

/\*\* cr.journals: 390.0 \*\*/

\*\* Topic: ADR in Aboriginal & Islander commu \*\*

\*\* Written 7:22 pm Jan 11, 1994 by peg:adrd in cdp:cr.journals \*\*

## ALTERNATIVE DISPUTE RESOLUTION

### IN ABORIGINAL AND ISLANDER COMMUNITIES

### THE COMMUNITY JUSTICE PROGRAM'S EXPERIENCE

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Nils Christie, in a seminal article "Conflicts as Property" has argued that in modern times people have had their conflicts stolen from them by the state.

He argues that we ought to think of conflicts as property and furthermore that we ought to guard our conflicts jealously and not allow them to be stolen from us, or give them away. Christie says that in modern Western societies conflicts have been taken away from the parties directly involved and in the process they have either disappeared or become someone else's property. This is a problem, he argues, because conflicts are potentially very valuable resources for us as individuals and as communities. A range of personnel including lawyers, mental health professionals and bureaucrats, have colonised our conflicts.

Christie's conceptualisation of the role of the state as a coloniser of conflict is particularly relevant to the plight of indigenous people in this country. Aboriginal people have had not only their conflicts but their very culture and often their lives "stolen" by the state.

Aboriginal people are doubly oppressed, both by social conditions arising from the experience of being colonised which in many communities have resulted in high levels of social disorder and violence; and subsequently by the state's response to those manifestations of disorder including application of the law.

Traditional methods of dispute resolution have been taken away or have fallen into official disrepute. Nothing - save litigation - has yet replaced them.

Whilst the average Australian in the street is likely to be dissatisfied with aspects of our current legal system (eg costs, delays, formality etc), the concerns

of Aboriginal people regarding the operation of the legal system are of a far more serious nature, even of a life and death nature. There is an urgent need to find new justice strategies for Aboriginal communities which are flexible enough to allow both systems of law, customary and Western, to be entertained and adapted to circumstances.

The Community Justice Program has been conducting a pilot Aboriginal mediation program for much of the last two years.

In this paper I will be outlining our activities and achievements in this regard, and highlighting some key issues and dilemmas.

## **THE ABORIGINAL MEDIATION PROJECT**

### **Background**

There was interest in mediation from Aboriginal people from the very earliest days of the Program. Representatives of the Aboriginal Co-ordinating Council approached the Attorney-General in 1990 even before the Community Justice Program opened its doors, seeking assistance in developing a mediation service for Aboriginal communities.

In March 1991, nine months after the Program commenced operations, we received an invitation to assist the people of Doomadgee who were experiencing conflict about the management of alcohol and alcohol related violence on their community.

In September 1991, encouraged by the success of the Doomadgee mediation, the Department of the Attorney-General provided special funding for two years for a pilot Aboriginal Mediation Project. A Project Officer was appointed and a project proposal prepared.

### **Strategies:**

Strategies developed for the project were:

Islander people including consultations about the general value of alternative dispute resolution and negotiations with specific communities about their participation;

#### **Mediation Project Officer**

Program mediation process to raise awareness within communities of alternatives in managing conflict;

conflict management skills to a core group of

Aboriginal and Torres Strait Islander people who could be used throughout ATSI communities;

alternative dispute resolution process on a Trust Area community which integrates traditional dispute resolution processes.

At about the same time that the Community Justice Program appointed its Project Officer, the Aboriginal Co-ordinating Council appointed a community justice project officer who works closely with the Community Justice Program on the mediation initiative. The Aboriginal Co-ordinating Council and its staff have been extremely supportive and co-operative and this has been an important factor in the project's success.

#### **Cairns ATSI Panel:**

Over two weeks in June and September 1992, the Program conducted a pilot mediation training course in Cairns for a select group of people comprising 15 Aboriginal and Islander and 3 non-Aboriginal participants. The three white persons selected are all actively involved with Aboriginal initiatives in Cairns. Eleven trainees were ultimately accredited with the Program by the Attorney-General.

This panel of mediators now provides a general service to the Cairns community as well as being utilised for visiting mediation services to the Deed of Grant In Trust (DOGIT) communities.

