
Alternative Dispute Resolution in Aboriginal and Islander Communities: The Community Justice Program's Experience

Christine Nolan

Nils Christie, Professor of Criminology at Oslo University, in a seminal article called *Conflicts as Property* (1977) 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 to give them away. Christie says that in modern Western societies conflicts have been taken away from the parties directly involved and in the process 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.

Nowhere is this whole process more painfully apparent than in the operation of the criminal law, where offences have become offences against the state, and others, primarily lawyers, generally speak on behalf of both victim and offender.

The outcomes of this process are well known. Offenders are isolated from the personal consequences of their actions by the formality of the process and the frequent delays in finalising matters. Victims are often doubly victimised—first by the offender and then by a criminal justice system which leaves them at the mercy of the schedules and agendas of officials.

The operation of the civil law is not immune from this critique either. As Christie (1977, p. 4) says:

Many among us have, as laymen, experienced the sad moments of truth when our lawyers tell us that our best arguments in our fight against our neighbour are without any legal relevance whatsoever and that we for God's sake ought to keep quiet about them in court. Instead they pick out arguments we might find irrelevant or even wrong to use (Christie 1977, p. 4).

If you accept this analysis, alternative dispute resolution becomes an important strategy for empowering individuals and communities. Mediation, for example, enables the parties to define the dispute in their own terms; to "own" and to share their feeling response to the conflict; to explore a range of options for resolution; and to settle on a mutually agreed solution. I should at this point define what I mean by mediation.

Mediation is the intervention into a dispute or negotiation by an acceptable impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute (Moore 1989, p. 14).

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 every aspect of 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, as manifested in the statistics on Aboriginal incarceration rates and deaths in custody.

Traditional methods of dispute resolution have been taken away and/or 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 (such as costs, delays and formality), 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. This paper outlines activities and achievements in this regard, and highlights some key issues and dilemmas.

The Community Justice Program

The Community Justice Program has been operating for almost three years. It was an initiative of the Queensland Attorney-General, Dean Wells, and was originally conceived as providing mediation services in primarily neighbour and family disputes.

Since those early beginnings the Community Justice Program has expanded its focus. It now provides dispute resolution services and training in a wide variety of contexts including workplace disputes; environmental and land use matters; citizen complaints against police; and crime victim-offender mediation.

The Program operates from four offices—Brisbane, Logan, Townsville and Mt Isa, but services a much wider area of the state through 008 call facilities. For example, there is a panel of mediators which has been recruited and trained in Cairns. When members of the Far North Queensland public want assistance they contact the Townsville Office via a 008 number.

They are interviewed by telephone and a mediation arranged which is held in Cairns at a suitable venue.

The Program has a staff establishment of eighteen of which the Aboriginal Mediation Project Officer is one. He is not the only person working on Aboriginal issues. Most of the staff, other than administrative staff, have been involved in mediating in disputes in Aboriginal communities or in disputes involving race issues. It has been a very exciting time for most of us as we are increasingly exposed to the experience and perspective of indigenous people.

In addition to the eighteen staff, there are approximately 110 mediators employed on a sessional basis as required. They are recruited on the basis of aptitude, not formal qualifications and undergo a rigorous 72-hour training course which is conducted on a pass/fail basis. They range in age from 17 to 70 and are from all sorts of backgrounds. Large panels of mediators are needed so that disputants can be matched with mediators with whom they will feel comfortable.

The mediators are paid A\$20 per hour. The Program exercises a number of quality assurance strategies:

- mediators always mediate in pairs;
- they are required to debrief one another at the end of each mediation and to prepare a report to the Program on a range of matters, including their own and their co-mediator's performance;
- feedback questionnaires are forwarded to all clients three months after the mediation;
- once a year mediators undergo a skills audit involving a videotaped and observed, simulated mediation.

To date, the Community Justice Program has opened over 4 000 dispute files, conducted almost 1 200 mediations and trained more than 150 mediators.

The Community Justice Program operates under legislation—the *Dispute Resolution Centres Act 1990* (Qld). This Act provides a number of important legal protections for mediators and for disputants.

