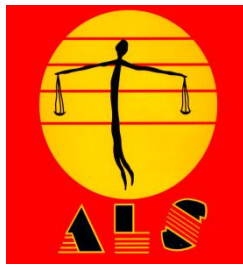


Joint ATSILS Proposal to the
Commonwealth Attorney -
General for the Establishment of
a National Aboriginal and
Torres Strait Islander Dispute
Management Service

November 2010



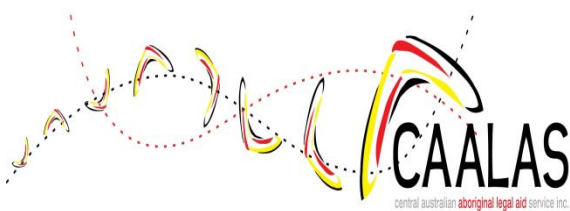
Victorian Aboriginal Legal Service Co-operative Ltd



Aboriginal Legal Service of Western Australia



Aboriginal Legal Rights Movement Inc



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List of Acronyms Used

AGD	Attorney General's Department (Cth)
AHRC	Australian Human Rights Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRM	Aboriginal Legal Rights Movement Inc
ALS (NSW/ACT)	Aboriginal Legal Service (NSW/ACT)
ALSWA	Aboriginal Legal Service of Western Australia
ATSILS	Aboriginal and Torres Strait Islander Legal Services
ATSILS (Qld)	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
CAALAS	Central Australian Aboriginal Legal Aid Service
COAG	Council of Australian Governments
DEEWR	Department of Education, Employment and Workplace Relations
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
FRC	Family Relationships Centre
MIRJ	Mornington Island Restorative Justice Project
NADRAC	National Alternative Dispute Resolution Advisory Council
NAAJA	North Australian Aboriginal Justice Agency
NMAS	National Mediator Accreditation Scheme
NNTT	National Native Title Tribunal
VALS	Victorian Aboriginal Legal Service Co-operative Limited

1. Introduction and scope of the proposal

The following is a joint ATSILS proposal for the establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service (the proposed service) within Australia, to operate within urban, regional and remote areas. The ATSILS prepared this proposal in response to the need for increased provision of culturally appropriate alternative dispute management services to Aboriginal and Torres Strait Islander peoples in order to achieve equal access to justice for members of these communities.

The proposal is divided into nine main sections. Sections one and two provide an introduction to the proposal and a brief description of each of the ATSILS. Section three will outline how mainstream Western styles of dispute resolution and conflict management can be culturally alienating and inaccessible to Aboriginal and Torres Strait Islander peoples. Section four will discuss the need for the proposed service with specific regard to access to justice, community needs and benefits and the need for national coordination of existing services. Section five consists of details regarding the development, structure and implementation of the actual service proposed and clarifies the roles to be played at both national and regional levels. Sections six and seven relate to the roles to be played in the proposed service by the ATSILS and government respectively. And finally, section eight will discuss the need for the development of appropriate methods for evaluating the proposed service and will be followed by a brief conclusion in section nine.

While this proposal specifically regards the issue of culturally appropriate alternative dispute management services, it is also of central importance to the concept of equal access to justice, and as such, it is hoped that it is given the level of consideration that it deserves. Furthermore, it is hoped that the Commonwealth and State and Territory Governments accept the recommendations contained in this proposal and take action to establish culturally appropriate dispute resolution and conflict management services throughout urban, rural and remote Australia under the umbrella of the proposed service.

2. About the ATSILS

ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law as well as human rights law and policy. It also offers community and prisoner support programs to both men and women. Its services are available throughout WA via seventeen regional and remote offices and one head office in Perth.

ALSWA is a representative body with sixteen executive officers elected by Aboriginal peoples from their local regions to speak on law and justice issues. ALSWA is a legal service provider solely for Aboriginal peoples living in WA and makes submissions on that basis.

Senior Management of ALSWA consists of a Chief Executive Officer, Executive Officer and the Director of Legal Services. The organisation also has a Practice Manager who oversees practice obligations in regards to the Criminal, Civil, Family and Law and Advocacy Units and in regards to the organisation's seventeen regional offices. Each of these units and most regional offices (but not all) are managed by a Managing Solicitor and staffed by Solicitors, Aboriginal Court Officers and administrative support staff. The Law and Advocacy Unit of ALSWA employs a Policy Officer, International Law and Human Rights Solicitor, Media Officer and Prison Support Team.

VALS

VALS was established as a community owned and controlled co-operative society in 1973. VALS plays an important role in providing legal aid and assistance to Aboriginal and Torres Strait Islander peoples in the areas of criminal, civil and family law and is also actively involved in community development, research and law reform. VALS maintains a strong client service focus and provides services from its head office in Melbourne, and six regional offices located at Bairnsdale, Heywood, Mildura, Morwell, Shepparton, Swan Hill, and Ballarat.

Membership is open to all Indigenous people resident in Victoria aged 18 and over. Members elect seven Indigenous people to the Board of Directors at the Annual General Meeting. The Board, which meets monthly, is responsible for the operation of the organisation.

The internal management of VALS consists of the Chief Executive Officer, who is responsible for the day to day operation of the organisation, and three Executive Officers, each responsible for the operations of the Legal Practice Unit, Research, Planning & Development Unit, and the Corporate and Financial Services Unit.

CAALAS

Founded in 1973, CAALAS provides high quality, culturally appropriate criminal, civil and family legal advice and representation to Aboriginal and Torres Strait Islander peoples living in Central Australia. Additionally, the organisation advocates for the rights of indigenous people, provides community legal education and assists released prisoners and their families in their reintegration into the community.

CAALAS has grown over the years and now has around thirty-five full-time employees based in Alice Springs and Tennant Creek. In addition to providing representation in the Alice Springs and Tennant Creek sittings of various courts, CAALAS lawyers and field officers also regularly attend bush court sittings in the communities of Ali Curung, Elliott, Hermannsburg, Kintore, Mutitjulu, Papunya, Ti Tree and Yuendumu.

ALRM

ALRM is an independent Aboriginal community controlled organisation governed by an all Aboriginal Board. The Board of ten members is appointed from Aboriginal communities from metropolitan and country centres across South Australia.

Through the provision of legal services and associated activities, ALRM promotes legal, cultural, economic, political and social rights for Aboriginal and Torres Strait Islander peoples as dispossessed peoples within South Australia. ALRM provides comprehensive legal advice and assistance in the areas of criminal and civil law to people of Aboriginal descent and their spouses. ALRM has its head office in Adelaide and four regional offices in Murray Bridge, Ceduna, Port Augusta and Coober Pedy.

ALRM's major aim is to advance the legal interests of Aboriginal people in South Australia and to ensure that those interests and rights are protected by the law and not adversely affected by abuse or misuse of any powers under the law. ALRM also acts as a lobby group, and where able, implements support programs that assist in addressing some of the issues known to contribute to Aboriginal people coming into contact with the criminal justice system.

NAAJA

NAAJA is a non-profit private company established on 1 February 2006. It involved the merger of three existing Aboriginal Legal Services in Darwin, Nhulunbuy and Katherine from community council based organisations into a single entity company called NAAJA. NAAJA employs a staff of seventy-one people, including thirty-eight lawyers, over its three offices in Darwin, Katherine and Nhulunbuy, with 46 per cent of staff being Aboriginal.

