

## Cultural aspects of negotiation & alternative dispute resolution

<b>Culture</b>	<b>General observations</b>
<b>Generally</b>	<p>Culture is critical to who we are but can we make generalisations?            Are personality &amp; negotiating style more significant than cultural background?            What is the effect of education, work experience, TV/film, internet, travel, cross-cultural influences?            The extent to which traditional cultures have been eroded.            These are very broad categories. Be careful about broad generalisations, as we need to take each participant as we find them.            Different European stereotypes eg. complaining, loud, aloof, stubborn, arrogant, romantic, efficient, humourless, hard working.            Australian stereotypes e.g. laid back, she'll be right, sporty, heavy drinkers, segregation at the BBQ.            Bear in mind that there are also Christian denominations and a Tribunal for the Catholic Church for annulments of marriage.            Education and life experience are important considerations.            Fluency in English is not a prerequisite for intelligence.</p>
<b>What to do</b>	<p>There is a need for cultural awareness and sensitivity.            The values of other cultures, particularly, traditional cultures may be very different to our own.            Be mindful and respectful of cultural differences.            Be aware of our own sensitivities so that we remain neutral &amp; impartial.            Avoid making value judgements. Be alert to any bias we might have.            Be careful not to use expressions that participants may not understand.            Participants need to feel that they are being listened to.            Some societies and families are male dominated.            In some societies and families the women are the decision makers.            It is important to identify whether non-participants are also stakeholders in the mediation.            Sometime confidentiality will be significant.            Interpreters are best when they are physically present but interpreters have their own views and attitudes.            Do not be patronising.            Try to be impartial &amp; foster genuine participation.</p>
<b>Aboriginal</b>	<p>There can be a number of stakeholders eg. extended family, kin, multi-family households, boundaries between family &amp; community.            An initial phase might involve establishing where everyone is from and how they are related.            Look for relationships and support networks.            Conflict can be cross-generational &amp; historically based. Feuding.            Time frames may be different.            In traditional communities meeting on home ground and outside might be better.            Women's business and men's business in traditional communities.            The mediator may have to "shuttle" between two large groups.            Eye contact with older Aboriginal people may not be appropriate.            There could be a tradition of consensus being required.</p>

<b>African</b>	<p>The shame of marriage problems.  Fear of publicity.  Unlikely to say that they do not understand.  Forcefulness may be mistaken as aggressiveness.  Importance of talking things through.  May have a tradition of conciliation.  May be uncomfortable with a female mediator.</p>
<b>Asian</b>	<p>Inscrutable.  Subtle negative.  The spokesperson is often not the decision maker.  Familiarity with Sun Tzu's <i>Art of War</i>.  "Yes, yes" does not necessarily indicate agreement.  Focus on long-term relationships.  Once bound together no excuses for non-fulfilment.  Face saving.  "Just one more thing"  Use of "middle men"  Variations e.g. Osaka, Japan (merchants) v Tokyo (what's the latest)</p>
<b>Indian</b>	<p>Have a tradition of ADR legislation.  Lok Adalat ("peoples court") focuses on compromise.  "To be honest", "Let me be honest with you"  Hindu caste system</p>
<b>Jewish</b>	<p>Beth Din, house of judgment still sometimes used to resolve civil disputes.  Won't be first to make an offer, instead asking, "Give us your best offer?"  Then negotiate down from there.  Apocalyptic language.</p>
<b>Middle Eastern</b>	<p>The use of "middle men"  Baksheesh (a donation, tip or bribe)</p>
<b>Muslim</b>	<p>As with Christianity, there are different views of the Quran.  Men &amp; women are not equal and have different rights in family law, divorce, child residence and inheritance. Modesty.  Fasting for Ramadan from dawn to sunset.  Sharia commercial law eg. interest on a debt is not allowed.</p>
<b>Polynesian</b>	<p>Impolite to say "No"  Time may be irrelevant.  Eye contact may be a bit fierce but it could be important to meet their gaze.  Some subjects may be taboo.</p>
<b>Western</b>	<p>Materialism  Self-focus  Competitive  Gender equality  Adversarial legal tradition</p>