It provides for confidential and privileged mediation sessions; it specifies the voluntary nature of mediation; it specifies that agreements reached in mediation are not enforceable at law; it preserves the legal rights and remedies available to the parties; it empowers police and magistrates to refer matters to mediation as an alternative to proceeding with charges with the exception of domestic violence.

The Aboriginal Mediation Project

There was interest in mediation from Aboriginal people from the very earliest days of the Program. Representatives of the Aboriginal Coordinating Council in Cairns 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.

Prior to the team of three mediators flying into Doomadgee, the consent was sought of all the major groups on the community. This is important because it cannot be assumed that the community endorses the representational role of any one body such as an elected Community Council. Such representational structures are not consistent with traditional forms of authority and decision making. Consequently, representational issues, that is, questions of who can speak, with authority, about what, are complex and often vexed for outsiders. The mediators met with groups separately and eventually together over six days to assist the community to identify options and strategies for managing the problems.

Doomadgee was only the first of a number of visiting mediation services provided to communities. Alongside the main activities of the pilot project, the Community Justice Program has been responding to requests for dispute resolution on communities by flying in mediators, often on very short notice. I briefly outline some of this work later in this paper.

In September 1991, the Department of the Attorney-General provided special funding of A\$90 000 a year for two years for a pilot Aboriginal Mediation Project.

Joan Welsh, one of the mediators who visited Doomadgee, was appointed as a temporary project officer to undertake consultations with communities and relevant agencies to research the issue and to prepare a proposal for the pilot project. She found strong support from Aboriginal people for the introduction of formal mediation services into Aboriginal communities.

Strategies

Strategies developed for the project were:

- extensive consultations with Aboriginal and Islander people including consultations about the general value of alternative dispute resolution and negotiations with specific communities about their participation;
- employment of an Aboriginal and Islander Mediation Project Officer to develop, in consultation with ATSI communities, culturally appropriate alternative dispute resolution processes;
- production of a video on the Community Justice Program mediation process to raise awareness within communities of alternatives in managing conflict;
- provision of training in mediation processes and conflict management skills to a core group of Aboriginal and Torres Strait Islander people who could be used throughout ATSI communities;
- trialing the establishment and operation of an alternative dispute resolution process on a Trust Area community which integrates traditional dispute resolution processes.

Project Officer

In March 1992, Alex Ackfun was employed as the Project Officer. Alex's previous employer was ATSIC. His personal skills and networks have proved critical to our ability to build

relationships with Aboriginal and Islander people, and to gain entree to various disputes. Alex has made a significant contribution to the success of this project.

Role of the Aboriginal Coordinating Council

At about the same time that the Community Justice Program appointed Alex Ackfun, the Aboriginal Coordinating Council appointed a community justice project officer who works closely with the Community Justice Program on the mediation initiative. This is Daisy Caltabiano. The Aboriginal Coordinating Council and its staff have been extremely supportive and cooperative and this has been an important factor in the project's success.

Video

The video, *Talk About It*, was launched in July 1992. It was filmed in part in Doomadgee and we were privileged to have Kev Carmody write and perform the title song for us. The video has proved a very useful strategy for spreading the word and building the Program's legitimacy.

Cairns ATSI Panel

In June 1992, the Program conducted a one-week pilot mediation training course in Cairns for a select group of people comprising fifteen Aboriginal and Islander and three non-Aboriginal participants. The three white persons selected are all actively involved with Aboriginal initiatives in Cairns.

The course was very successful and a further one week of training was provided in September 1992, which enabled those who successfully completed both weeks to receive accreditation by the Attorney-General. Fourteen trainees started the final week with eleven reaching the required standard.

This panel of mediators now provides a general service to the community as well as being utilised for visiting mediation services.

Mediation Services for a Deed of Grant in Trust Community

Much of Queensland's Aboriginal and Islander population reside in isolated communities, formerly reserves. These are commonly

known as Deed of Grant in Trust or Trust communities. Legislation passed by the previous government in 1986 provided for new land arrangements—deeds of grants in trust.

