

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 25 February 2008

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Mr G. Lekakis, Chairperson,

Mr C. Pagonis, Senior Policy Adviser, and

Mr S. Dimopoulos, Manager, Policy and Projects, Victorian Multicultural Commission.

The CHAIR — Thank you for coming to speak to us this afternoon. There are a couple of quick formalities that I am sure you are familiar with. The discussion we will be having this afternoon comes under the Parliamentary Committees Act. This means that it is covered by parliamentary privilege, but if you say the same remarks outside the hearing you are not covered by that privilege. Hansard staff will be recording our discussions, and you will be sent a copy of that soon after the meeting so you can make any minor changes to it.

Thank you very much for the material you sent. The submission has been read. We have some things we want to talk to you about, but the best way to start is if you could give us a bit of an account of the commission's work in this particular area and speak to the submission and to the terms of reference.

Mr LEKAKIS — Thank you for the opportunity to address this committee. Alternative dispute resolution is a very important process for resolving difficulties in our communities, and it is an experience that in some traditional cultures is used quite extensively. Reaffirming the path away from the courts to a more client-focused, client-friendly dispute resolution process will only benefit Victorians of all cultures.

The commission obviously throughout its last six years at most public consultations has had to deal with the concept of dispute resolution in very marked ways in that a lot of communities have dealt with legal entities, but they have also talked to us about some of the difficulties they have encountered; in particular some of the issues concerning family matters and family problems, matters concerning interventions by DHS and other issues regarding family law and those types of matters. Obviously nobody needs to state any further that Victoria is a very complex, culturally diverse society, therefore our processes to respond and deliver services to that complex society need to be attuned adequately in order to deal with them, particularly with alternative dispute resolution.

ADR programs need to be responsive to cultural and linguistic diversity in Victorian communities. Natural justice requires that a Victorian with no or low English proficiency or with a different cultural heritage should have an opportunity to access ADR programs and services, find the service usable and obtain an equitable outcome. Sometimes it is contrary to that overall principle. A regular range of disputations experienced by members of the wider community can be compounded by people in ethnic communities, especially the more recently arrived. Compounding factors can include a lack of familiarity with Australian law or no familiarity with Australian or state laws, or local laws for that matter; institutions and norms and the stresses that overlay the resettlement process, particularly for refugees and particularly for people from the African continent. Again I state that family mediation is a critical area where it has been stated over and over again there is a need for adequate handling in alternative dispute resolution procedures.

As with earlier waves of migrants and refugees, many sections of our African-Australian groupings are experiencing acute dislocation of their traditional, social and community values and practices which, when not addressed sensitively, can give rise to compounding tensions and conflict. Leaders and representatives of these new and emerging communities sometimes find themselves in disputation over the establishment, development and direction of their fledgling community organisations also, and our commission sees ADR playing a valuable facilitative role in dealing with some of the conflicts that have a potential to become litigious.

Protocols, for example, need to be explored between Consumer Affairs — the corporate office — and ADR agencies. For example, if there is conflict persisting in community organisations, rather than that matter being resolved through legal means, as a matter of course, the specific section of the consumer affairs department as a matter of protocol sends off those disputes to ADR as an initial step. Practitioners involved in ADR programs and services obviously need to have cultural sensitivities, so the issue about cross-cultural training for practitioners of ADR services is essential. This includes an understanding of traditional community values, family roles, pre-arrival refugee experiences, the cultural appropriateness of interventions, options and training on the effective use of interpreters. So anybody who does mediation work or is involved in the delivery of these alternative dispute resolution services needs to have that as part of their ongoing training, and familiarity with the different cultural groups they will be dealing with.