## Reading

### **Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community by Mohamed Keshavjee IB Tauris & Co Ltd 2013**

I have not read this book but the author is said to show how ADR can be used with Muslim teachings. “My hope is that my research will increase understanding of the cultural sensitivities of Muslims in the context of ADR and help to improve the conceptualisation and design of ADR training programmes for Muslims in the West.” (p. 17)

### ***Intersections between the Law, Religion and Human Rights Project* by Scholfield King Lawyers for the Australian Human Rights Commission Jan 2011**

[https://www.humanrights.gov.au/sites/.../law\\_religion\\_hr2011.doc](https://www.humanrights.gov.au/sites/.../law_religion_hr2011.doc)

Contracted to investigate the practice of ADR and ADR education in Islamic communities they concluded that more comprehensive and systematic research was required.

“...while there is strong evidence that immigrant communities from non-Anglo ethnicities are significantly under-represented in the use of family mediation services associated with the Australian Family Court (see Armstrong 2009:4) further research is needed to establish whether people from Islamic communities are over-represented among this group.” (p. 5)

### **The Way to the Watering Hole - Sharia Law by Sally Neighbour in The Monthly Dec 2010-Dec 2011**

Referring to Robin Inglis from the Fitzroy Legal Service in Melbourne, she says that the ideal of equality before the law is fine in principle but rarely achieved in practice, as minority groups such as Muslims often find the civil court system daunting, inaccessible, prohibitively expensive and incomprehensible.

Quoting Joumanah El Matrah of the Islamic Women’s Welfare Council of Victoria, “Muslim understanding and day-to-day ethics around relationships have changed, so this tradition of imitating practices formulated in the time of the Prophet Mohammed - I don’t think is acceptable to a vast majority of Muslims now.”

### ***Culturally Responsive Family Dispute Resolution in Family Relationship Centres* by Susan Armstrong School of Law University of Western Sydney 2010**

<http://www.catholiccare.org/sites/default/files/Report%20on%20Mediation.pdf>

This report was based on research that “sought to understand some of the reasons families from CALD [culturally and linguistically diverse] communities don’t readily use FRCs and so develop strategies to enhance accessibility to FRCs for CALD individuals and families.” (p. 9)

The report makes numerous recommendations for FRCs and in relation to FDRs says:-  
“Culturally responsive FDRPs are reflexive practitioners. They recognize that a range of cultural contexts might be relevant to families, and develop a practice of ongoing critical reflection about the relevance of their own personal and professional cultures to their FDR practice. They have developed the skills to use this knowledge and reflection to assist parties and their children in a way that responds to their wholeness and to the things that are important to the individuals in each family.” (p. 15) “A reflexive mediator is non-hierarchical, collaborative, and engages clients in conversations which privilege the client’s knowledge and meaning.” (p. 85)

Culturally responsive FDRPs are describes as those that:-

- “...recognise the centrality of a client’s cultural contexts in disputes about parenting.”
- “...culturally aware.” (p. 15)
- “... explore with clients whether and how elements of an individual’s culture may be accommodated in the FDR process. They avoid the traps of cultural relativism by being clear about the legal limits of accommodating culture, particularly where violence is present, but also understand that this assessment is a complex one. They will know when law, and procedural justice, trump culture and have the capacity to make this clear to the parties. Culturally responsive FDRPs respond effectively to the cultural dynamics of violence and of gender.” (p. 15)
- “...self awareness of their own cultural norms and the cultural norms of their professional practice.” (p. 15)
- “...lets the family be the expert of their experience and the educator of the practitioner in identifying what is problematic in the family. The competent practitioner will seek to explore the specific ways that this person is understanding, feeling and acting. To do this they must avoid making assumptions from the perspective of cultural dominance and naivety about the parties’ cultural contexts.” (p. 16)
- “...make inquiries effectively and respectfully.” (p. 16)
- “...understand the similarities between people everywhere, while maintaining an equally strong commitment to differences.” (p. 16)
- “...recognize that children’s best interests are culturally constructed. They appreciate that there are different concepts of best interest, and that their role is to challenge these if they appear inconsistent with children’s well being.” (p. 17)
- “...will be flexible and creative in devising strategies to respond to clients’ cultural contexts, and be supported by their service to do this. The role of the extended family in caring for children of separated CALD parents suggests that it might [be] valuable to explore the implications of adapting models of FDR to include the input of extended family members.” (p. 17)
- “...enough cultural knowledge is important for avoiding cultural transgressions and as a starting point for exploring the relevance of cultural issues with each client.” (p. 79)
- “at once an expert and a novice, they also acknowledge the limits of their cultural understanding.” (p. 79)
- “...distinguish between religious principles and cultural practices.” (p. 80)
- “[recognise] the complexity of navigating cultural terrains, particularly where they appeared inconsistent with dominant cultural beliefs regarding gender.” (p. 82)
- “...will “let the family be the expert” in deciding the issues...” (p. 86)
- “...explore the presence and implications of violence if one or both of the parties are from culturally diverse backgrounds.” (p. 88)
- “...develop a cultural “radar” which signals that cultural (or other) dimensions of an issue may need to be further explored.” (p. 89)
- “...familiar with that sinking feeling of being lost in translation with barriers to meaning making the cultural signposts just too difficult to read.” (p. 89)
- “...may require the use of male and female mediators...” (p. 95)