NAAJA delivers quality and culturally appropriate Aboriginal Legal Services to the Top End of the Northern Territory in the areas of criminal law, family law and civil law. NAAJA is also heavily involved in the advocacy of a range of systemic legal issues affecting Aboriginal people and the provision of community legal education.

NAAJA has an experienced and dedicated Board comprised of twelve Board Directors, with four representatives from each of the three regions that NAAJA services – Darwin, Katherine and Nhulunbuy. The Board is entirely Aboriginal controlled, and determines the direction of its membership.

ATSILS (Qld)

ATSILS (Qld) is a non-profit, community based organisation that provides criminal, civil and family law services to Aboriginal and Torres Strait Islander Australians and their families in Queensland. ATSILS (Qld) also provides services in the programme areas of law reform and community education, deaths in custody monitoring, and prevention, diversion and rehabilitation.

With a team of over 160 staff across the State, fifteen regional offices, and nine satellite offices, in addition to the head office in Brisbane, ATSILS (Qld) bring together a wealth of experience in the fields of criminal, civil and family law. Growth in the areas of law reform and social work/prison support in recent years has also allowed us to provide a more diverse range of related services to communities across the State.

ATSILS (Qld) has a Board comprised of nine directors elected from its Aboriginal and Torres Strait Islander membership. A specialist director is also appointed to provide additional guidance in the areas of finance and corporate governance. The operational management team is comprised of a Chief Executive Officer; Principal Legal Officer; and Finance Manager who look to our Board of Directors for strategic direction and advice.

ALS (NSW/ACT)

The ALS (NSW/ACT) was created in 2006, when the six ATSILS that had previously served NSW merged to form one state wide service. ALS (NSW/ACT) seeks to achieve justice for Aboriginal people and communities through the provision of culturally appropriate legal advice and representation.

ALS (NSW/ACT) is predominantly a criminal law practice which provides advice and representation for both Indigenous adults and young persons via its head office in Parramatta and twenty regional offices located around NSW and ACT. In addition, ALS (NSW/ACT) also provides services in child protection matters. In the past, it was also able to provide clients with representation in civil matters and family law, however, a reduction in real funding means that it can no longer provide any assistance in these matters at present.

3. Background

It has been highly documented that the Western style of dispute resolution and conflict management can be culturally alienating towards Aboriginal and Torres Strait Islander peoples.¹ As reported by the Productivity Commission, economic disadvantage means that while Aboriginal and Torres Strait Islander peoples are dependent on government provided services, mainstream services often do not meet their needs.²

A report for the Attorney-General's Department (AGD) on violence in Aboriginal and Torres Strait Islander communities has also noted that mainstream mediation services do not figure highly in violence prevention programmes studied.³ Also, evaluations of mainstream dispute resolution and conflict management services have shown that Aboriginal and Torres Strait Islander peoples avoid such services, especially when they do not have Aboriginal or Torres Strait Islander peoples on staff.⁴ Such lack of engagement can be explained by the numerous barriers faced by Aboriginal and Torres Strait Islander peoples in accessing mainstream dispute resolution and conflict management services. These include, but are not limited to:

- The cultural differences and lack of experience that Aboriginal and Torres Strait Islander peoples have had with dispute resolution processes means that such concepts may not make sense to members of these communities.⁵ Furthermore there is often a lack of understanding amongst Aboriginal and Torres Strait Islander peoples that a mediator is neutral, and they are left feeling that they are in a pseudo-judicial system where the "judge" is on the side of the other party.
- Communication barriers relating not only to difficulties with speaking, reading and understanding Standard Australian English, but also in regards to correspondence. Aboriginal and Torres Strait Islander peoples are more likely to be in rental accommodation or experience overcrowding at home and hence, may experience difficulties in accessing reliable and private telephone, mail and internet services.⁶
- Financial constraints experienced by many Aboriginal and Torres Strait Islander peoples. Many of the people for whom these services may be deemed appropriate are dependent on CentreLink entitlements. They often do not own or have access to a motor vehicle. In cases of family law matters, they often have several children whom they may not be able to find alternative care for.
- Many Aboriginal and Torres Strait Islander peoples are reliant on public transport to get to dispute management services. Sometimes, without other arrangements for travel it may seem too overwhelming and people will not show up for their appointment.

¹ L Behrendt, *Aboriginal Dispute Resolution* (1995) 53-67.

² National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) National Alternative Dispute Resolution Advisory Council <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_IndigenousDisputeResolutionandConflictManagement> at 3 November 2009, 9.

³ P Memmot et al, *Violence in Aboriginal Communities* (2001) 71.

⁴ B White, *Evaluation of the Alice Springs Counselling Service and Reengagement of Aboriginal Family Consultants in Alice Springs and Darwin* (1998) cited in National Alternative Dispute Resolution Advisory Council, above n 2, 9.

⁵ National Alternative Dispute Resolution Advisory Council, above n 2, 9.

⁶ Ibid.

- Time and place issues. Different understandings of time may cause confusion and difficulty in regards to the setting and keeping of appointments. Physical spaces may be intimidating, and due to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, certain environments may remind individuals of previously negative experiences with the formal justice system.
- The complexity of Aboriginal and Torres Strait Islander disputes means that mainstream services may not be equipped to deal with such characteristics and mainstream processes may not fit. For example, Aboriginal and Torres Strait Islander disputes often involve many parties and numerous overlapping issues, evolve over a longer period of time and involve the process of 'healing' relationships rather than just settling the definitive dispute at hand. Aboriginal and Torres Strait Islander peoples are also far more likely to live in multi-family households⁷ and family relationships may also include people who are not biologically related.⁸
- Services may not be readily available due to the fact that a large number of Aboriginal and Torres Strait Islander peoples live in remote or very remote areas of Australia.
- The traditional principles which inform mainstream mediation such as, the neutrality of the mediator, confidentiality and voluntary attendance can be inconsistent with Aboriginal and Torres Strait Islander customs and values.⁹

It is clear that mainstream dispute resolution services are not being utilised by Aboriginal and Torres Strait Islander peoples. The reason for this is not that Aboriginal and Torres Strait Islander peoples reject alternative dispute resolution as a means to deal with conflict, but rather, that purely Western models of dispute resolution often clash with, and do not meet the needs of, contemporary Aboriginal and Torres Strait Islander peoples.¹⁰ In fact, evaluations have shown that the presence of Aboriginal and Torres Strait Islander mediators and staff has led to usage by Aboriginal and Torres Strait Islander peoples of services which they had previously avoided.¹¹

Dispute resolution and conflict management services have been established as an alternative to the Court system as a better and more appropriate means through which justice can be more effectively served in certain types of cases. However, Aboriginal and Torres Strait Islander peoples are being denied this alternative because such services are often culturally alienating to them.

⁷ Social Justice Commissioner, *Statistical Overview of Aboriginal and Torres Strait Islander People in Australia* (2004) Australian Human Rights and Equal Opportunity Commission
<http://www.hreoc.gov.au/Social_Justice/statistics/index.html#App2_3> at 15 December 2009.

