mental health issues resulting from pre arrival trauma

⁶ WA Department of Community Development, "African Communities forum on domestic violence report" 2005

- Lack of education, knowledge of and access to services in Australia
- Lack of understanding of African cultures, traditions and family values on behalf of mainstream agencies and service providers resulting in issues not being properly addressed

“Men’s employment was clearly considered a significant factor in reducing the incidence of family conflict and domestic violence.”

Overall, this project highlighted that the range of African communities consulted believed that improved access to education, information and culturally appropriate services were key factors in preventing family breakdown within their communities. Men’s education programs were particularly highlighted, as was the role of community elders. Community elders were seen as integral in breaking down communication barriers and working with the community to help them operate within Australian legal contexts.

“... group of elders in the community that understand the Australian law and who can communicate it in a way that is culturally understood.”

“...African communities approaches to conflict resolution are different and they have their own frameworks within which they resolve situations. They approach elders and religious leaders for assistance. These people are extremely important stakeholders in any solution to the problem.”

In her research within NSW, Mehraby⁷ (2007) looked at counselling of refugee children but also highlighted important lessons in counselling refugee communities as a whole. In this research too, sensitivity and awareness of client culture was considered crucial in helping address family settlement. As with previous research referred to above, the western concept of counselling was unfamiliar to many refugee communities and counselling, which included “*advice and direction giving*”, was carried out by extended family.

Finally, whilst much work in this area within Australia has focused on research, there are a number of initiatives being undertaken to address the range of factors that impact access to the range of family services by African communities.

One of the most successful of these programs has been the Family Court’s project *Families and the Law in Australia: The Family Court working together with new and emerging communities*⁸. This project ran nationally over a two year period and included partnership with a range of African communities. The project developed in response to perceptions of lack of trust and disharmony that impacted on the delivery of court services to new and emerging communities. It’s objectives included, but were not limited to:

⁷ Mehraby, N. “Therapy with Refugee Children’ STARTTS 2007

⁸ Family Court of Australia, *Families and the Law in Australia: The Family Court working together with new and emerging communities*, partnership project with DIAC, 2007

- Improving awareness and understanding of family law and how the court operates
- Opportunity for the court to demonstrate it understands and is able to respond to the cultural, religious, ethnic and social arrangements of communities
- Further empower community leadership

This innovative project was underpinned by a community inclusivity approach where the community themselves not only decided how they were to be involved in the partnership, but also played the key role as educators for Court staff in a reciprocal learning approach.

Whilst each of the strategies was unique in that they were relative to the situational specificity of each community and each local area, they were all based on an empowering approach to improved awareness and understanding of the Australian legal system. Fundamental to this approach is the conviction that new and emerging communities themselves are invaluable partners for the development of effective community education strategies.

The community consultation stage of this large scale project found that:

- Refugee and new and emerging communities have resources, capacities, experiences and strengths
- That pre arrival experiences impact profoundly on the acculturation and settlement process.
- That in the process of settlement, gender identities and family relations may change significantly
- That the impact of the Australian legal system on the daily lives of new communities is considerably greater than that previously experienced in countries of origin
- That increased understanding of the legal system and improved legal literacy can enhance the settlement process and promote greater community interaction with policy makers
- That short term projects potentially contribute to community cynicism and disengagement and as such considerations of long term sustainability are critical to successful community engagement
- That there is no one single approach, but rather the need for multiple approaches
- That fluidity, flexibility and uncertainty of process and outcomes are an inherent component of working with new and emerging communities.

The Bridges for Men from Africa and their Families⁹ project was funded as part of the national FaCSIA Stronger Families and Community Strategy for 2004-2009. This project has received funding to work with 120 men from African communities in Tasmania who are experiencing difficulties integrating into Australian society. The project was developed in response to the culture shock experienced by African men living in Australia, often leading to

⁹ FaCSIA, Stronger Families and Communities Strategy, 2004-2009

relationship difficulties for families. The project is looking at identifying culturally appropriate ways to engage with African communities and encourage their members to access support for dealing with relationship difficulties. It involves facilitating workshops for male community leaders to help them identify and address family and relationship problems in their community. The workshops cover topics such as early intervention and aim to increase community knowledge around support services and how to access them. Participants will also be trained as mentors for their communities. A significant feature of this project is that it recognises the essential role played by community leaders in family mediation and is attempting to ensure their role continues to be respected whilst also ensuring communities comply within Australian family law boundaries.