It is interesting to look at the diverse community profiles for local government areas in Western Sydney on pp. 50 & 51.

Chapter 6 goes into more detail about what FRCs and FDRPs can do to be more culturally responsive commences with the quotation:-

“...well culture is what we are... All our values are tied up in our culture... [It is] who you are, how you parent, how you play, how you love, how you live. So if we strip that from people and ask them to take on another identity then you strip them of all their resources. (Manager, FRC)” (p. 78)

The report commences and concludes with a quotation from *Dispute Resolution in Australia* by Astor & Chinkin Butterworths 2002, “[mediation] has the potential to bridge cultural gulfs and to allow people to understand both their own assumptions and those of others. However, in order to achieve these ends mediation must be supported by resources, skills and by the personal and political will to make it work.” (pp 17 & 103)

The report includes an extensive list of references.

Appendix 9.1 is an interview guide for FDRPs and FDR services.

Appendix 9.2 is an interview guide for services assisting culturally diverse families.

***Communication, representation, voice and choice: facilitating conversations on indigenous needs and aspirations: Part 1*** by Helen Bishop **ADR Bulletin Vol 11 No. 2 Article 2 2009**  
<http://epublications.bond.edu.au/adr/vol11/iss2/2>

The author believes that ADR processes could be used to assist Indigenous Australians overcome abject disadvantage and solve problems concerning themselves.

“As Indigenous people’s traditional cultural frameworks work for the collective interests of the group, it is plausible to suggest then that this form of problem solving is constructive on a number of levels. First the process seeks to build and foster trust, honesty and cooperation. The notion of constructive problem solving through ADR provides parties with access to such service so that parties may enter into discussions in the first instance, secondly that there is a commitment to maintain cultural practices of witnessing or confidentiality and thirdly that parties enter into this process do so voluntarily and with the best of intentions. The purpose of utilising ADR services means that parties recognise that they need assistance and would like to use a peaceful and non-aggressive form of dispute settlement and want to be involved in the decisions and arrangements that will ultimately affect their lives.” (p. 4)

“Where a non-Indigenous facilitator is engaged their patience and openness would be crucial to enable other world views to be explored, as well as using the best metaphor to represent the relevant parts of unshared experiences. Using metaphors therefore is a necessary skill in communicating and exploring unshared experiences ... I use my own cultural knowledge of kinship structures to demonstrate this point. Kinship relationships could be described as tapestries delicately woven throughout a community. The colour of each thread is an integral part of the strength, pattern and design, its function being to hold each thread together as is the skill of tapestry.” (p. 6)

“... a facilitator must be capable of fostering relationships, creating a collaborative framework and modelling an attitude to match engagement and cooperation. That is effective facilitators will have the composite skills, knowledge and attitude to be able to set a stage that is friendly and welcoming and will foster working impartially and harmoniously with all parties.” (p. 6)

“... at the commencement of any discussions ... in some cases a smoking ceremony could be used to trigger or stimulate a fresh and cleansed attitude.... In any event preparing parties is vital to motivate, focus and understand the purpose in yarning about difficulties so as to work cooperatively to overcome them.” (p. 6)