⁸ Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report* (2004) Attorney-General's Department

<[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~28+FEB+ATSI+22+Dec+04.pdf/\\$file/28+FEB+ATSI+22+Dec+04.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~28+FEB+ATSI+22+Dec+04.pdf/$file/28+FEB+ATSI+22+Dec+04.pdf)> at 5 November 2009, 30.

⁹ M Suavé, 'Mediation: Towards an Aboriginal Conceptualisation' (1996) 3(81) *Aboriginal Law Bulletin*, 10-12, 10.

¹⁰ National Alternative Dispute Resolution Advisory Council, above n 2, 3.

¹¹ Mandala Consulting, *Review of the Dispute Settlement Centre of Victoria Koori Programme* (2002) Australian Institute of Aboriginal and Torres Strait Islander Studies
<http://ntru.aiatsis.gov.au/ifamp/events/pdfs/Koori_Program.pdf> at 27 November 2009.

It is time that Aboriginal and Torres Strait Islander peoples received the same access to justice and the same opportunities to resolve their disputes and deal with conflict in their communities, as those made available to the mainstream population. The ATSILS recommend that in order to achieve this, the proposed service should be established in Australia, to operate in urban, rural and remote areas. Until such a service is established, Aboriginal and Torres Strait Islander communities will continue to be denied access to justice in this way and will continue to deal with disputes either through the Court system or not at all.

4. Need for the Service

There are numerous reasons as to why the proposed service should be established. The three central arguments however, relate to equal access to justice, community needs and benefits, and the need to build on the success of current services.

4.1. Access to justice

In discussing the establishment of the proposed service, it is important to highlight the concept of 'access to justice', which is underpinned by the Australian ethos that access to justice is central to the rule of law and integral to the enjoyment of basic human rights.¹² On a theoretical platform it is an essential precondition to social inclusion and a critical element of a well-functioning democracy.¹³ It has also increasingly become the focus of Commonwealth and State/Territory Governments.

The ATSILS support the aim of increasing access to justice holistically for Aboriginal and Torres Strait Islander peoples, and supports the Commonwealth Strategic Framework on Access to Justice in the Federal Civil Justice System (Framework) which focuses on the five key principles of accessibility, appropriateness, equity, efficiency and effectiveness, which in turn are designed to support a justice system that aims to:

- allocate resources more efficiently;
- promote fair outcomes;
- encourage the early resolution of problems and disputes;
- enable matters to be directed to the most appropriate method for resolution;
- identify broader issues which may cause specific legal problems; and
- empower individuals, where possible, to resolve their own disputes.¹⁴

However, in light of these principles and aims, it must be asked how Aboriginal and Torres Strait Islander peoples will realistically or practically benefit from the five principles and six aims of the Framework without the establishment of the proposed service.

If the key aims of the Framework, as informed by the principles outlined above, are brought to life through the proposed service, then and only then will Aboriginal and Torres Strait Islander peoples have genuine access to justice in this area, and have a reasonable expectation of success in managing conflict, violence and tension in their own communities. As it was stated in the foreword to the Framework Report, "the critical test is whether our justice system...provides effective early intervention to help people

¹² Access to Justice Taskforce Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) ix.

¹³ *Ibid.*

¹⁴ *Ibid* 65.

resolve problems before they escalate and lead to entrenched disadvantage.”¹⁵ Effective and culturally appropriate dispute resolution and conflict management services are paramount to Australia’s justice systems passing this test.

Recommendation 11.4 of the Framework recommends that the “Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians.”¹⁶ At present, in order to access the Family Court of Australia disputants have to first obtain a certificate from a Family Relationships Centre (FRC) stating that they have attempted mediation, unless they qualify for an exemption, as they are the only body recognised by the Court to do so.

Due to the fact that such centres are often not culturally appropriate or accessible to people in remote and regional areas, Aboriginal and Torres Strait Islander peoples can be discouraged from accessing them, and hence are obstructed from accessing the Family Court of Australia. To address this situation the ATSILS recommend that the proposed service be given the same recognition as FRCs by the Family Court of Australia. This would remove the obstacles described above and increase access to justice for Aboriginal and Torres Strait Islander peoples. Such action would also serve as recognition of the fact that civil and family legal issues can, and do, escalate into criminal acts resulting in criminal charges, which perpetuates the cycle of over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

4.2. Community need

There has been a considerable and alarming rise in the national data for legal representation of Aboriginal and Torres Strait Islander clients by the ATSILS.¹⁷ Such information reinforces the significant and substantial need for Aboriginal and Torres Strait Islander disputes to be resolved as early as possible and before they escalate into criminal matters¹⁸.

The proposed service would provide opportunities for individuals and communities to resolve matters at an early stage so as to prevent the often destructive consequences of escalated disputes. By providing opportunities for conflicts to be resolved before escalation, the proposed service would contribute to reducing the level of violence within communities, the healing of damaged relationships and the establishment of safer communities overall and would thus be consistent with the building blocks identified by COAG under its ‘Closing the Gap’ strategy.¹⁹

The proposed service would also deliver several important positive developments to urban, rural and remote communities. Dispute resolution and conflict management processes can fundamentally enable Aboriginal and Torres Strait Islander peoples to retain ownership of their disputes as they can place the means of dispute resolution back into Aboriginal and Torres Strait Islander hands. By ensuring such ownership, services provided by the proposed service would provide communities and individuals

¹⁵ Access to Justice Taskforce Attorney-General’s Department, above n 12, ix.

¹⁶ Ibid 171.

¹⁷ Department of Finance and Deregulation Office of Evaluation and Audit (Indigenous Programmes) *Evaluation of the Legal Aid for Indigenous Australians Program* (2008) 22.

¹⁸ J Fitzgerald, *Why are Aboriginal and Torres Strait Islander Peoples Imprisonment Rates Rising?* (2009) 1.

¹⁹ National Alternative Dispute Resolution Advisory Council, above n 2, 3.

with a sense of empowerment which comes from dealing with one's own conflict, as well as enhancing governance and decision-making skills.²⁰

Furthermore, it would help address the level of resentment and distrust held by Aboriginal and Torres Strait Islander peoples towards the judicial system by providing an opportunity for them to be proactive in the decision making process. Such benefits would extend well beyond individual disputes and would have positive flow on effects in numerous areas throughout the community. This would go some way towards addressing the entrenched disadvantage of Aboriginal and Torres Strait Islander peoples and 'Closing the Gap'.

4.3. Community benefits

The establishment of the proposed service would meet a dire overdue need present in Aboriginal and Torres Strait Islander communities and result in numerous social, cultural, economic and justice related benefits for members of these communities.

In recent years there has been increased recognition of the effectiveness of dispute resolution and conflict management processes in dealing with legal issues. This has led to the inclusion of such processes within State, Territory and Commonwealth justice systems. There has also been increasing international recognition of the value and sophistication of Indigenous conflict management processes and the recognition that Indigenous approaches to dispute management are an under-utilised resource.²¹

Despite this, Aboriginal and Torres Strait Islander peoples continue to be denied access to these services for the reasons outlined in the introduction of this proposal. There is a need for dispute resolution and conflict management services to be modified for use in Aboriginal and Torres Strait Islander contexts in order for them to be effective within, and utilised by these communities, and in order for individuals in these communities to have equal opportunities to settle legal issues without having to go through the more formal Court system.

