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ADR for Indigenous Australia

Communication, representation, voice and choice: facilitating conversations on indigenous needs and aspirations

PART 2

Helen Bishop

This is the second part of a two-part article adapted from a research paper.

The author's research looked at the question: Could ADR processes be used to assist Indigenous Australians overcome abject disadvantage and solve problems concerning themselves? She identified five themes from her research to construct a picture of how Indigenous people might be more involved in decisions concerning their own lives: (1) natural justice; (2) alternative dispute resolution; (3) culturally effective communication; (4) policy framework; and (5) moving forward.

Part 1 of this article discussed themes (1) to (4). In this part she suggests how Indigenous Australians might be able to move forward and overcome their problems.

Moving forward

Although it is not current practice, all who are to do business with Indigenous people need to be effectively trained in cooperative problem solving, negotiation skills and techniques as well as conflict management and peace-making practices.⁴² This situation therefore requires remediation through effective policy development about how best to support practical problem solving to overcome conflicts of interest. This seems to me to be the better alternative for it needs us in the process and supports a naturally just approach.

There are several elements that require discussion before I launch into a suggested model for Indigenous

people's use. The first is the provision of culturally effective facilitators or practitioners. ADR as a process does not attempt to de-culturalise a person. ADR process and practice techniques embrace the difficulties faced by humanity and effectively work to support parties to talk about, to listen to each other and to assimilate the meaning of their needs and interests and support parties to design and negotiate realistic solutions in a cooperative environment. Practitioners are focused on the problem and are mindful, respectful and nurturing of the people involved.

ADR processes can be limited in respect of the cultural issues of Indigenous peoples as Indigenous practitioner Kelly outlines on the use and terms of culture and traditional dispute mechanisms:

A culturally appropriate mediation process does not replace the existing dispute resolution mechanisms a community may use to resolve disputes. If elders act as conflict managers within a particular community, then this needs to be respected and reflected in the dispute resolution service. This might mean that the community mediation service recruits and trains elders.⁴³

The task of a well-skilled facilitator is to therefore ensure that Indigenous people are involved in developing a suitable model in which they wish to work. As Folberg and Taylor suggest 'Mediation is a process that emphasises the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process'.⁴⁴

So by involving Indigenous people at the outset in designing or creating our own dispute resolution systems we are effectively involved in a process of co-operation. This approach emphasises the participants' own responsibility for making decisions⁴⁵ through building a culturally effective mediation or facilitation plan. Why design a culturally effective mediation plan?

A culturally effective mediation plan assists in building relationships with parties by contributing to a process that supports identified cultural needs. Some of these cultural needs may involve the recognition of kinship structures, thus requiring a facilitator to explore relationships and to map them, for example in cases of community or family feuding. In other circumstances ceremony or particular activities and protocols may also need to be designed into the mediation plan. This form of collaboration in designing a process to accommodate cultural imperatives could therefore be considered both culturally safe and effective. Indigenous people must have access to fair and effective services and skilled personnel who are culturally effective⁴⁶ and will facilitate discussions with Indigenous people and work with parties to assist them identify and voice their needs so that solutions may be generated to match those needs.

These same findings are resounded in the Harvard Project⁴⁷ and the American Indian Dispute Resolution Service of Sacramento in California that works to support effective problem solving approaches and



self-governance and is described as:

A national non-profit Indian organization founded in 1990 by a consortium of five national and regional Indian organizations. These included: First Nations Development Institute, Seventh Generation Fund, California Indian Legal Services, Northern Circle Indian Housing Authority, and Round Valley Indian Reservation. Today, IDRS is governed by a national Board of Directors composed of prominent Indian leaders from throughout the country.⁴⁸

The primary purpose of the American Indian Dispute Resolution Service is to assist American Indian communities to develop the foundations for effective self-government. Staff of the service work with and assist communities and Indian organisations to:

1. Build organic documents, governing institutions and processes to support informed decision-making and the orderly resolution of conflicts;
2. Train and skill leaders and staff to deliver effective services and work in problem solving values which intend to enable them to lead decisively and work cooperatively;
3. Assist parties to resolve specific conflicts/disputes within their organizations, government and community, and
4. Work in productive 'Government to Government' consultations and negotiations with federal, state and local agencies and other entities and members of the public.⁴⁹

In the scenario being explored, that of building and encouraging governments and Indigenous people to enter into cooperative problem solving, there would seem to be no more important approach than to create opportunities which enable our rapport and trust to develop. When we negotiate our future relationships through facilitators they are able to assist us to develop our concern for others in others. A previously presented example of where this might be achieved is in metaphorically enriching the negotiation process through kinship structures.