Community education is very important — that ADR agencies have traditional and non-traditional strategies of disseminating information. They can do stuff like printed and web-based translations about ADR programs and services, and they are very important. Obviously that information can be divulged to a potential client who will be involved in those sorts of processes about steps to take, procedures to follow, the availability and how the whole process works. On top of that, information about ADR really does need to go forward in the community in a broader sense with the presentation of material in ethnic community newspapers, radio programs, particularly

targeting communities that are susceptible to not knowing about the legal process and not knowing how to handle both family and community disputes and more broader legal problems they might experience — in other words, working closely with new and emerging community groups and their media outlets to deliver specific information about alternative dispute resolution.

Further to this, it is always good to have bilingual presenters who are familiar with ADR going out to community groups and speaking directly to people. We have seen a whole swag of government programs that have done this in the past — health promotion programs, programs promoting a whole host of government initiatives and programs. It is important for those people to go out and explain what alternative dispute resolution is all about within those networks. You might speak to a group of Somali women at the high-rise estate in Flemington. That acts as a trigger for a whole range of women in that community to know about alternative procedures for handling some of their difficult problems. It is very important that we have a range of methods in disseminating information.

It should be factored in that in every alternative dispute resolution process, interpreters are engaged in order to facilitate the communication. Previous speakers mentioned that, but it should be the rule. Obviously the complexity of dialogue, the nuances, dealing with the conflict and all of those matters are not something that most interpreters can handle, so you need specifically equipped people in order to do that particular type of job. Therefore it would be good for alternative dispute resolution agencies to provide specific training to interpreters whom they can then use as a pool to draw from and have within those mediation sessions so that at least the interpreters you are getting are not people who do not know what the processes are about or what the protocols are about and they know how to act impartially and effectively. It is important that an ADR agency that uses interpreters works with the contractor, if they do have a contractor — I know that the Department of Justice does not have a single contractor; hopefully in the future we might get to that. But the agencies that do it have trained interpreters in order for that to happen.

Ultimately the best procedure in dealing with mediation is to use bilingual mediators, so you avoid the notion of having interpretative information not being carried properly and all sorts of other problems occurring if you have a group of professional bilingual mediators that you train and you have on call to assist you in resolving disputes. We have had the experience with a dispute resolution centre, where there has been the employment and training of bilingual personnel, and by far that is obviously the optimum scenario. It also acts to provide better skills for people in the community who engage in this sort of work, and it also allows you to tap into some of the candidates in new and emerging languages and new communities, who could possibly act as mediators — African elders and other people. If they understand what the legalities and the processes and the frameworks are, they can then use their mediation role to its full potential. A development of this sort of model would address a lot of the challenges that have been posed to alternative dispute resolution.

They are the sorts of issues that we would like to see this parliamentary inquiry take into consideration. Obviously we believe alternative dispute resolution can be quite consistent with cultural practices. Victoria's migrant and refugee communities would strongly support any moves to enhance the capacity of those services to meet the various problems that arise. There should be some specific program designs and specific matters that ADR services do as a matter of course, and also, looking at the future, there should be consideration for greater liaison and consultation with communities, cross-cultural training for practitioners, information dissemination about ADR services to communities and quality data collection on take up of services. You cannot have an ADR agency without any people from different backgrounds who use it, given that our courts are full, and our police stations and a whole range of others do not experience the same problem.

We would see this Law Reform Committee as putting forward some clear-cut guidelines and suggestions for the more effective use, more effective understanding of, and better servicing of communities through what we believe are good ways of settling disputes in Victoria.

The CHAIR — Thank you, George, that is great. The way you talk and the way we all talk about this issue is that we talk about how the message of ADR in this instance can be properly communicated to the variety of multicultural communities and also new arrivals. You instanced the African-Australian communities, the newer communities coming here, and how important it is to have interpreters and translators talking about that because they understand the culture where the message is going. Just keeping that in mind, what I want to ask you is: the recipients, the people hearing this, have a set of what they think law is in their own home countries, so when we talk about 'alternative', the assumption in that is that it is alternative to the court system. But if you do not have a

particular engagement with the court system, then ‘alternative’ obviously is not necessarily an alternative to anything; it is just the way things happen. People then work out their own ways of doing things.

