

# **MEDIATION WITHIN ABORIGINAL COMMUNITIES: ISSUES AND CHALLENGES**

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THE COMMUNITY JUSTICE PROGRAM WITHIN THE DEPARTMENT OF THE Attorney-General in Queensland is attempting to provide resources, services and ideas to Aboriginal people, particularly those on Deed of Grant in Trust (DOGIT) communities to enable them to manage their own disputes in a creative and powerful way. In doing so, the Community Justice Program is mindful of the need for ongoing consultation and liaison with Aboriginal and Torres Strait Islander people and communities. The preservation of functional, existing dispute resolution structures is also perceived to be of paramount importance as care is taken not to introduce yet another "solution" which communities neither want nor find relevant.

The Community Justice Program (CJP), an initiative of the Attorney-General of Queensland, the Honourable Dean Wells, opened its doors for business in Brisbane on 1 July 1990. Its brief was to provide a dispute resolution service to the State, firstly in the south-east corner, and then to extend gradually to all major provincial cities which would, in turn, service the surrounding regions. It has now been operating for two years.

A service is provided to the entire south-east region, from Gympie to the New South Wales border, west to Toowoomba and the Darling Downs, Townsville and Mount Isa. Since opening, approximately 450 mediation sessions have been held. Settlement has occurred in around 85 per cent of these cases. The types of disputes which have presented include the traditional disputes brought to Neighbourhood Justice Centres in Australia and overseas, that is disputes between neighbours, family members, co-workers, landlords and tenants, residents groups and local authorities.

There is currently a panel of around 120 accredited mediators. These are people from all walks of life, ages, ethnic backgrounds. Seven of these accredited mediators are of Aboriginal or Torres Strait Islander descent. All have undertaken and passed a seventy-two hour skills development training course.

The Community Justice Program in Queensland is pioneering several innovative fields of practice in Australia. Two of these are the Crime Reparation Program and the Police Complaints Mediation Initiative. Both of these pilot projects, if implemented throughout the State, will have an enormous impact on the administration of justice on Aboriginal communities.

## **The Crime Reparation Program**

The Crime Reparation Program, currently being trialled at the Beenleigh Magistrates Court, provides a voluntary opportunity, after conviction and before sentencing, for adult and juvenile offenders to come together to discuss the offence which has occurred and to provide an opportunity for the victim and offender to participate in the determination of mutually acceptable reparation for the victim, thus personalising the criminal justice processes for both victims and offenders.

To date, the pilot has targeted non-habitual adult offenders and repeat juvenile offenders who plead guilty to property offences, for example, break and enter, vandalism or minor theft. What is said at mediation is confidential, but parties sign a waiver which enables the CJP to provide a copy of the agreement reached to a Community Corrections Officer who reports to the court. The Magistrate may then choose to take the outcomes of the mediation into account in sentencing offenders.

There are other points in the process of contact between the offender and the criminal justice system where mediation is being considered. For example, it could be used prior to charging as a diversionary option, as a sentencing option, as a condition of a parole order, or it could be used post-sentencing as part of a correctional strategy, either during probation or a term of imprisonment in cases of more serious crimes.

## **The Police Complaints Mediation Initiative**

The Police Complaints Mediation Initiative is also a pilot program which followed discussions and agreement between the CJP, the Criminal Justice Commission and the Queensland Police Service to mediate in complaints of a minor nature against police and other public officials.

## **Development Of An Aboriginal Focus**

In early 1990 the Aboriginal Coordinating Council in Cairns approached the Attorney-General seeking assistance in developing a mediation service for Aboriginal communities. Visits were made to the Aurukun and Yarrabah communities with Barbara Miller from the Aboriginal Coordinating Council to gauge interest in the concept. Despite support for the concept from within the CJP, the decision was made at that time to direct the energies of the yet to open program to the provision of alternative dispute resolution services in the Brisbane and south-east corner.