These same skilled facilitators will encourage the exchange of information between parties about these interests, providing space to unpack those interests and assign them to a category which parties identify. As Fritz, Parker

and Stumm discuss in *Beyond Yes*,⁵⁰ when facilitators encourage and cultivate understanding by creating relationships and building rapport with all parties, they can enable effective communication and negotiation practices. A good facilitator needs to take special interest in the people with whom they are working and plan for working with people.⁵¹

It is also important at the outset that a facilitator genuinely acknowledge traditional Indigenous ancestors (usually this is the traditional custodian or land language group) and ask that they guide the 'yarns' or conversations of the group about the issues that they wish to discuss.⁵² It is suggested that facilitators acknowledge that each party brings with them reasonable problem solving skills and seeks to explore such skills which may be particular to local ways and therefore may be most appropriate or effective. The idea is to preserve traditional values and customs to create an ethical framework of conciliation.

I am suggesting that we need to be more involved in decision making especially as historical and contemporary decisions have ultimately and negatively affected our lives. In order to achieve the level of participation being suggested, that is cooperative problem solving through effective participation, representation and decision making, then we need to consider for the moment, five key elements. These include aspects of government effectiveness in fields that involve services and skilled facilitators' contact with Indigenous people, and include:

- (1) institutionalising a human needs approach to cooperative problem solving and ADR processes to assist working effectively with Indigenous Australians;
- (2) effectively skilling and coaching Indigenous facilitators of our communities;
- (3) fostering skill and knowledge in agencies;
- (4) developing Indigenous policy about cooperative problem solving and ADR processes in working with Indigenous Australians; and
- (5) achieving institutional and policy reform.



In my professional experience there have been countless times when countrymen speak to me about mediation or ADR. Some suggest the process is too 'white', and often I interpret this to mean that few Indigenous cultural elements are used. Other Indigenous mediators and peace practitioners⁵³ also confirm that there need to be flavours of ADR suitable for our people's use and while I agree with my peers, it might be too impractical to manage all these different approaches realistically. That is, the practitioners would have to have all the skills and knowledge to be able to match those different flavours of ADR and that could perhaps take a lifetime to acquire. Instead I pondered this issue for it is the reality of our mob that mainstream service provision largely comes from another cultural group and gaps broaden because Indigenous peoples' cultural needs are absent from services and the corporate knowledge of employees and the organisation in which they work.

So how might Indigenous and non-Indigenous facilitators integrate cultural needs necessary to support culturally safe and competent facilitation processes? Facilitation I liken to the role of the conductor of an orchestra. They do not play any of the instruments in the orchestra. Instead conductors study the score and plan how to integrate and build on the themes the music intends to carry. The role of the conductor is to guide the musicians to skilfully represent the musical intonations of the score according to the musical terms and notations the composer expressed. The conductor assists players to resolve all of the themes covered in the composition.

Facilitation in this case concerns the interplay of the parties working on the score or the issues, cooperating to a pattern of speaking, responding, listening, questioning and confirming, and the conclusion or resolution of all of the themes or issues. In this case the facilitator could be considered a conductor. This same equation is

applied to counterpoint of music and orchestration. For example an interplay, of 'point against point', or 'note for note'. A single 'part' or 'voice' added to another is called a counterpoint.⁵⁴

Mediation described by Folberg and

about cultural comfort. A staged communication plan could ensure parties to a dispute are involved in and able to identify those persons they believe need to be involved, or those that they are not permitted to engage with directly, (such as, for example,

Facilitation I liken to the role of the conductor of an orchestra. They do not play any of the instruments in the orchestra. Instead conductors study the score and plan how to integrate and build on the themes the music intends to carry.