Dispute resolution and conflict management processes, if performed in a culturally appropriate way, can reflect traditional Aboriginal and Torres Strait Islander dispute resolution practices, and can be a very effective tool. Mediation in particular, as a dispute resolution process, can engender a process which is inexpensive, informal, non-coercive, non-punitive and flexible in practice, making it "more suited to Aboriginal communities than the Western adversarial system."²²

The case studies and snap shots described in the '*Solid work you mob are doing - Case Studies in Aboriginal and Torres Strait Islander Dispute Resolution Management in Australia*' Report produced by the Federal Court of Australia, serve as evidence of how successful dispute resolution processes such as mediation can be, and what positive developments they can bring to communities, if they are modified and tailored to Aboriginal and Torres Strait Islander contexts.²³

²⁰ National Alternative Dispute Resolution Advisory Council, above n 2, 3.

²¹ Federal Court of Australia, *Solid work you mob are doing-Case Studies in Aboriginal and Torres Strait Islander Dispute Resolution Management in Australia* (2009) 137.

²² K L Pringle, 'Aboriginal Mediation: One Step Towards Re-Empowerment' (1996) 7(4) *Australian Dispute Resolution Journal*, 253-270, 254.

²³ Federal Court of Australia, above n 21, chapters 3-6.

4.4. Need for national coordination

Several Aboriginal and Torres Strait Islander dispute resolution and conflict management services have already been established, and the communities involved have already begun to enjoy the benefits of these. While these services show a promising start, they are by no means enjoyed nationwide across all urban, rural and remote areas. The success of such services, and the positive changes they have had in individual communities, is evidence of the fact that Aboriginal and Torres Strait Islander communities are in desperate need of culturally appropriate services and that if provided, they will be embraced and utilised. The success of existing services and programs provides a preview of what the proposed service could deliver.

While already existing services and programs are successful in the individual communities that they serve, they largely exist in isolation from each other. There is great potential for increased co-ordination and consolidation which could bring about benefits in regards to the sharing of best practice, profile development and the extension of services to more communities. The proposed service would be an excellent way to bring about such advances.

Services that already exist include:

- In the Native Title area, the National Native Title Tribunal (NNTT) and the Federal Court of Australia have undertaken initiatives to improve their mediation practices. The Australian Government has funded a project on Indigenous Facilitation and Mediation by the Native Title Research Unit of Australian Institute of Aboriginal and Torres Strait Islander Studies. The project aims to build the dispute resolution capacity of Native Title Representative Bodies.²⁴
- In the family law area, the Family Court of Australia has engaged Aboriginal and Torres Strait Islander family consultants to assist in the delivery of Family Court services, including primary dispute resolution services, to Aboriginal and Torres Strait Islander communities. Legal Aid New South Wales has also piloted an Aboriginal and Torres Strait Islander Family Mediation Project, and Legal Aid Queensland has conducted a study into the feasibility of a specialised Aboriginal and Torres Strait Islander Mediation service for family disputes. The Family Law Pathways Advisory Group also examined issues associated with the provision of family dispute resolution services to Aboriginal and Torres Strait Islander peoples.²⁵
- In Western Australia, a specialised Aboriginal Alternative Dispute Resolution Service was established in the early 1990s. The service focussed especially on inter-family feuding.²⁶
- Since the early 1990s specialised Indigenous dispute resolution projects have also been established under the auspices of community mediation programs, including the Indigenous Mediation Program in Queensland Dispute Resolution Centres, the Aboriginal Mediators Network in the New

²⁴ National Alternative Dispute Resolution Advisory Council, above n 2, 4.

²⁵ Ibid.

²⁶ Ibid.

South Wales Community Justice Centres and the Koori Mediation Program in the Victorian Dispute Settlement Centres.²⁷

- The Australian Human Rights Commission (AHRC) and State and Territory Equal Opportunity, Human Rights and Anti-Discrimination Commissions have conducted programs aimed at improving services to Aboriginal and Torres Strait Islander peoples²⁸.
- A recent project, Mawul Rom, aims to provide leadership and dispute resolution skills among Aboriginal and Torres Strait Islander youth and cross-cultural mediation training²⁹.
- In the criminal justice system, mediation-type approaches have been used in diversionary conference programs for Aboriginal and Torres Strait Islander peoples. Koori, Murri, and Nungah Courts, Western Australian Aboriginal Community Courts (located in Kalgoorlie and Norseman), and the New South Wales Circle Sentencing program use collaborative processes in deciding on sentencing options. These criminal justice programs, while not usually considered 'alternative dispute resolution' in the conventional sense, can use similar processes and may engage Aboriginal and Torres Strait Islander dispute resolution practitioners.³⁰
- The Mornington Island Restorative Justice Project (MIRJ) is funded by the AGD in partnership with the Dispute Resolution Branch of the Queensland Department of Justice and Attorney-General. The program has the capacity to accept preventative referrals to respond to the likelihood of escalating family violence as well as diversionary referrals from police and courts. The establishment of the program followed lengthy family focused consultation and detailed negotiations with community Elders, police, Aboriginal and Torres Strait Islander Services and magistrates. The MIRJ project aims to be inclusive of cultural needs and protocols whilst meeting the requirements of the justice system. One hundred and forty family members have participated in the three mediation sessions, and all three sessions were successful in removing the threat of escalating violence and prevented people from being charged with criminal offences.³¹

5. The proposed model

The model the ATSILS recommend for the proposed service is based on the recommendations of the "*Solid work you mob are doing-Case studies in Indigenous Dispute Resolution and Conflict Management in Australia*" Report conducted by the Federal Court of Australia with AIATSIS,³² and the subsequent recommendations released by the National Alternative Dispute Resolution Advisory Council (NADRAC).³³ The model, outlined below,

²⁷ Ibid.

²⁸ National Alternative Dispute Resolution Advisory Council, above n 2, 4.

²⁹ Ibid 5.

³⁰ Ibid.

³¹ Ibid.

³² Federal Court of Australia, above n 21, 137.

³³ M Kellam, *NADRAC Recommendations to the Attorney-General of Australia-Aboriginal and Torres Strait Islander Dispute resolution and Conflict Management* (2009) National Alternative Dispute Resolution Advisory Council
[http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(966BB47E522E848021A38A20280E238](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E238)

consists of a National Governing Body with a regional infrastructure comprised of Regional Services overseen by Regional Advisory Boards.

5.1. The National Governing Body

The National Governing Body of the proposed service would be established through a 'staged process' involving national roundtables initiated and co-ordinated by the Federal Government. The ATSILS recommend that those invited to participate should include:

- (a) National policy makers and advisers including relevant staff in the AGD, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), Department of Education, Employment and Workplace Relations (DEEWR), Federal Court of Australia, Family Court of Australia, NNTT, AIATSIS and NADRAC;
- (b) Service providers in each State and Territory (including those who are federally funded) and State and Territory policy makers, such as representatives of the relevant Indigenous Affairs and Justice departments, community mediation centres, police, 'mainstream' service providers, FRCs and services, Magistrates Courts, community justice organisations, and the ATSILS; and
- (c) Aboriginal and Torres Strait Islander mediators and facilitators.