**Indigenous Dispute Resolution & Conflict Management by National Alternative Dispute Resolution Advisory Council (NADRAC) January 2006**

<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Indigenous%20Dispute%20Resolution%20and%20Conflict%20Management.PDF>

“... traditional Indigenous practices have been weakened over time and mainstream services are under-utilised by, and often ineffective with, Indigenous people.... Dispute resolution practices should take into account:

- additional intake and preparation issues
- the selection of practitioner(s)
- differing concepts of time and place
- attendances and representation at ADR sessions, and
- changes to conventional processes and ground rules.” (p. 1)

“It is important to avoid over-generalisations. Indigenous experiences, culture and attitudes to customary law vary across individuals, communities, gender and age groups, and are influenced by a range of social factors such as the degree of urbanisation.” (p.6)

“Weakened traditional processes are being confronted by new problems outside past experience. Moreover, Indigenous people’s experience of and attitudes about traditional dispute resolution have changed over time and vary from person to person and from community to community. Western and customary legal systems overlap not only in disputes between Indigenous and non-Indigenous people but also between Indigenous people themselves. For these reasons, a purely traditional system of dispute resolution is unlikely to meet all contemporary Indigenous needs.” (p. 7)

“Indigenous-specific services would be likely to develop different models, processes, concepts and terms that are more congruent with Indigenous experience. For example, a term such as “peace-making” may be preferred over “mediation”, the process may be described more like “having a yarn” than applying a strict process, and a dispute resolution or conflict management process may serve broad objectives, such as “healing” or “better governance”. (p. 8)

“Not all disputes involving Indigenous people can be dealt with Indigenous-specific services.... Indigenous-specific services may also not be appropriate in dispute between Indigenous and Non-Indigenous participants...” (p. 8)

“...where only one of the participants is Indigenous, the application of the western model may well be unfair and imbalanced.” (p. 10)

“Services may need to take an active role in meeting with the participants on their home ground, rather than expecting them to come to the service.” (p. 11)

“Taking time to explain western ways to Indigenous participants, or customary ways to non-Indigenous participants, may create perception of bias. It may therefore be necessary to explain to both Indigenous and non-Indigenous participants the reasons for different treatment.” (p. 11)

The report says that the ADR process itself may need to be discussed and negotiated e.g. participants may need to “come and go”; note-taking may be inappropriate; caucus may create mistrust; there may be a preference for an oral agreement or understanding; tolerance for strong language and even “ritualised fighting”; confidentiality may not make sense in some situations but be vital in others.

“The recruitment and training of Indigenous people as ADR practitioners or for a liaison role is a critical factor in improving the effectiveness of dispute resolution and conflict management services for Indigenous people.” (p. 13)

“Although Indigenous dispute resolution needs vary widely, disputes involving Indigenous people will tend to be more complex, involve a larger number of people, comprise a series of overlapping issues and evolve over a longer period of time when compared to non-Indigenous groups. Remoteness and educational and economic disadvantage create problems in service delivery. Dispute resolution and conflict management practices will need to be highly flexible and take into account different notions of time and use a range of venues. Although processes may be more resource intensive, the long term benefits of a successful dispute resolution or conflict management process may be spread across different program areas.” (p.16)

***The Art of War – Sun Tzu translated by Thomas Cleary Shambhala 2005***

There are many translations of this two thousand year old compilation on strategy. This translation includes commentary by ancient Chinese military figures and scholars.

***Report of the Committee of Inquiry into Aboriginal Customary Law by the Northern Territory Law Reform Committee 2003***

[www.nt.gov.au/justice/policycoord/.../lawmake/ntlrc\\_final\\_report.pdf](http://www.nt.gov.au/justice/policycoord/.../lawmake/ntlrc_final_report.pdf)

The report concentrated on Aboriginal communities and made a number of recommendations including: cross cultural training; video conferencing facilities to community Elders and witnesses could avoid travelling; each Aboriginal community should be assisted to develop its own plan to incorporate traditional law into the community in anyway that the community thinks appropriate (models may deal with ADR, family law issues, civil & criminal law and relationships with government); consultation about “promised brides”; inquiry into the traditional law punishment of “payback”; allowing a community sentencing model; increased participation of Aboriginal people in the justice system; and that Aboriginal customary law be recognised as a source of law as long as it does not conflict with Australian law.