In March/April 1991 an approach was made to the CJP via the office of Rob Hulls, MHR, Federal Member for Kennedy, for the service to contact the Doomadgee community. The people of Doomadgee were at that time experiencing a good deal of upheaval and adverse public exposure relating to the management of alcohol and the levels of violence on their community.

After seeking permission from all major groups (the women, the Council, and so on) within Doomadgee, consultation with the Aboriginal Coordinating Council staff and attending a full Aboriginal Coordinating Council meeting, a team of three mediators (two white, one black) flew to Doomadgee and began a five to six-day process of meeting separately and then in groups together with the wider communities to assist them to identify their major concerns, discuss them fully and establish priorities for the way forward. The role of the mediators was to act as a neutral, third party, willing to preserve the confidentiality of the issues and able to encourage all

parties to speak fully and constructively to each other about past concerns and future options and directions.

Feedback from sections of the Doomadgee people has indicated that they achieved positive outcomes and found this process of dispute resolution empowering for themselves as a community and also as individuals. The Doomadgee people have since re-enacted some of that settlement process for a video which the CJP has just produced about Aboriginal mediation.

Since then, Community Justice Program mediators have been asked to assist in the settlement of disputes or the facilitation of issues in the following cases:

*August 1991*

Facilitation of a three-day meeting convened by the Queensland Department of Family Services and Aboriginal and Islander Affairs with representatives from a number of Aboriginal and Islander communities and organisations, and relevant government and community based organisations, to develop a strategy for Caring for Returned Human Remains and Burial Artefacts.

*14-17 October 1991*

Mediation/facilitation with the Palm Island community representatives to formulate a response to community problems and establish appropriate community laws.

*December 1991*

Mediation with members of the Aboriginal community at Mount Isa.

*9-11 March 1992*

Mediation on Darnley Island of a dispute between two members of the community which had been escalating over a period of years and which had spread to the stage where it involved other family and community members.

### **Darnley Island Dispute**

To give some idea of how the mediation process works when CJP mediators visit communities, the following excerpt from the report of Alex Ackfun, Project Officer with the Program is included.

The dispute was essentially between two family members surrounding issues of the "old ways" versus the "new ways". The content of the mediation session is confidential and cannot be discussed. The session took place over a three-day period.

Prior to the visit to Darnley, we had to establish that the disputing parties were ready to attend mediation. A lot of ground work was done on this aspect in consultations with the parties and Island Community Council. The Council itself had an interest in the matter because it could see the dispute disrupting the harmony of the island and its administrative operations.

Even though the dispute on its face value appeared to involve two family members, it soon became clear the decisions they made in their negotiations would affect the whole social fabric of the community.

Arriving at the Island, we took some care to visit the two parties separately and in their own homes. Here the steps of the mediation process were explained to each party and care was taken to provide identical information to both.

The mediators assisted the parties to decide on the manner in which proceedings would commence, for example what time, where, who could attend and speak at the mediation session. Both agreed that anyone in the community could speak. Some ground rules were also established, for example allowing the other to speak uninterrupted so concerns could be heard, following a set number of steps in the mediation session.

This process saw the mediators walk from one party's house to the other to finalise proceedings for the next day. It was decided by the parties to hold their mediation session as a public meeting at the Council Chambers.

The building of trust in the mediators and the process was in effect taking place. This was a conscious effort on the part of the mediators.

The session from then proceeded as a normal mediation would, with parties in exploration talking about the past, but encouraged by the mediators to look at options for the future. Some care had to be taken to reaffirm the role of the CJP mediators—that the parties themselves would be working out solutions and options for themselves—the mediators would assist them in doing this—no conditions were to be imposed on them by the CJP.

At the end of the second day, the options worked out by the parties were prepared and delivered to each of the parties in their homes. Mediators clarified and acknowledged progress made by the parties.

The list of options also allowed them to discuss these with other members of their family. Here the mediators recognised other stakeholders needed to be consulted by the parties to give the process a chance of success.

On the third day the parties were encouraged to focus on the future. A restating of the role of the CJP and the fact that we were not going to solve the dispute for the parties was also necessary.