The process described above would be consistent with Recommendation 11.7 of the Commonwealth Access to Justice Framework which states that the "Attorney-General's Department should work with legal assistance service providers...to explore options for improving access to legal assistance in regional, rural and remote Australia."³⁴ National roundtables would enable relevant parties with the necessary skills, knowledge and expertise to discuss and formulate a blueprint for the National Governing Body in regards to organisational and governance structures. This blueprint would then be implemented by the Commonwealth Government.

Participants in national roundtables should keep in mind that the National Governing Body of the proposed service would play specific roles at the national and regional levels.

At the national level the National Governing Body would fulfil a role focused on national accreditation development and provision, facilitation of effective co-ordination and co-operation between Commonwealth Government agencies, Aboriginal and Torres Strait Islander organisations and Regional Services, research, providing a clearinghouse for best practice and profile development.

At a regional level, the National Governing Body would assist in the initial stages to identify appropriate service locations and establish Regional Advisory Boards, as described below. The Regional Advisory Boards themselves would then further develop Regional Services. It is envisioned that the Regional Advisory Boards, rather than the National Governing Body, would develop training programmes, culturally specific dispute resolution and conflict management protocols and processes, and community education and awareness raising campaigns that are specific to their respective locations.

[6\)~NADRAC+Recommendations.DOC/\\$file/NADRAC+Recommendations.DOC](#) > at 15 November 2009, 2-4.

³⁴ Access to Justice Taskforce Attorney-General's Department, above n 12, 171.

The National Governing Body could:

Development

- Work with State and Territory governments and community service providers to identify appropriate locations for Regional Services;

Regional Panels

- Establish Regional Advisory Boards, which build on existing services and experts where possible, and support them in developing Regional Services and regional infrastructure;

Codes, Standards and Competencies

- Develop Aboriginal and Torres Strait Islander specific codes of ethics, standards and competencies for use nationwide;

Accreditation Structures

- Develop professional accreditation structures which complement the National Mediator Accreditation Scheme (NMAS) and establish itself as a Recognised Mediator Accreditation Body in order to accredit those practitioners who wish to become mediators under the NMAS³⁵. Accreditation standards should be based on recognition of special skills and assessment of abilities, rather than academic qualifications. Some current standards, such as those in the Family Law Regulations, should be reviewed in this regard;³⁶

Template Procedures

- Develop template procedures for monitoring and evaluation, mentoring of trainees and selection processes for trainees that can be adjusted at the regional level.

Co-operation and Co-ordination

- Facilitate effective co-operation and co-ordination between and amongst Commonwealth Government agencies, Aboriginal and Torres Strait Islander organisations, and Regional Services;

Clearinghouse

- Act as a clearinghouse for best practice and co-ordinate an annual national conference on best practice;

National Profile

- Develop a national profile for Aboriginal and Torres Strait dispute resolution and conflict management; and

³⁵ Kellam, above n 33, 3.

³⁶ National Alternative Dispute Resolution Advisory Council, above n 2, 14.

Research

- Conduct and manage ongoing research.

5.2. Regional Advisory Boards and Services

The fundamental diversity of Aboriginal and Torres Strait Islander peoples and communities must be carefully and respectfully addressed in the design and implementation of the proposed service.³⁷

The ATSILS believe that the best way to reflect such diversity is for regional service structure, policy, operating procedures, training programmes and information campaigns to be developed, tailored and delivered at the regional level where local needs and particularities can be taken into account.

Over-generalisations and homogenous approaches must be avoided. Cultural understandings, priorities and responsibilities to land and kin differ markedly between and amongst Aboriginal and Torres Strait Islander communities across Australia.³⁸ Aboriginal and Torres Strait Islander experiences, culture and attitudes to customary law vary across communities, gender and age groups, and are influenced by a range of social factors such as the degree of urbanisation and past and present conditions³⁹.

The Development of Regional Advisory Boards

The ATSILS propose that the National Governing Body establish Regional Advisory Boards which will then establish Regional Services. Regional Advisory Boards should build on, and take advantage of, the experience and knowledge of existing service networks. Regional Advisory Boards should incorporate and work with existing services rather than be established alongside them as a competing duplicate body.

The ATSILS propose that Regional Advisory Boards incorporate representatives from Aboriginal and Torres Strait Islander organisations and service providers, as well as relevant stakeholders and community leaders. The existence of Regional Advisory Boards will mean that the skills, knowledge and expertise possessed by relevant parties who may not be able to be directly involved in service delivery, will still be utilised in the development of Regional Services.

This accords with statements from the Federal Court of Australia who suggested that “regionally based services could be usefully guided by regional forums or committees, comprised of members of local justice groups and regional representatives of relevant service providers”⁴⁰. By incorporating the skills, knowledge and experience of such people within Regional Advisory Boards, it will help to ensure that Regional Services reflect both best practice and local community needs and particularities.

Role of Regional Advisory Boards

Regional Advisory Boards will need to develop policy guidelines, operating procedures and structural and governance arrangements before Regional Services can be established. Regional Advisory Boards will also need to develop regionally specific training programs and alternative dispute management protocols and processes that will

³⁷ Federal Court of Australia, above n 21, 99.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid 132.

be delivered by Regional Services. Regional Advisory Boards will also identify pathways for the delivery of community education and awareness raising campaigns. Once Regional Advisory Boards have developed these tools they will establish Regional Services and hand over the responsibility of day to day operation and service delivery.

In developing the above tools, the ATSILS recommend that Regional Advisory Boards conduct genuine community consultation, in respect of how a Regional Service could best be established in order to meet their needs, so as to ensure the creation of a service that reflects the needs and particularities of local communities. In regards to how to conduct genuine community consultation, the ATSILS recommend that the consultation process follow the guidelines that have been developed by the AHRC (see Appendix A). Such consultation will not only be essential in regards to ensuring that training programs, protocols, processes and Regional Service configuration in general are culturally appropriate and meet community needs and expectations, but will also be essential in securing community trust in, support of, and most importantly, participation and engagement with, Regional Services. Genuine consultation will also provide communities with a sense of ownership in regards to the eventual services provided.

Regional Advisory Boards could:

- Develop Regional Service structure, policy guidelines and operating procedures;
- Develop regionally and culturally specific dispute management protocols, processes, training programs and services through consultation with regional communities;
- Identify pathways for the provision of regionally specific community education and awareness raising campaigns regarding the existence of Regional Services and what they can do for people;
- Adjust national templates to develop regionally specific selection procedures for regional mediators, evaluation and monitoring processes and 'peer modelling' initiatives; and
- Retain staff to fulfil senior management positions within Regional Services who can then conduct interviews to fill remaining positions.

Role of Regional Services

Once established, Regional Services will be responsible for day to day operation and delivery of services. Regional Services will conduct training programs, deliver culturally tailored dispute management services and carry out effective education and awareness raising campaigns. The provision of effective community education and awareness raising campaigns will be critical in regards to securing community engagement with, and utilisation of, such services.

As mentioned above, the ATSILS propose that Regional Advisory Boards identify effective pathways for delivering such campaigns. However, due to the need for such campaigns to evolve and adapt over time to combat different issues which arise, the ATSILS recommend that the actual content of such campaigns be determined by Regional Services once in operation.

The adage used in the Commonwealth Access to Justice Framework is that in accessing the justice system there should be “no wrong number, no wrong door.”⁴¹ However, in the case of Aboriginal and Torres Strait Islander peoples, this adage might not be appropriate as there first needs to be education and raised awareness that there is in fact a “door” in the first place. Again, it must be emphasised that existing networks and services should be utilised here so as not to result in duplication and competing information.