Taylor, on the other hand, describes the process of isolating issues in order to negotiate and conciliate suitable alternatives or arrangements that will mutually meet their needs:

The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs.⁵⁵

I have spent considerable time exploring a method that may assist in answering the research question and propose a stepped or staged approach that might occur after the intake process has been completed. Intake of course refers to the application for ADR services and confirmation that parties are willing to enter into a process to work on their difficulties.

Where the parties agree to enter into the process, further conversations with them usually occur prior to working on the issues or negotiating an agreement. It is in between these two stages of Intake and Mediation that an additional process could be entered into as part of a planning event through which the whole facilitation will unfold.

Staging or stepping out a process could become part of the pre-mediation stage. It is an opportunity for all parties to develop communication protocols, identify necessary people and relationships and activities or ceremonies that could enhance or bring

poison cousins, father/mother/brother-in-law). The information coming from a communication plan may assist the facilitator manage more effectively parties and design a dispute resolution system/model to accommodate their express needs, and in the case of poison cousins select effective ways to work them, such as shuttle mediation.

Shuttle mediation is used to separate each party, placing them in different rooms or environments, usually in reasonable proximity. The facilitator/s can move between the rooms to work with parties. In a more political approach this could become shuttle diplomacy,⁵⁶ which might involve going out to communities rather than having people come in to a service. This model is often used when parties' relationships are hostile or violent, or where power differentials overwhelm a party, or relationship governances or cultural observances prevent direct interaction.

This model can be used to manage cultural imperatives such as poison cousins' presence. This step encourages parties to enter into conversations about communication and behaviours (cultural protocols). By engaging parties in establishing a communication pathway, it may enable cultural protocols to be outlined, observed and experienced as part of the dispute resolution process, one designed by the parties themselves.

Part of this stepped or staged process includes relationship mapping or social



mapping and it is capable of identifying necessary parties to, say a multi-party dispute/conflict, not uncommon to Indigenous feuds. This stage is important in capturing many of the members involved in the dispute/conflict. Often (in my own experience) there are many people involved in an Indigenous community or family dispute. I find that when people are provided with an opportunity to examine their own roles in a dispute or the cultural limitations imposed by a dispute, it can often trigger withdrawal or movement toward exiting the dispute through a number of channels not discussed here.

The next step could assist parties to determine who might be influencing, enlarging or contributing to the dispute. The purpose of social or relationship mapping is to aid the facilitator to work with parties more effectively. When kinship structures are interrupted by conflict the community suffers. Relationship mapping can expose vital information that could be used to assist solving the dispute. This stage allows parties to identify who needs to be involved in the decision-making process, and who needs to be involved in resolving the problems associated with the dispute/conflict. The process then provides for parties to determine who else might be needed to assist work through the issues in dispute (for instance Elders, or other important persons). This filtering process is added in so as to identify who may be needed to support problem solving and who might not be required in the dispute/conflict.

It is important to provide an opportunity for important people to be drawn in, particularly when behaviour has been identified as aggravating and escalating a dispute. Elders or other important and highly regarded people may at some point be drawn into the problem-solving phase to assist in guiding parties (and resourced for cultural authority). Drawing in highly regarded Elders for their cultural expertise, wisdom and knowledge might support the parties work more effectively to meet cultural imperatives. The role of Elders in this respect might mean that they are retained as part of a pool of culturally

competent advocates. Communities are better able to define the holistic role for which their respected Elders are regarded. I personally consider these special Elders as Stewards, for Elders of the calibre I mention are concerned about their people, the community's longevity, culture and protection of language and land.

The final step concerns cultural observations, ceremonies or other important activities to meet the necessary cultural identities. Having this stage allows parties to design the environment, activities and communications to better match their individual cultural needs. Staging cultural imperatives has not been made available in contemporary mainstream mediation or ADR facilitation models. However working in Indigenous culture to enable effective problem solving can uphold the notion of holistic problem solving, designing a system to suit cultural needs as well as to use culture to support effective problem solving.