“Regrettably, some Aboriginal communities have become dysfunctional, in the sense that *neither* Australian law nor traditional law is properly observed. The reasons for this lie in a whole host of economic and social factors. Concern was also expressed that in these communities the authority of the elders was being challenged and their numbers diminishing. Fears were expressed that the traditions were not being passed on to the new generations because of this. This represents an extraordinarily difficult problem which cannot be immediately resolved.” (p. 13)

The report identified that some judicial officers and court officials were insensitive and failed to understand many of the problems confronting tribal Aboriginals in a court situation. The aim should be to “sit down” with Aboriginal people and discuss problems in an informal way. Efforts also need to be made to explain to Aboriginal people the general law system.

“Much has been said and said frequently of the immense problems facing many Aboriginal people in a non-Aboriginal society, and on Aboriginal communities. There is no point in denying or evading the fact that drunkenness (grog culture), drugs and violence play a large part in some Aboriginal communities and among those who have ceased to belong to a community but have not merged into non-Aboriginal society. The reasons are many and various and we do not desire to discuss again what has already been explored in full. We do however point to one fact which is often overlooked that the proportion of non-drinkers amongst Aboriginals is higher than the proportion in non-Aboriginal society and that much of the statistics relate to a group of repeat offenders.” (p. 28)

***Caravanserai – Journey among Australian Muslims by Hanifa Deen Allen & Unwin 1995***

A collection of short stories about Australian men and women.

**Aboriginal Dispute Resolution by Larissa Behrendt Federation Press 1995**

The subtitle for the book is *A Step Toward Self-determination and Community Autonomy*. The focus is mainly on disputes over land.

“Traditional Aboriginal society has complicated laws and legal structures which reflect the cultural values of the Aboriginal community.” (p. 106) Traditional Aboriginal society had to deal with a complex society, small communities, large extended families, kin ties and communal decision-making. “The closeness and interdependence of a community meant that it was imperative for disputes to be resolved quickly and without animosity.” (p. 7)

“The legal system is not seen as an equitable tool by Aboriginal communities ... Aboriginal people have every right to be suspicious of the legal system.” (p. 1) Concerns are raised about the neutrality of mediators when there are often extended family ties and that mediators undermine the Elders. (pp. 64-65)

Some of the observations made include: some groups were patrilineal (based on kinship with father) others matrilineal (based on kinship with mother); “The relationship between men and women was one of partnership rather than subservience”; “Women Elders could wield as much influence within a group as a male Elder” (p. 13); “Certain clanspeople were more influential but no one had ultimate power ... continuity was stressed over change ... There was an egalitarian diffusion of power rather than a leader.” (p. 17)

A distinction is made between the cultural of Aboriginal and non-Aboriginal Australians (Table 1. p. 18):-

Traditional Aboriginal values	Non-Aboriginal values
Belief in custodianship of land	Land viewed in proprietary way
Equality with all other creatures	Superiority to all other creatures
Oral culture	Written tradition
Taught by example	Harsh disciplinarians
Reluctance to change	Openness to change
Communal	Individual
Egalitarian	Hierarchical
Co-operation	Competition
Respect for Elders	Youth oriented
Consensus	Authoritarian

Behrendt argues that urban Aboriginal people hold these same values and “Aboriginal people in urbanised areas continue to maintain their links with the land.” (p. 24)

Behrendt proposes a model of ADR for disputes between Aboriginal people. A council of Elders facilitates the process. The proceedings need to take place in public, traditionally outdoors, and in the community of the disputants. The parties sit in a circle. The Elders are one part and the disputants, their families and supporters sit on the sides facing the Elders. The process will be along the lines: the aggrieved person or initiating party states the issue; the Elders state the appropriate law; the other side speaks; others affected by the decision respond; the people in conflict are questioned by the Elders; and the Elders work toward an agreement. (pp. 79-87)

***The Asian Mind Game (A Westerner's survival manual) by Chin-ning Chu Stealth Productions 1995***

Chapter 3 of this book refers to Sun-Tzu Bing-Fa (The Art of War).