By assigning the responsibility of designing and delivering education and awareness raising campaigns to the Regional Services, it will ensure that such campaigns are effectively tailored to local communities. For example, Regional Services will be able to utilise local languages, symbols and stories in order to effectively get the message across. The need for effective education and awareness raising campaigns is in line with Recommendation 6.4 of the Commonwealth Access to Justice Framework which states that:

“The Attorney-General’s Department should develop strategies to increase the accessibility of legal information and services among groups that may not be reached by more general programmes. This may include targeted advertising, technological solutions, and outreach programmes.”⁴²

Regional Services could:

Delivery of Services

- Provide dispute management services which are consistent with the policy guidelines and operating procedures developed by Regional Advisory Boards;
- Deliver training programs developed by Regional Advisory Boards; and
- Follow the selection procedures developed by Regional Advisory Boards in order to retain regional and local dispute management practitioners and co-ordinate their timely response to Aboriginal and Torres Strait Islander peoples’ resolution needs by matching practitioners with disputes;

Development

- In response to the pathways identified by the Regional Advisory Boards, develop and deliver regionally specific community education and awareness raising campaigns regarding the existence of the service and what it can do for people;

Monitoring and Evaluation

- Monitor and conduct periodic evaluations of training programs, dispute management protocols, processes and services using monitoring and evaluation methods developed by Regional Advisory Boards;

⁴¹ Access to Justice Taskforce Attorney-General’s Department, above n 12, 79.

⁴² Ibid 163.

Profile

- Promote the use of dispute resolution and conflict management processes amongst local service providers and government related agencies and departments;

Act as a Clearinghouse

- Identify and monitor community conflicts and serve as a clearing house for the consideration of potential interventions;

Co-ordination/Co-operation

- Co-operate with the courts, police and others working in the mainstream justice system, in order to provide information or evidence regarding Aboriginal and Torres Strait Islander culture and the justice system;
- Co-ordinate interagency activities and referrals, identifying and arranging appropriate therapeutic interventions where dispute management may not be appropriate;

Research

- Keep relevant data and statistics; and
- Identify relevant research.

6. The ATSILS role in the proposed model

The ATSILS are the preferred legal service provider for Aboriginal and Torres Strait Islander peoples. They occupy a pivotal role in relation to Aboriginal and Torres Strait Islander peoples and their contact with the justice system. The ATSILS are embraced by communities and play a critical role in the regional co-ordination of services.

The central relevance that the ATSILS would have in relation to the proposed service is evidenced by the critical role that was played by an Aboriginal Legal Service Field Officer in the Halls Creek mediation process outlined in the '*Solid work you mob are doing - case studies in Indigenous Dispute Resolution and Conflict Management in Australia*' Report. The Hall's Creek case involved two families who had been involved in a long running dispute that had escalated to the point where criminal charges were pending against individuals on both sides.⁴³ Chips Carmichael, an Aboriginal Legal Services Field Officer from Hall's Creek, was formally representing one of the parties and while this created a conflict of interest for Chips in regards to his direct involvement in any mediation process that might occur, it was acknowledged that his in depth knowledge of, and established relationships with, the parties involved would be a critical factor in securing their participation in a proposed mediation process.⁴⁴

Chips lived in Hall's Creek, knew the history of both the community and the parties involved and had already established relationships of trust with them.⁴⁵ Once the decision to propose mediation was made, these factors enabled Chips to successfully approach the disputants

⁴³ Federal Court of Australia, above n 21, 13.

⁴⁴ Ibid 18, 21.

⁴⁵ Ibid 23.

and facilitate their entry into the process.⁴⁶ Chips was also instrumental in helping the mediators map out the conflict as he had detailed knowledge of individual family dynamics as well as the relationship between the parties and how it had evolved over time, which enabled the mediators to better tailor the mediation process to the specific parties involved.⁴⁷ Chips also organised with the local Police for them to recommend to the Court that the relevant matters be adjourned until after the mediation process.⁴⁸

The knowledge and attributes that Chips contributed to the Hall's Creek mediation process should not be viewed as an isolated incident. The lesson that should be taken from this example is that the proposed service should utilise people like Chips Carmichael, who are known to the community and have local grassroots knowledge of how services can best be set up to meet the needs of the community.

Due to the unique position occupied by the ATSILS, it is recommended that the ATSILS be involved in the national roundtables that will establish the National Governing Body, as well as in the Regional Advisory Boards that will establish Regional Services. Due to conflict of interest issues in regards to disputants from a failed dispute resolution process seeking legal representation, the ATSILS do not wish to be involved in the direct delivery and operation of Regional Services under the proposed service. However, due to the ATSILS' existing relationship with, and knowledge of, Aboriginal and Torres Strait Islander communities, they would be ideally placed to contribute their expertise to the areas of service structure development and policy formulation.

In addition, the existence and experience of the ATSILS Community Legal Education Officers, and the fact that the ATSILS would become a central referral point of the proposed service because they are usually the 'first door' for many Aboriginal and Torres Strait Islander peoples, means that they would also be ideally placed to develop and deliver community education and awareness raising campaigns in partnership with Regional Advisory Boards and Regional Services.

The ATSILS already play a pivotal role in delivering Community Legal Education to Aboriginal and Torres Strait Islander communities in metropolitan, regional and remote areas. Community Legal Education delivered by the ATSILS is targeted and relevant to its audience. Community Legal Education programs are on the whole under-recognised in terms of their usefulness in the dissemination of information to Aboriginal and Torres Strait Islander communities regarding available services and options available to individuals with respect to the legal system.

There is also little acknowledgement of the financial burden such programs have upon the ATSILS. In light of the fact that the ATSILS already have experience in presenting Community Legal Education programs in culturally appropriate ways, it is recommended that additional funding should be allocated to the ATSILS for the purpose of expanding their role with respect to Community Legal Education and the proposed service.

⁴⁶ Federal Court of Australia, above n 21, 21.

⁴⁷ Ibid 23.

⁴⁸ Ibid 22.

7. Government role in the proposed model

7.1. Resourcing

Regional Services are going to need significant resources in order to ensure effective dispute management processes take place. Due to the complexity of Aboriginal and Torres Strait Islander disputes, it can take a significant amount of time and resources in order to clearly map out issues and relationships and to then work through them. This results in a much more resource intensive process than that which is often experienced in non-Aboriginal and Torres Strait Islander dispute resolution or conflict management processes.

Although Aboriginal and Torres Strait Islander dispute management processes may be more resource intensive, the long term benefits of a successful dispute resolution or conflict management process may be spread across different program areas and because of the intricacies of Aboriginal and Torres Strait Islander relationships, throughout the wider community also⁴⁹.