Incorporating ceremonies and protocols into facilitation plans engages us in a holistic way. Ceremonies and protocols confirm our values and significant practices and naming and using our value systems effectively recognises the integral cultural needs we have by respecting our diversity, our relationships and the way we define ourselves. By incorporating our cultural needs into facilitation plans ADR can generate cultural warmth and pay respect to Indigenous peoples, cultures and heritage. Further it communicates that Indigenous cultural practices can be used to effectively restore respect and understanding of Aboriginal cultures, and importantly contributes to the living practice of cultural imperatives through ceremonies and protocols.

Ceremony and cultural protocols can be used in many settings, and where ADR is being accessed from a community, could also be negotiated with the parties, the most suitable or proper place that ceremonies may be conducted. Alternatively the use of highly regarded Elders might also be able to establish the most effective ceremony and place where ceremony may be done. There are some



ceremonies such as the Mawul Rom ceremony of Elcho Island, Yolgnu Golumala Nation of East Arnhemland, which could not possibly be undertaken in an office setting for the resources are extensive and involve numerous people, fire, smoke and dance and are an important pathway to purification and forgiveness. Usually such significant ceremonies are attended to by important people who look after ceremonial activities and practices. As the parties have identified the ceremonies and protocols needed they will also have identified the important persons needed to perform the activity. I suggest that many of the ceremonies that may be nominated by parties will almost certainly be conducted in a community setting. This clearly means bringing facilitative services to communities, thus ensuring direct access.

Conclusion

This research discussion article began with the proposition that a plethora of government inquiries designed to improve the conditions in which Aboriginal people live have failed to address, and have in many cases added to, Aboriginal disadvantage. The reason for this is the lack of natural justice and the absence of Aboriginal voice and representation in identifying problems and solutions. The role that ADR might play in building cooperative solutions was explored and a proposal for a model which stretches the conventional practice of ADR to better match Aboriginal community needs was developed.

Effective ADR with Aboriginal communities will see the 'mediator' more as a facilitator and will give greater emphasis to the preliminary stage, which will involve mapping the cultural dimensions of the issues and the complex and frequently diverse cultural relationships in the community.

Within the wider sphere of Australian society, facilitation of conversations on Indigenous needs and aspirations could improve communication with and representation of Aboriginal people themselves. The need for access to skilled facilitators was explored and they could enhance opportunities to confront distrust and civic obstacles and

transform the way governments make decisions about Indigenous people and communities. With well-developed ADR policies and the commitment of government, Indigenous people themselves can begin to work more effectively to improve lives and own solutions and decisions stemming from direct involvement about their needs.

The core is to give up 'doing for' Aboriginal people and begin working with them (us) as equals. In doing so, Indigenous people will be better able to articulate their interests and work to establish the most effective solutions. This way of working involves self-determination and an effective means to developing sound governance practices, effective relationships and advanced problem solving.

ADR is a humanising approach to problem solving for it can bring about those conversations that pay respect to and dignify the speaker, enabling them to isolate and work on problems. By using effective communication with one other through ADR we can change the way business is done to Indigenous people. Importantly there exists the ability to minimise arbitrated decision making, resulting in fewer imposed solutions. With reductions to successive governments' maladministration of human rights and the serial failures of inquiries and imposed decisions comes the opportunity to deliberately include countrymen to develop and own solutions that will influence life experience. With fewer imposed decisions and solutions the human and economic costs can be reduced.

By building cooperation through ADR, with its tools to better assist understanding of problems and techniques for constructing solutions, we all have much to gain. ADR has a great deal to offer Indigenous people and governments and will support natural justice, human rights, informed decision making, representation and the orderly resolution of conflicts. ●

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Endnotes

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44. J Folberg and A Taylor, *A Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (1984) 18.

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48. At <www.indiandispute.com/about.php> accessed 15 September 2008.

49. Above note 48.

50. P Fritz, A Parker and S Stumm, *Beyond Yes: Negotiating and Networking — The twin elements for improved people performance* (1998).

51. Above note 50 at Chapter 10.

52. The term yarning has been incorporated into Indigenous cultural communication protocols and promotes responsible, non threatening conversation. Cultural protocols differ but generally the term yarn refers to friendly or non-harmful discussion.

53. Discussions with Mr Robin Thorne, Dr Loretta Kelly, Uncle Charlie Watson and others.

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