#### **Mediation Services for a Deed of Grant in Trust Community:**

Much of Queensland's Aboriginal and Islander population reside in isolated communities, formerly reserves and commonly known as DOGIT (Deed of Grant in Trust) or Trust communities.

The Program held consultations during the second half of 1992 with several communities with a view to selecting one community to pilot a mediation service.

A number of principles informed the manner in which we approached the task.

1. Commitment to skilling local people to mediate in disputes within their own community.
2. Recognition of the need to commence and develop the project in consultation with a community; and the need for broad community support given representational dilemmas in this cultural context.

3. Concern not to undermine the authority of elders and traditional dispute processing mechanisms which are in place to varying extents in different communities.
4. Acknowledgment that mediation is only one of a number of community justice mechanisms and that it would function best as part of a comprehensive set of interlocking strategies to address disputation and violence.
5. The need to develop culturally appropriate mediation models and training material.

The community ultimately selected was Hopevale, a community of approximately 1,000 persons located one hour's drive from Cooktown and 360 kms north of Cairns. Hopevale was originally a Lutheran mission which brought together Guugu Yimidhurr speaking clans from the Cooktown region and further North who had originally been dispossessed by the Palmer River Gold Rush and the spread of the cattle industry. The church continues to exercise a degree of influence, although more secular Western values have assumed greater influence in recent years.

The major issues facing the Community Justice Program in developing and implementing a mediation training package for an Aboriginal community were:

#### 1 Selection of Mediators

This was seen as pivotal to the success of the initiative.

Ideally those selected needed to be broadly representative of the community (this, in the context of customary law and authority systems and modern adaptations/impositions, is not easy to define), acceptable to the whole community, committed to the concept of mediation, available to undertake the training, and in possession of the interpersonal and analytic skills necessary to engage and manage the disputants and to track the content of the dispute.

Various options were considered for recruiting and selecting mediators. Ultimately, however, participants self selected following a number of visits to the community by Program staff, both to give information about the training project including demonstration role plays, and to mediate in a dispute.

Self selection may not necessarily be the best basis for choosing mediators in Aboriginal communities because of traditional cultural patterns which favour self deprecation in communication. Those most vocal and ready to take up such an opportunity offered from the outside may not be the persons with most influence or acceptability within the group.

Alternatively, members of marginalised families may feel unable to put themselves forward. As an outsider, only visiting the community, it is very difficult to develop a comprehensive and accurate understanding of these matters.

In the end sixteen people enrolled for the program. Nine people actually commenced the training course on 10 May.

## 2. Content and Structure of the Course

The Community Justice Program's standard training manual and training scripts for role plays were not considered culturally appropriate for the Hopevale course.

A special manual was developed and new role play scripts. The trainers were determined to be flexible and responsive to input from trainees. This need for flexibility was borne out.

The role play scripts required further amendment once the course commenced. The presence of only one woman in the group created difficulties as many of the role plays revolved around family feuding and required female roles. Male participants were very uncomfortable with role playing women.

Role play content was also amended by participants who wanted them to reflect actual disputes experienced at Hopevale. The trainers had originally written "neutral" situations which could not be construed as reflecting any current disputes on the community.

In order to accommodate the local lifestyle which would inevitably require participants' absence from the training course on family and other business, the course was extended from the usual 72 hours to 96, conducted between approximately 9.00 am and 3.00 pm, Monday to Thursday over four weeks, during May and June 1993, commencing with a two week block, followed by a week's break, and then the remaining two weeks.

### 3. Post Training Phase

Major challenges remain in the post training period to support trainees and maintain and enhance their skills as they attempt to exercise the role of mediator in an isolated community, and to evaluate the success of the initiative. Community willingness to use the local mediators is one of the factors which the Community Justice Program will be attempting to monitor in coming months.

#### Provision of Visiting Mediation Services:

Another strand of the Community Justice Program's work with Aboriginal and Islander communities has been the provision of a visiting mediation service, often on a crisis response basis.

Requests have come from several sources - the Aboriginal Co-ordinating Council, police, the offices of the Minister for Family Services and Aboriginal and Islander Affairs, and the Minister for Tourism, Racing and Sport who is responsible for liquor licensing and communities themselves where they have been familiar with the Program's work.

Mediators have visited seven communities to offer or provide a service, some on several occasions.