The ATSILS propose that funding be provided from the relevant sections of Commonwealth and State and Territory governments within a whole of government framework. Funding currently supplied to the ATSILS is already inadequate and has no capacity to be diverted for this cause. Finding additional funding for the proposed service is critical. As noted by NADRAC:

It takes time and resources to develop and manage dispute management processes in a genuine and sustaining way. This is true in any cultural setting, but perhaps especially so in the Indigenous context where there are particular needs to build mutual understandings, to address disadvantage and dysfunction, and to allow genuinely local responses to evolve. Specific support is also needed to ensure that men and women, and people from the range of language or clan groups within the community, are included...Communities also require support to build local capacity and to experiment, to trial and change processes as necessary.⁵⁰

While the proposed service will take significant effort and resources to establish, it would ultimately result in significant cost savings. For example the Federal Court of Australia has stated that

from a government or industry perspective, an investment in effectively managing disputes is likely to reduce costs caused by delays to projects, enhance the potential for meaningful partnerships with Indigenous communities, and avoid the costs of Indigenous contact with the criminal justice system.⁵¹

The Court also noted that

from an Indigenous perspective, effective dispute management can provide a permanent forum for community self-regulation and may form part of a community's justice and governance structures. In this sense, the functions of a national Indigenous dispute management service can be seen as integral to a broader response to 'Closing the Gap' and the building of safer, self-sustaining Indigenous communities.⁵²

⁴⁹ National Alternative Dispute Resolution Advisory Council, above n 2, 16.

⁵⁰ Federal Court of Australia, above n 21, 131.

⁵¹ Ibid 137.

⁵² Ibid.

If sufficient resources are not provided to ensure that services function effectively, or services are labelled as short term 'pilot' programs, this will discourage people from using the proposed service. If funding arrangements do not seem stable into the future then services may be viewed as temporary and they will not be utilised.

If there are not sufficient resources to "get the word out" through effective education and awareness raising campaigns, then individuals and communities will not know that the service is even there. Failure to secure engagement for these reasons may be misunderstood as Aboriginal and Torres Strait peoples not wanting the proposed service, which would be highly regrettable.

7.2. The Need for a Co-ordinated Government Approach

It is important to recognise that conflict in Aboriginal and Torres Strait Islander communities can often be complex and may have underlying situational or systemic causes. For example, overcrowding, health issues, inappropriate housing, financial issues, drug and alcohol dependency and grief often contribute to or exacerbate conflicts. Hence, effective dispute resolution or conflict management may require numerous complementary strategies before and after mediation which go beyond the normal scope of a mainstream service.⁵³ In other words, intervention into a conflict by way of dispute resolution and conflict management services may also need to be "accompanied by - and intertwined with - other interventions related to legal, housing and health issues".⁵⁴

If underlying situational or systemic causes are not addressed then while the individual dispute may be resolved, the underlying causes remain unaddressed and will likely cause more conflict in the future.⁵⁵ Thus, policy should be focused on not only intervening to 'fix' a specific problem but also identifying, supporting and developing co-ordinated networks of people and services in the community which not only serve to resolve the immediate dispute at hand, but also the wider range of underlying causes.⁵⁶ It may also be necessary to integrate a "follow-on" service to ensure that actions reached at alternative dispute resolution are carried through.

These recommendations are consistent with the Commonwealth Access to Justice Framework whose 'appropriateness' principle states that "legal issues may be symptomatic of broader non-legal issues" and that "the justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues."⁵⁷ Addressing the real causes of conflict will also mean that any resolutions reached will undoubtedly be more sustainable and last longer. What this means is that a whole of government approach is needed in order to provide Aboriginal and Torres Strait Islander peoples with opportunities to effectively deal with conflict in their communities.

Therefore, the ATSILS recommend that the proposed service should incorporate co-ordination between government services under the responsibility of the AGD, FaHCSIA and DEEWR. Such co-ordination should focus on providing greater access to family law and family dispute resolution and mediation through the AGD, community based programs through FaHCSIA and employment and training initiatives through DEEWR. This will in turn provide avenues for early intervention, diversion, rehabilitation and dispute resolution services to prevent conflict from escalating within Aboriginal and

⁵³ Federal Court of Australia, above n 21, 110.

⁵⁴ Ibid 127.

⁵⁵ Ibid 110.

⁵⁶ Ibid 127.

⁵⁷ Access to Justice Taskforce Attorney-General's Department, above n 12, 62.

Torres Strait Islander communities. This kind of co-ordination and co-operation will need to be incorporated into both the national and regional tiers of the proposed service.

Co-operation from police will also be essential in order to ensure that on-going police training programs promote the benefits and use of dispute resolution and conflict management processes as a more effective option for resolving disputes and conflict within Aboriginal and Torres Strait Islander communities than control mechanisms, harassment practices and the more formal justice system.

8. Evaluation methods

Conventional methods of evaluation may not provide a reliable or valid picture of effectiveness when it comes to dispute resolution and conflict management in Aboriginal and Torres Strait Islander contexts.⁵⁸ Due to the multi-party nature of Aboriginal and Torres Strait Islander disputes, it is unfair to expect the same level of 'success' to be reached in negotiated outcomes than for mainstream mediations. That is, if 'success' is defined by the number of settlements and partial settlements reached.

It has been noted that Aboriginal and Torres Strait Islander perspectives on measures of outcomes differ from non-Aboriginal and Torres Strait Islander perspectives, that indicators affect each other and that much of the current available data is deficient as it measures met rather than unmet needs⁵⁹.

Conventional statistical collection is also likely to be misleading, firstly because the data may not be collected accurately (for example, due to literacy issues) and secondly because statistics often fail to provide a valid picture of a complex dispute resolution, or conflict management, process.⁶⁰ Conventional qualitative surveys face similar problems in relation to service delivery, for example, literacy issues, lack of understanding of the process, and difficulties in identifying informants.⁶¹ Individual case studies may provide more useful information but can be resource intensive.⁶²

Thus, new methods of evaluating the effectiveness of Aboriginal and Torres Strait Islander dispute resolution and conflict management services will need to be developed. Perhaps, rather than focusing on how many settlements or partial settlements are reached, best practice might entail evaluations that are based on the party's level of satisfaction with the process. Hence, client satisfaction analysis might need to focus on whether relationships were restored or whether judicial intervention was circumvented.

9. Conclusion

The principles, aims and recommendations contained in the Commonwealth Access to Justice Framework justify the establishment of the proposed service. The establishment of the proposed service is also consistent with the approach taken by COAG in 'Closing the Gap' between Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples.

⁵⁸ National Alternative Dispute Resolution Advisory Council, above n 2, 16.

⁵⁹ Ibid.

⁶⁰ R Chadbourne, *An Evaluation of the Aboriginal Alternative Dispute Resolution Project* (1992) cited in National Alternative Dispute Resolution Advisory Council, above n 2, 11.

⁶¹ C Cunneen et al, *Evaluation of ATSI-FAM* (2005) cited in National Alternative Dispute Resolution Advisory Council, above n 2, 11.

⁶² National Alternative Dispute Resolution Advisory Council, above n 2, 16.