“All Chinese Bing-Fa texts agree that the essence of successful warfare is deception. Victory is to be achieved through any means and deception of the opponent plays a vital role in the strategy of war... When applied to business dealings, the word deception has strong connotations of unethical or illegal actions. These attitudes tend to make Westerners naïve and vulnerable to Asian strategies of deception. The ability to mislead an adversary has always been an admirable quality to Asians. This does not mean that Asians are without honour, but ethical distinctions are cultural. The differences between East and West are deep and sometimes hard for the Western mind to grasp.” (p. 32-33)

Then the chapter it goes on to list a number of principles:-

- If one is able and strong, then one should disguise oneself in order to appear inept and weak.
- When you are ready to attack, you must convey the impression that you will not attack
- When you are close, pretend you are far, but when you are far, you must give the illusion you are close.
- One should bait the enemy with small gains.
- If the enemy is well prepared, strong, well trained and secure in all areas, avoid direct confrontation.
- Create opportunities for victory by arousing your opponent's anger causing him to take foolish actions.
- Make your enemy grow proud and arrogant by expressing humility and weakness.
- When your opponent is inactive, give him no rest.
- Destroy your enemy's alliances, leaving them totally alone.
- Victory is determined before the battle begins.
- The five essential components of victory:-
  1. Know when to fight and when not to fight.
  2. Obtain the wholehearted support of your troops.
  3. Be well prepared to seize favourable opportunities.
  4. Free yourself from interference from superiors.
  5. When the time is right, act swiftly and decisively.
- The highest form of victory is to conquer by strategy.
- The opportunity for victory is provided by the enemy.
- The combination of basic elements into unique strategies.
- Use local guides.
- Keep plans as dark and impenetrable as night; move like a thunderbolt.
- Attack when the opponent is least prepared and least expects it.
- When the enemy speaks peace, he is plotting deception.
- When facing death, the struggle for survival will give new birth.
- Espionage

In Chapter 4 the book refers to 36 ancient Chinese strategies. “It is traditionally composed of six sections, each containing six related strategies. There are different versions of *The 36 Strategies*, but the arrangement of six sections of six strategies is always the same because of the significance of the number six in the *I Ching* and also the common perception among Chinese that the number six is associated with deceit.” (p. 52) “The phrase “36 strategies” is a common Chinese expression used to describe someone's actions as deceitful. Even Chinese children are aware of its meaning. The Chinese maintain that their study of these strategies is not motivated by a desire to deceive others, but rather to recognise and prevent these

strategies from being used against them.” (p. 53). (The *I Ching* is an ancient Chinese text, *Book of Changes*, a classic of Confucianism based on the principles of yin and yang.)

Some of the strategies are: 1. *Deceive the sky and cross the ocean* (it is sometimes necessary that a falsehood be openly displayed and the truth hidden); 2. *Surrounding Wei to rescue Zao* (instead of taking on a strong enemy head-on, divert the enemy’s strength, attack vital points and avoid direct confrontation); 4. *Make your enemy work while you wait at leisure*; 6. *Display your forces in the East and attack in the West*; 7. *Create something from nothing*; 8. *Secretly utilise the Chen Chang Passage* (distract the opponent); 9. *Watch the fire burning across the river* (be patient); 10. *Knife hidden under smiling face*; 15. *Entice the tiger to leave the mountain*; 17. *Trade a brick for a piece of jade*; 18. *Defeat the enemy by capturing their chief*; 19. *Remove the firewood under the cooking pot* (undermine an opponent’s strength); 26. *The hidden message* (Asian peoples do not always say things directly, especially if they are unpleasant. Listen for subtle hints); 27. *Pretend to be a pig in order to eat the tiger* (pretend to be weak to catch an enemy off guard); 29. *Be wise but play the fool*; 30. *Provoke emotions*; 31. *The beauty trap*; 33. *Espionage and counterespionage*; 35. *Chain links* (combining strategies); 36. *Escape is the best policy* (retreat when faced with unfavourable conditions).