A number of positive items were gained from the Darnley experience. They can be reflected in any other mediation outcome if handled successfully. These positives were:

- an opportunity for parties to air concerns and be heard;
- some understanding of the other's concerns;
- the adoption of a manageable plan of action;
- the achievement of some acceptable outcomes;
- the regaining/maintaining of respect by the parties;
- an understanding of the mediation process; and
- a new way to resolve differences.

The Darnley Island mediation provided reinforcement of the rewards possible using conflict resolution processes. Similar rewards have been encountered on other communities where the CJP has intervened.

As well as this "on the ground" experience, staff of the CJP met with the Legislative Review Committee and prepared documentation (Legislative Review Committee 1991) for discussion regarding the introduction of mediation services on DOGIT communities. Subsequently, alternative dispute resolution mechanisms were recommended for Aboriginal and Torres Strait Islander communities in the final report on the Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland by the Legislative Review Committee (1991).

### **Aboriginal Mediation Initiative**

As a result of this growing interest in alternative dispute resolution services within the Aboriginal community, special funding for the 1991-92 and 1992-93 financial years was allocated by the Attorney-General to the Alternative Dispute Resolution Division Community Justice Program. The funding was provided so that a special focus could be made on the development of Aboriginal mediation initiatives, including the provision of services while emphasising the training of Aboriginal people in mediation skills.

A Project Officer, Alex Ackfun, was appointed to develop this process. A decision was made to target DOGIT communities. Initially, the brief was broad and consultation was to be an inherent part of the process. There were three guiding assumptions:

- n The project needs to be developed in consultation with individual communities. It cannot be imposed. We are aware that arrangements to introduce formal alternative dispute resolution services in DOGIT communities must reflect local perceptions of justice.
- n We need to avoid undermining traditional dispute processing mechanisms which are in place to varying extents in different communities.
- n We are aware of the complexities regarding management and resolution of conflict in the communities and the need to develop a comprehensive and coherent set of interlocking strategies, of which mediation is only one, to address problems of disputation and violence (Welsh 1992).

### **Conflict Management on Communities**

At this point it is important to acknowledge that there is a diversity of mechanisms in place throughout the communities for the maintenance of social order. These range from the handing down of correct codes of behaviour from appropriate and knowledgeable members of the community, to the traditional process of public dispute management required between rival families or clan groups.

Some common issues of concern are those of violence on communities, children, physical conditions, and funding arrangements. Land disputes arising out of the *Aboriginal Land Act 1991* (Qld) are also expected.

Concern is often expressed regarding the term "dispute resolution" in relation to these disputes. Conflict is regarded as an essential part of life and there is a high tolerance of anger and aggression.

Aggression had traditionally been accepted and managed in a ritualised structure which encompassed a strict set of rules and expectations. Large numbers of people

became quickly involved in supporting their kin and "blockers", who acted as referees, intervened to prevent serious harm. Skilful management of the process allowed the participants to control and enjoy the interaction. On occasion, these controls proved inadequate. However, the structure generally worked to reduce the level of conflict.

The desired outcome was a return to harmony and balance within the society, rather than a win/lose resolution. One of the main reasons for violence was to regain the balance upset by a former injury or death.

Alcohol abuse has transferred controlled violence into uncontrolled violence on many communities and changed the nature of conflict. Drunken conflict is now a major social problem. Traditional processes often escalate the violence and people are looking for alternative means to manage disputes.

As well, there are, it is acknowledged, formal Aboriginal structures such as Aboriginal Courts and Community Councils which have played important parts in the resolution of conflict in communities, alongside the more traditional, informal processes.

## **The Project**

Although the details of the project needed to be developed in consultation, there was a broad vision which encapsulated the advice and knowledge and experience which was already to hand. This vision entailed three key strategies.

Firstly, the CJP would continue to provide a visiting expert dispute resolution service to communities when asked, when possible, and when appropriate. Provision of this service would, when able, rely upon the assistance of Aboriginal and Torres Strait Islander mediators working sometimes in conjunction with white mediators, sometimes on their own. Recognition was also given to the possibility that alternative dispute resolution services would sometimes be provided through the use of an all-white mediation team.