The goals contained in the National Aboriginal and Torres Strait Islander Law and Justice Framework 2009-2015 aim to “improve all Australian justice systems in order that the justice systems comprehensively deliver on the justice needs of Aboriginal peoples and Torres Strait Islanders in a fair and equitable manner” and are consistent with taking action to implement the proposed service.⁶³

The conclusions of the Federal Court of Australia in its *‘Solid work you mob are doing- Case Studies in Aboriginal and Torres Strait Islander Dispute Resolution Management in Australia* Report ultimately point to the need for the proposed service to provide consistent and specialised services to Aboriginal and Torres Strait Islander peoples in a wide range of contexts.⁶⁴ Further, the NADRAC recommendations which followed the Federal Court of Australia Report also align with the establishment of the proposed service.⁶⁵

There is a strong positive push among academics, dispute resolution and conflict management experts, Aboriginal and Torres Strait Islander communities, the Federal Court of Australia, the AGD and State and Territory governments, towards establishing culturally appropriate justice services. This, coupled with increasing international recognition of the value and sophistication of Aboriginal and Torres Strait Islander conflict management processes and the recognition that Aboriginal and Torres Strait Islander approaches to dispute management are an under-utilised resource, has created a certain degree of momentum. It is hoped that such momentum will continue and that a co-ordinated commitment by the Commonwealth and State and Territory Governments, to establish the proposed service, will be extended.

The ATSIILS therefore propose that the Commonwealth and State and Territory governments establish culturally appropriate dispute resolution and conflict management services throughout urban, rural and remote Australia under the umbrella of the proposed service.

⁶³ Access to Justice Taskforce Attorney-General’s Department, above n 12, 155.

⁶⁴ Federal Court of Australia, above n 21, 137.

⁶⁵ Kellam, above n 33, 2.

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Appendix A

PRINCIPLES THAT CONSTITUTE 'GENUINE CONSULTATION'

There are a number of principles and practices that can be made use of when defining 'genuine consultation'. These include the following:

The consultation process should be proportionate to the potential impacts of the proposed measure.⁶⁶

(a) *Initial Considerations*

- Enter consultations in good faith and with a view towards establishing or improving **long term working relationships** with Aboriginal communities.
- **Recognise the diversity of Aboriginal and Torres Strait Islander communities.** Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.
- Be mindful that well coordinated consultation processes are **time** and **resource intensive**.
- Do not assume that communities are familiar with your agency or that they understand your mandate or business.
- Be aware that there may be **misinformation** and/or a lack of understanding of the most basic issues related to your consultation topic.
- Make every effort to understand, acknowledge and **respond sensitively** to the alienation that community members may feel from government and government processes.

(b) *Effective Engagement*

- **Involve Aboriginal and Torres Strait Islander people at the outset.** Community leaders (for example traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.
- Respectfully **acknowledge** the involvement that participants have had historically in addressing the issue that is being discussed.
- **Identify the best ways to promote community consultation sessions.** This may involve advertisements in local newspapers, written notices on community notice boards or announcements on community radio.
- **Ensure that the conduct of consultations allow affected communities to have control over timeframes.** It is important to respect a community's right to choose the timing and location of consultations. It is also important to adopt a flexible approach to the consultation process. Be mindful that cultural events or religious

⁶⁶ Australian Government. Best Practice Regulation Handbook (2007) Department of Finance and regulation <<http://www.finance.gov.au/obpr/docs/handbook.pdf>> at 22 June 2009.

priorities and family and work responsibilities may impact on the availability of community members.

- **Ensure that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting traditional land owners, the Prescribed Body Corporate (PBC) local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital.
- **Ensure that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.
- **Have a prior understanding of and respect for local dispute resolution and decision making processes.** Where difficulties arise in relation to reaching agreement between various communities or groups during consultations, do not get involved. However, you may have to request assistance from local Mediation centres, the Ombudsman or resource an independent person or body to facilitate resolution of the dispute.
- Consultations must be based on **mutually agreed processes** and utilise **local knowledge** in order to achieve sustainable outcomes in Aboriginal and Torres Strait Islander communities. Provide people with a clear idea of **how their input** will be included in decision making processes.
- Consider how you will structure your sessions to answer your consultation questions and **maximise the quality of input from participants.**
- Be clear about **likely barriers** to stakeholder participation. You should also consider how you will interact with target groups including young people, aged people, people with disabilities, mothers etc.
- Keep consultations **focused, interactive and deliberative.** Creating an environment where people are comfortable with sharing their views may improve the quality of attention and information received from participants.
- **Where you need to consult with large numbers of people, providing for small group engagement is preferable to ensure that all people have an opportunity to give and receive information.** In some cases, communities or groups may demonstrate preferences for separate meetings based on age, gender or elder status.
- **Where possible, ensure that engagement is structured in a way to provide an incremental skills building process for participants.** For example, community members could develop a more comprehensive understanding of community development practices.
- Use various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation.
- It is important that government officers check for **participant understanding** periodically during the course of any consultation session.

- If necessary, consultation session should be **small and targeted** around specific stakeholder groups to protect privacy and confidentiality.
- The consultation should aim for a **gender balance** in relation to overall participant representation.
- Reach agreement with communities about **how feedback will be provided** after the consultation phase is concluded.
- Identify the best ways to **keep communities informed** about development regarding the issue/proposal.

(c) *Minimum Standard of Information Transparency*

- Be clear about what **outcome/s** the proposal seeks to achieve and what **issue/s** the proposal seeks to address.
- Be clear about the potential and real **risks, costs** and **benefits** of the proposed measure.
- Be clear about what **aspects of the proposed measure** Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern.
- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with a particular activity, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.
- **Notice of proposed measure/s must be given sufficiently in advance of its authorisation in order to give time for the community to reach informed consent or to arrive at considered points of difference.** Adequate resourcing should be provided to communities and specific stakeholder groups to support them in their discussions and decision making, prior to a formal consultation process. It is important to be respectful of Aboriginal and Torres Strait Islander peoples' timeframes to ensure inclusiveness around issues. Timeframes may be subject to cultural ceremonies and law, climatic and geographical conditions.
- **Government officers should provide full information regarding the parameters of the consultation, including what options are being considered as part of the consultation.** It is important that you have clear parameters around your consultation process, for example measuring the benefit and effectiveness of a specific measure. However your consultation process should be sufficiently open-ended so that community members have an opportunity to discuss concerns or propose alternative methods that, in their view, may achieve the same or enhanced outcomes. These views should be formally noted, participants should have an opportunity to fully communicate their wishes and aspirations as they relate to the future of their communities.

(d) *Implementation, Monitoring, and Evaluation*

- Provide **feedback** to communities as agreed at the front end of the process, including how decision making was influenced by the consultation process.

- Explain to community members the **likely timeframes** for the first phase of implementation.
- Identify how you will **accurately collect** and **record data** during consultations.
- Consider what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures.
- Notify communities in a timely manner when **outcomes** are announced.
- Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.
- To ensure that there is **transparency** around the consultation process and that consultation findings correspond to decision making, government agencies may like to appoint an independent observer or request the assistance of the commonwealth Ombudsman.
- Explain what, if any options community members have to call for a **review of decision making**.
- **Government agencies should publish their consultation protocols**. This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate/not feasible.
- **Regular monitoring** should be undertaken to ensure that actions taken for the purpose of the legislation are aligned with its core objectives.
- Government agencies should **evaluate** and **continuously improve** their consultation processes.
- Be **approachable, contactable** and meet the **commitments** you make to individuals and organisations throughout the consultation process.
- Remember that consent is NOT valid if it is obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with **ALL** the information relevant to a proposed measure.⁶⁷

⁶⁷ United Nations, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005) United Nations <<http://www.un.org/esa/socdev/unfii/documents/workshopFPICtamang.doc>> at 22 June 2009.