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 the task was approached:

- commitment to skilling local people to mediate in disputes within their own community;
- recognition of the need to commence and develop the project in consultation with a community. Broad community support was required in view of representational dilemmas referred to earlier;
- concern not to undermine the authority of elders and traditional dispute processing mechanisms which are in place to varying extents in different communities;
- acknowledgment that mediation is only one of a number of community justice mechanisms and that it would function to best advantage as part of a comprehensive set of interlocking strategies to address disputation and violence;
- development of 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 km north of Cairns. Hopevale was originally a Lutheran mission which brought together Guugu Yimidhirr 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.

I am pleased to report that training of mediators at Hopevale is now in its final week. The two trainers are Alex

Ackfun, the Aboriginal Mediation Project Officer and Patricia Hovey, the Program's full-time Training Officer.

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

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 including:

- advertising in the community;
- adopting a ready-made list of interested people provided by an elder;
- asking each of the major family groupings to nominate someone; and
- asking the Council to nominate people.

Ultimately, 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 an earlier 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.

An observation by Kolig is relevant here (1989, p. 56 cited in Rowse 1992, p. 47):

Expressing their prominence in rather subdued tone (outstanding men) would easily have escaped the attention of a person not

intimately familiar with the situation. They shunned the limelight of public speeches, grandiose gestures, or self-exhibitionism.

Thinking back, it strikes me that these men sported a relaxed, affable style being jovial, smiling and mild of manner. Yet a word casually uttered or jocularly said, rarely failed to make a noticeable impression. Their behaviour contrasted with the style of what I might call the lower level elite, those men aspiring to yet higher status, most of whom it appears to me now, were stern, tense, serious men (Kolig 1989, cited in Rowse 1992, p. 47).

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.

Sixteen people enrolled for the program. Nine persons actually commenced the training course on 10 May. The trainers report that of those attending none appear to be inappropriate choices for this community. All are respected and represent families within the community. Two are community police; one is a primary school teacher (a local person who went to Adelaide for teacher training and then returned to the community); one is the wife of a regional ATSIC Councillor and Chairman of the Cape York Land Council. The age range is from the late thirties onwards. Unfortunately only one of the participants is a woman.

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 has been 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 revolve around family feuding and require 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 they had experienced at Hopevale. In an attempt not to offend local sensitivities, 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 a.m. and 3.00 p.m., Monday to Thursday over four weeks, commencing with a two-week block, followed by a week's break, and then the remaining two weeks.

Attendance as expected has varied on a day-to-day basis from a maximum of nine people to a minimum of three as a result of participants' other obligations.

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 as such 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 for visiting mediation services have come from several sources—the Aboriginal Coordinating 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.

Providing services in this way is clearly a very expensive option for the Community Justice Program, although in a number of instances, Community Councils have assisted with expenses. The Community Justice Program is nevertheless committed to fulfilling its role in the Queensland "Whole of Government" approach to service delivery within Aboriginal communities.

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.

Some people may be familiar with the work of the Aboriginal Alternative Dispute Resolution Project in West Australia. It is a project of the Special Government Committee on Aboriginal/ Police and Community Relations conducted with funding provided by the Office of Multicultural Affairs. It has a specific focus on inter-family feuding (Chadbourne 1992).

Whilst a number of the mediations conducted by the Community Justice Program in Aboriginal communities also have had this focus, we have been involved with a broad range of matters including:

- a contested land claim under the Queensland *Aboriginal Land Act 1991*;
- conflicts between elected Community Councils and residents' groups;
- whole community planning for law and order and the management of alcohol;
- facilitation of discussions between a statutory authority and a community.

Conflicts between Community Councils and residents' groups is in part a by-product of the perceived/actual emergence of alternative power loci within communities, particularly women's groups in receipt of external funding. In view of the patriarchal nature of adopted structures, funded women's groups facilitating an independent women's perspective may be viewed as threatening existing arrangements and interests.

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:

- inter-racial violence in a country town;
- conflict between river bed dwellers and traders in a country town;
- large-scale family feuding;
- conflict over the management of an Aboriginal owned enterprise;
- facilitation of a three-day meeting convened by the Department of Family Services and Aboriginal and Islander Affairs to develop a strategy for caring for returned human remains and burial artefacts;
- facilitation of a one-day consultation with Aboriginal people convened by the Department of Environment and Heritage on cultural heritage management;
- facilitation of a planning exercise for the 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. 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.