Secondly, the CJP would train Aboriginal and Torres Strait Islander people, both on and off communities, in dispute resolution skills so that they could effectively manage their own disputes.

Thirdly, in conjunction with existing legal, justice, policing and welfare processes, the CJP would assist Deed of Grant in Trust (DOGIT) communities to establish structures and arrangements on their communities which would allow the full utilisation of a range of alternative dispute resolution possibilities. For example, the establishment of victim-offender mediation processes as piloted in Beenleigh, may require specialist interventions and assistance from CJP staff to fully set up on remote communities.

It will be appreciated of course that the dilemma in planning such innovative services and programs is in convincing Treasury officials to fund a project broad in vision, which will only proceed *after* consultation with relevant key stakeholders. The challenge has been for the CJP to present a draft plan of action without pre-empting the wishes or decisions of the Aboriginal communities.

So far, the CJP has produced a video on Aboriginal mediation called *Talk About It* which was mostly filmed at Doomadgee with members of that community talking about their experiences of mediation and re-enacting some mediation processes.

As well, the first mediation skills training course particularly aimed at Aboriginal and Torres Strait Islander people has been offered. Fifteen Aboriginal and Torres Strait Islander people undertook and completed the thirty-five hour course. We expect

that this group will form the nucleus of a pool of Aboriginal mediators who will both assist in dispute settlement service delivery and help train other Aboriginal people, especially those on communities, to be mediators.

### **Challenges And Issues**

Alternative dispute resolution services throughout Australia and overseas have mushroomed from the neighbourhood mediation services to more complex court-annexed, mandatory processes such as in the Family Court, those attached to Tribunals, grievances and complaints procedures as listed in government manuals, and sometimes as standard elements of contracts in business agreements.

Aboriginal people have responded enthusiastically to a procedure that does, after all, owe more to its origins in traditional dispute resolution processes within Aboriginal society than the Western legal tradition. The emphasis on personal and group empowerment and resolution, the face to face confrontation of protagonists, the structured discussions, the free expression of feelings as well as facts, the ability to deal with substantive as well as perceived issues of alternative dispute resolution are significantly different elements than those found within the arcane rituals and structure and mystifying language of the court experience.

Some Aboriginal people have expressed views similar to the Danish Criminologist, Nils Christie (1977) who argues that we ought to think of conflicts as property and 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, because conflicts are potentially very valuable resources for us as individuals and as communities. 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 Alternative Dispute Resolution Process**

Central to discussions of alternative dispute resolution, in particular mediation, are the key issues of voluntary participation by the parties, the confidentiality of the process and outcome and the neutrality of the mediator.

#### *Voluntary Attendance*

Although voluntary attendance at mediation is seen by most as desirable, it is worth considering whether or not there may be some cases where parties should be required to attend. The *Racial Discrimination Act 1975 (Cwlth)* and *Sex Discrimination Act 1984 (Cwlth)* have powers to require parties to attend conciliation conferences and the industrial arena is another where compulsory conferences between parties are common.

It may be that mediation may be used as a compulsory pre-court diversionary option, or as a sentencing option by Aboriginal Courts in criminal matters. In civil relationship matters people may be required by the Community Council or a respected elder to attend mediation. It has been suggested (Cedric Geia, personal communication, Cairns 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*

The mediation process as practised by the CJP and most dispute resolution services is characterised by its universal commitment to the confidentiality of the process. This confidentiality is seen by many as essential and as a major incentive for people to attend in the first place.

The disadvantages of the court—the expense, time—are hugely compounded by the public exposure that court brings. The confidentiality provisions also ensure that parties cannot use what was said in mediations as a basis for future legal action or public prosecution of the other.

Aboriginal communities do not resemble the same dispersed and private living arrangements as those found particularly in urbanised Australian society. Privatisation of disputes through mediation as experienced in cities would not only be absolutely impossible on communities but also, in many cases, completely unacceptable. It is expected that disputes on communities *will* be public and polycentric, that is, involve issues of shifting focus and importance and affect the wider community beyond merely two protagonists.