Whilst it is very demanding for mediators to enter an unfamiliar community on short notice, communities themselves often see the outsider role of the mediators as an advantage in terms of neutrality.

#### Matters mediated have included:

- Aboriginal Land Act 1991;
- residents' groups;
- the management of alcohol;
- authority and a community;

In addition to dispute resolution services provided to communities, the Community Justice Program has mediated in a number of disputes involving Aboriginal people in country towns and urban centres, and facilitated several consultation processes between government departments and Aboriginal stakeholders.

#### Issues here have included:

- in a country town;
- owned enterprise;
- the Department of Family Services and Aboriginal

and Islander Affairs to develop a strategy for caring for returned human remains and burial artefacts;  
Aboriginal people convened by the Department of Environment and Heritage on cultural heritage management;  
Health Minister's Aboriginal and Torres Strait Islander Advisory Council.

Our mediators who are trained in a structured twelve step process of mediation have found mediating in some of these disputes the most challenging of any area of our work. Because of the nature of social organisation and wider levels of involvement in disputes in Aboriginal communities, many of these exercises have involved up to 400 participants in meetings.

In entering a community in dispute mediators have difficult assessments to make about how matters might be best handled - whether by bringing key protagonists together for mediation, or whether large public meetings will more effectively address the conflict. Mediators must bear in mind that exclusion from a process, and even part-inclusion, allows for repudiation of both process and the results by any person with a continuing grievance. Mediators also need to quickly identify local power brokers, assess whether and how their support or opposition will affect process and outcomes, and gain their support for whatever dispute resolution process is planned.

#### Issues and Dilemmas:

Some of the hallmarks of classical mediation are severely challenged by adaptations to the Aboriginal community context including the concepts of neutrality, confidentiality and voluntary participation. For this reason, there is no plan at the current time to accredit the mediators trained at Hopevale, under the Dispute Resolution Centres Act 1990. It may not be possible nor appropriate for them to operate under the constraints imposed by the Act, nor would it be easy for the Director of the Program to meet legal and program accountability requirements for mediators operating under the circumstances envisaged at Hopevale.

#### Domestic Violence -

Family mediation also presents potential dilemmas in the Aboriginal and Islander context.

The Community Justice Program has a policy of not mediating between spouses where domestic violence is a problem. The Program's policy is consistent with that

adopted by the National Committee on Violence Against Women. Domestic violence is considered to represent too great an imbalance of power between the parties to enable justice to be achieved in mediation. Mediation may both expose the victim to physical danger or further harassment and intimidation as well as proving detrimental to her longer term interests as she attempts to negotiate from a position of weakness.

Aboriginal people commonly identify family fighting and domestic violence as concerns suitable for mediation. This has always represented a policy dilemma for women's advocates who seek to safeguard the interests of abused women, yet accommodate Aboriginal perspectives.

The Community Justice Program has not been called to mediate between Aboriginal or Islander spouses to date. The disputes with which we have dealt have been on a larger scale. It would be fair to say that there is general acknowledgment that further policy development informed by experience is required in relation to this sensitive issue.

Rowse says " Aborigines from a number of places have been observed to strive to make decision according to an ideal of consensus rather than by means of adversarial procedures accepted within non-Aboriginal associations. The hierarchical structure of such processes, and particularly their impact on Aboriginal women, require further analysis."

Astor says " Alternative methods of resolving disputes, such as mediation, may be useful or appropriate for Aboriginal women, but it should be for Aboriginal women to decide if this is so, to decide what types of ADR are appropriate and whether alternative methods provide sufficient protection for victims of violence."

## CONCLUSION

The Community Justice Program has now had two years' worth of experience in introducing mediation services to Aboriginal and Islander communities. The process has been far more complex and challenging than I have been able to convey in this paper. We believe that the results to date are very encouraging, although it is as yet unclear where the journey will take us.

To what extent alternative dispute resolution as practiced by the Community Justice Program will be adapted to indigenous needs and processes is yet to be seen. Also yet to be determined is the valuation to be

placed on such adaptation by our Program and its political masters. Will adaptations which deviate in significant respects from the ideal of mediation we hold up, be regarded as a measure of success or of failure of the Aboriginal mediation initiative?

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