I am thinking as an example of the community that we both know well, the Jewish community, which is now working towards establishing the Beth Din. I do not know whether you are familiar with that — the local court around marriage. I read recently it is moving into commercial dispute resolution. There is a community, well entrenched in Australia over many years, working on a really interesting development. That is one thing. Then it may be — and I do not know about this; I am asking you to reflect on it — that in the Sudanese community, where you talked about the elders, are there structures there that the mainstream community could support, while not creating a separate system, and could start to help us work out a common approach?

Mr LEKAKIS — If the common goal is to resolve disputes under the framework of laws, then if there is an opportunity for those disputes to be settled — in this context, the Jewish-community context — it is a matter of accreditation that the dispute resolution service that the Jewish community is running is subject to meeting certain standards. And if it is accredited and can do the job, keep people away from courts and resolve their problems, then so be it.

Now whether there are other communities that have the same capacity is yet to be tested, but at least the ADR services that are there can do their best to both understand from the community how it engages in mediation, what frameworks and concepts they use in resolving problems and, more importantly, recruit people from those communities to actually do the mediations themselves so that there is some sense of confidence that that person behind the table will understand where the parties are coming from.

I was part of a tribunal that also spoke in Greek as part of the Social Security Appeals Tribunal. All the members spoke in Greek so the client of Greek background who came before the tribunal could speak to us in a language that they were familiar with. The tribunal hearing went for an hour less than usual and most people, even if they lost the case, felt comfortable that they could actually deliver the information in their own language. We dealt with the same law, but we delivered it in a way that was responsive to the client. Clients were floored when they heard us introducing the tribunal and its process to them.

I am not averse to specific mediation programs or specific administrative review mechanisms being done in a culturally appropriate way, as long as they follow the legal framework that we have, then that is fine.

Mr DONNELLAN — When Consumer Affairs Victoria rolls out a new one do they actually come to VMC and say, ‘We have got a couple of emerging communities’ — it might be the Afghanis, Sudanese or Somalis — ‘How do you think we should roll out this service to them?’. Does Consumer Affairs or whoever is rolling out the alternate dispute resolution service in that particular area, whether it be small business, and there are many of them, actually speak to the VMC about what you guys think or, in other words, what does the organisation think?

Mr LEKAKIS — It is not often that we do, but the dispute resolution centre did come, in its formative days, to actually discuss things, and it did look at training and employing bilingual dispute mediators. That was greeted with great joy, both from the point of view of the community, that they were then able to provide service to the community and inform them that they would get an appropriate service in the language. But overall we do not often get consumer affairs or other bodies coming to us and saying, ‘This is what we want to do’. Not on all occasions. We do sometimes, but I do not have, from memory, a great list of meetings with consumer affairs to discuss tenancy tribunal matters or other dispute resolution matters that they develop, or respond to, or put forward.

Mr FOLEY — A key part of our reference is:

to reduce the need, where possible, for contact with the court system, particularly in marginalised communities —

as part of the alternate dispute resolution procedure. We have had submissions from Victoria Police as the, if you like, pointy bit between the court system and the community. From your organisation’s point of view, what is going on at that point of the process to assist in diversion programs, once people are into the system, for culturally appropriate ways to then divert or give cautions in an appropriate manner that both operate within the legal framework of the community and to avoid the very things we are trying to avoid it here of a conduct in court system?

Mr LEKAKIS — It is not a uniform practice, but some police districts do involve community elders as part of resolving particular conflicts. In the Dandenong and south-eastern area they bring community elders in when it comes to discussing specific problems with individuals and they have a mechanism where they come in, if they apprehend a young person of a particular background. But it is not a uniform thing; it does not happen across the state; it is very much up to the initiative of an inspector in a local area. If it were uniformly applied that alternative dispute resolution procedures be engaged before people get summoned to go before the courts or other hearings, then I think it will only act in the best interests of Victorians and might sort out problems before they get through to the courts. Most people presenting before the courts in our system depend very much on their legal representation and whether they have access to it. Any mechanism that provides them with an opportunity to sort out a problem before it gets there is a very good thing.