Families and interested parties may need to be aware of negotiations and outcomes and settlement may often require pressure from appropriate family members and the widest possible publication throughout the community.

### *Neutrality*

The neutrality of the mediator, as with the concept of "blind" or impartial justice, is held to be of paramount importance in effective dispute resolution practice. It is considered, however, that neutrality of mediators will be almost an impossibility within communities due to family and kinship affiliations. A respected person appears to be a more appropriate person, as these are the people who have traditionally been required to take a role in dispute management.

Some disputes may involve conflict within whole communities, or between communities and government or organisations such as mining companies. In these cases outside mediators may be used.

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.

### **Domestic Violence**

The question of whether mediation is appropriate between couples with a history of domestic violence is one of the significant policy debates in the field of alternative dispute resolution in Australia at the current time.

The issue is contentious and a general policy consensus has not been achieved to date.

The Community Justice Program's position is essentially consistent with that promoted by the National Committee on Violence Against Women (Astor 1991). Key elements of the National Committee on Violence Against Women policy include:

- an intention to exclude the majority of disputes from mediation where there has been domestic violence;
- the introduction of procedural guidelines to provide effective protection for those victims who find themselves in mediation or who make a free and informed choice to use mediation.

The guidelines adopted by the National Committee on Violence Against Women and by the Dispute Resolution Centres Council (Community Justice Program 1992, unpub.) acknowledge that mediation is undesirable in many cases of domestic violence in that it may expose the victim to several kinds of unacceptable risk. However, they also provide for the reality that it is not possible to screen out all couples affected by domestic violence, and for the rights of victims or survivors of domestic violence to choose a method of dispute resolution.

It is apparent that the most common presenting problems in the Aboriginal Community are conflicts within families and extended families, and that they are most likely to involve some degree of domestic violence. Those are the very issues that people want mediated.

There is widespread alarm and distress at the degree of family violence occurring and the number of women dying as a result of that violence. It is estimated that many more Aboriginal women die as a result of violence than Aboriginal people die in custody. Yet they have little access to appropriate support groups or agencies, and have a negative contact with the formal justice system.

In a position paper prepared for the National Committee on Violence Against Women, Dr. Hilary Astor (1991) explains that

. . . many Aboriginal women who are the victims of domestic violence have strong doubts about using the protections of the formal justice system if it results in their husband, fathers and brothers being sent to jail. European women also have such doubts, but the consequences of using the formal justice system are different for Aboriginal women. However, some Aboriginal women do want and need the protections of the formal justice system but their experience of seeking to use these protections is that, in most cases, nothing is done and their complaint is not taken seriously. Other women fear that complaining will bring the intervention of the white welfare system and that they will lose their kids.

It is therefore obvious that alternative dispute resolution services provided by and to Aboriginal women may well include meetings between perpetrators and victims of domestic violence.

In looking at providing this service to Aboriginal women, care will need to be taken that appropriate safeguards are in place to minimise risk to the woman's safety and checks made to ensure that any arrangements or agreements entered into are not as the result of fear and powerlessness on the part of the women concerned.

## **Conclusion**

It is the author's view that Aboriginal people must explore current developments in alternative dispute resolution, to take from these processes what is useful and relevant

for themselves and their communities and evolve a coherent set of interlocking strategies which will address their problems of disputation and violence. Whilst new alternative dispute resolution processes are put in place, older traditional conflict management processes must not be discredited or dismantled. It is important that new ways do not bring about the loss of face or authority by key elders. A further consideration relates to the ethos of the Community Justice Program version of mediation which promotes collective decision making arising out of negotiated, bottom-up agreements. The challenge will be to integrate this underlying principle with more traditional top-down decision making processes as practised in Aboriginal communities.

This and other challenges outlined in the paper are set before the Community Justice Program and the Communities. The goal of an integrated and effective dispute resolution service on communities is there to aim towards.

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