Neutrality

The actual and perceived neutrality of the mediator is considered a significant factor in the success of mediation. This is not lost on Aboriginal and Islander people who, in many of the cases with which the Program has dealt, welcome the importation of outside mediators.

The Community Justice Program, whilst offering a visiting mediation service, is committed to skilling local Aboriginal people to resolve their own conflicts wherever possible, consistent with a principle of empowerment of indigenous peoples. Marg O'Donnell, the Director of the Community Justice Program, has said:

As with the issues of voluntary attendance and confidentiality, neutrality is a concept which will have special and sometimes limited application in the management of disputes on Aboriginal communities. It would be expected that local rules and procedures governing these fundamental concepts would emerge on a community basis (Community Justice Program 1993).

We are yet to witness the working out of these issues at Hopevale in the aftermath of the training course.

Voluntary Attendance

The voluntariness of mediation is enshrined in the legislation governing the operation of the Community Justice Program.

The relationship between mediation and various forms of formal or informal authority on communities is yet to be worked out. It has been suggested (Cedric Geia, personal

communication, 1992) that mediation may only be considered acceptable on some communities if a respected older person "orders" mediation for parties as the prescribed method of dispute settlement in particular cases. The alternative dispute resolution process is flexible enough to accommodate these variations. They should be considered by communities and decided according to local needs.

Confidentiality

In Western culture, the confidentiality of the mediation process is a key element which enhances the attractiveness of the mediation option for parties and contributes to its success through enabling a free and frank discussion without fear of legal consequences.

In Aboriginal society, privatisation of disputes as experienced in mainstream urban culture, is not possible, nor even necessarily desirable, in view of physical living arrangements and kinship obligations.

In many disputes, extended family or even the whole community are usually well aware of the history and causes of the dispute and will need to be aware of the outcomes of the mediation for resolution of the conflict to be achieved and any agreements implemented. A formal recognition of resolution, rather than solely resolution, may thus be required at this stage in some communities.

Discretion and sensitivity must be exercised by the mediators in managing information during all stages of the dispute resolution process.

Domestic Violence

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 (Astor 1991). Domestic violence is considered to represent too great an imbalance of power between the parties to enable justice to be done in mediation. Mediation may expose the victim to physical danger or further harassment and intimidation as well as proving detrimental to her long-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 (1992, p. 59) says:

Aborigines from a number of places have been observed to strive to make decisions 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 (Rowse 1992, p. 59).

Astor (1991, p. 19) 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 (Astor 1991, p. 19).

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 has been conveyed here. 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 practised 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?

The following extract from the *Mt Isa North West Star* of 5 January 1993 (p. 1) illustrates the ability of Aboriginal culture to adapt to changing circumstances by selecting and co-opting aspects of the dominant culture and making them their own.

Justice Program used to settle dispute

Community Justice Program (CJP) information was modified and used to successfully settle a family dispute at Doomadgee yesterday.

Doomadgee spokesman Mr Greg Sutherland said CJP information and a video sent to the town, had been modified by elders for use in Aboriginal communities.

He said its success would be documented for use in other Aboriginal and ethnic disputes.

Members of the Waayni and Gungaleda tribes started arguing about four days ago in the town, continuing a long-running dispute between two families.

"We believe the way we settled the problem was a positive reaction to a disappointing experience," Mr Sutherland said.

"A meeting of the Council of Elders in Doomadgee has solved most of the problems leading to the dispute."

Mr Sutherland said discussions would be held to consider a curfew for children, sly grogging and dealing with problems the traditional way.

Although sly grogging is a problem in Doomadgee, Mr Sutherland said alcohol was not an issue in the problems.

"It was not a riot and it was not a drunken melee," he said.

"It was a family dispute and with Aboriginal extended families, this can mean a lot of people."

Aboriginal and Islander Police Liaison Officer Senior Constable Chris Castley, who attended a meeting of elders held in Doomadgee yesterday, said the elders had successfully solved many of the problems.

Constable Castley said about 20 elders from the two tribes attended the meeting.

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