Mr FOLEY — And at the other end of the system, once you are either in the court system or pre-sentencing or post-sentencing, do you see any role in which particularly newly arrived communities could be dealt with in sensitive ways?

Mr LEKAKIS — Opportunities particularly for young people to seek better pathways outside the courts would be some way of dealing with problems in a much more beneficial way. With repeat offenders, obviously it is something that ultimately we have to confront, how far we exhaust a non-punitive system to a more reconciliatory approach. But at the end of the day every opportunity must be made to at least provide people presenting before courts with an alternate process.

The CHAIR — Could I just come back to the point I was raising before? You have talked about it again, George, with regard to the elders being brought in. We saw, I think it was last year, where there were issues involving members of the Sudanese community in parts of Melbourne. Over the next few days we then heard spokespersons from the community speaking about how they were working with police and other local agencies to try to resolve these things. I did not see that in its depth at all — I was just looking at it in the newspaper — but does the commission know anything about what happened underneath? How were people selected and what kinds of ongoing work has been done there that could be useful to the committee perhaps to speak to people about all that?

Mr LEKAKIS — People came forward by association. No systematic recruitment occurred. No training occurred. It was the goodwill of community members of particular organisations who have familiar or lasting relationships with inspectors or sergeants in particular areas. It is not a systemic thing. What we are arguing is that if you are going to have bilingual mediators and they happen to be African, then you go out and recruit them. If they are good and they are people with great intentions and have some experience in mediation and they are elders, then you might as well set them up to succeed and to make them fully aware of what is going on around them. Then they can be called upon to perform that role with remuneration and with the training and the status that is involved. They know all sides. It is not a hit-or-miss, or something that is done through the goodwill of a particular individual, but it is a systemic response to resolving problems.

The CHAIR — It has also been put to this committee that ADR — I do not think I am overstating it; correct me if I am — by its very nature is Western European in its categories and the way it operates and the way it thinks, and that we need to be much more responsive and mindful of the way it is culturally bound in that way. I take it from what you are saying, without putting words in your mouth, that you do not agree with that assessment of it?

Mr LEKAKIS — Alternative dispute resolution is a factor in every culture. You can apportion the same notion to Western-based counselling techniques and whether they are appropriate. ADR is performed by various individuals in every culture. The local policeman on the beat in a suburb might be the person who reconciles problems and gives directions on the way people should act. The local clergyman might be a focal point of reconciling differences for couples and communities. I do not need to go into a whole range of cultures and pinpoint where an alternative dispute resolution occurs, whether it is formalised or not formalised. I would argue that, if you do have a process of resolving conflict, whether we have that experience which is archetypal in every culture, what you need to do is make it available for understanding in the cultures that we do have, and get people to participate in it. Let us face it. If you can resolve a family problem outside the court system and settle it both for the parenting plan of the child and also for the assets and the property that are involved and you can avoid expensive litigation, people stand to benefit. In the same way, if you can mediate a problem between two

neighbours, people stand to benefit. Conflict is across cultures. We cannot say that conflict is something that is not a feature of every culture. Every culture has it, so let us try to resolve it.

The CHAIR — There are no more questions. We got there fast. You got 10 out of 10 and an elephant stamp.

Mr LEKAKIS — I think our submission lays it out. If we give alternative resolution a real go, we can stand to benefit. If I can refer two or three parties that are in conflict in an organisational context and get their problem resolved through mediation before they run off and go to courts, that would be great.

The CHAIR — That is great. Thank you very much. You will get a copy of the transcript, as you know.

Witnesses withdrew.