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9 Lessons from the Mediation Obsession: Ensuring that Sentencing 'Alternatives' Focus on Indigenous Self-Determination

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Statistical data have shown that Indigenous people in Australia are increasingly over-represented in the criminal justice system. At the same time, Indigenous families are experiencing high levels of violence. Hidden behind this trend evident in the statistics is the impact of colonization on Indigenous communities and of incarceration on the families of those coming into contact with the criminal justice system. Finding solutions to these already hard issues is made increasingly difficult by the cultural conflict that can occur when Indigenous people, as victims or offenders, come into contact with the criminal justice system.

This chapter seeks to consider the lessons that can be learnt from other attempts at seeking resolution to conflict between Indigenous peoples. It seeks to explain how cultural conflict arises in the legal system and in other alternative dispute resolution models, namely, mediation. It also considers the right to self-determination as an holistic approach needed for the breaking of the legacies of colonization, of which family violence is a factor. To this end, this chapter should be read in conjunction with the chapter by Loretta Kelly that considers the issue of family violence as a phenomenon in Indigenous communities in Australia in more detail.

When a legal system looks neutral on the surface, many will assume that it produces fair results. This assumption is incorrect, as the experience of Aboriginal Australians bears out, because:

- seemingly neutral institutions can often contain inherent biases;
- seemingly neutral institutions can generate biased results.

I want to use an Australian case study to explore and explain how seemingly neutral laws contain and create bias and how this cultural conflict extends to popular methods of alternative dispute resolution, particularly mediation models. I propose to discuss this in relation to mediation with the hope that these critiques will provoke some thought on how the same problems may occur and be avoided in conferencing and other more elaborated models of restorative justice such as the healing circles

that draw on Indigenous experience in North America. It is my hope that these explorations will provide some basis upon which to explore the question posed by Loretta Kelly in her chapter, namely, whether restorative justice is culturally appropriate in the contemporary Australian context.

Historical Legacies

How seemingly neutral institutions contain bias

If court victories offer only sporadic and episodic protections, which are limited or overturned by the legislature's political will, the Constitution remains the last bastion for rights protection. But this area offers very few guarantees. Australia has no bill of rights and minimal rights are recognized in the constitution, though some have been implied.

The issue of whether the race power, which allows the Federal Government to make laws with regard to Indigenous people, could be used to deprive Indigenous people of their rights was raised by the plaintiff in *Kartinyeri v. The Commonwealth* (the Hindmarsh Island Bridge case). In that case, brought in a dispute over a development site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by passing an Act, the Hindmarsh Island Bridge Act 1997 (Cth). That Act was designed to repeal the application of heritage protection laws to the plaintiff. The plaintiff argued, *inter alia*, that when Australians voted in the 1967 Referendum (Attwood et al, 1997) to extend the federal race power (s.51(xxvi)) to include the power to make laws concerning Indigenous people it was with the understanding that the power would only be used to benefit Indigenous peoples. The court did not directly answer this issue, finding that the Hindmarsh Island Bridge Act 1997 (Cth) merely repealed legislation. The majority held that the power to make laws also contains the power to repeal or amend them. This decision was seen as a victory by the Australian Government who saw constitutional challenges to amending legislation that extinguished Native Title rights as much harder to mount.

Many were shocked to contemplate that Australia's Constitution offers no protection against racial discrimination but one need only look at the intention of the drafters to see why it remains this way. In fact, a non-discrimination clause was proposed for inclusion in the Constitution when the instrument was being drafted. Proposed clause 110 was drafted to include the phrase:

'... or shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws' .

This clause was rejected. It was rejected for two reasons:

- it was believed that entrenched rights provisions were unnecessary, and
- it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race. (Williams, 2000)

If one is aware of these attitudes held by the drafters of the Constitution then it comes as no surprise that the Constitution is a document that offers no protection against racial discrimination today. It was never intended to do so and the 1967 Referendum in no way addressed or challenged those fundamental principles that remain entrenched in the document.

In a country where there is a racist Constitution, racist Native Title legislation and a government which cannot understand that there is a sector of the Australian community still hurting from the government practice of removing Indigenous children from their families to assimilate them into white society (Cunneen, 2000), the question of reconciliation between Indigenous and non-Indigenous people is going to be difficult.

How formal equality is a formula for inequality

In 2000 the United Nations Committee on the Elimination of Racial Discrimination issued a report critical of the present Australian Government's record on human rights protected under the Convention on the Elimination of all forms of Racial Discrimination (CERD). In particular, the concluding observations by the Committee included expressions of concern over the 'mandatory sentencing schemes which target offences committed disproportionately by Indigenous Australians, especially juveniles, creating a racially discriminatory impact on already high rates of Indigenous incarceration' (CERD, 2000).

The Human Rights and Equal Opportunity Commission's *Social Justice Report 1999* recounted the alarming statistics concerning Indigenous juvenile incarceration. According to the report, rates of over-representation of Indigenous youth in the criminal justice system are increasing. Indigenous people make up around two percent of the population but are around 20 percent of the prison population; for

Indigenous women and children, the over-representation is even higher. The Report cites the following figures:

- in 1993, an Indigenous youth was 17 more times likely to be detained in custody than a non-Indigenous youth. By 1996 this rate had increased so that an Indigenous youth was 21 more times likely to be detained in custody than a non-Indigenous youth;
- between June 1994 and June 1997 there was a 20 per cent increase in the number of young Indigenous people in detention. The correlative level of over-representation for that period increased from 18.9 times in 1994 to 24.6 in 1997. (HREOC, 1999: 84)

In the two jurisdictions that had mandatory sentencing schemes, in June 1999, 76 percent of all prisoners in the Northern Territory and 34 percent of all prisoners in Western Australia were Indigenous (HREOC, 1999).

These increases have occurred despite the lengthy and thorough recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991). The legislation in Western Australia and the Northern Territory imposes mandatory periods of detention for offenders who commit prescribed property offences. These provisions focus on the punitive and retaliative roles of the criminal justice system, rather than on the rehabilitative and reformative functions (Roche, 1999). Nor do such provisions seek to address the underlying causes of the offending behaviour. The following two cases bear this out:

- an 18-year-old Indigenous man obeyed his father and admitted to police that he stole a $2.50 cigarette lighter. He was sentenced to 14 days in prison;
- a 29-year-old homeless Indigenous man wandered into a backyard when drunk and took a $15 towel. It was his third minor property offence. He was imprisoned for one year. (HREOC, 1999: 95)

These measures impact disproportionately on Indigenous people. In Western Australia, Aboriginal children constituted '80 per cent of the three strikes cases in the Children's Court of Western Australia from February 1997 to May 1998' (HREOC, 1999: 92). The HREOC Report noted that even though on the face of it, the legislation may not seem discriminatory, 'where a pattern of sentencing reveals that certain groups of children are more likely to receive the harshest penalties, sentencing is suspect' (HREOC, 1999: 92).

The impact of mandatory sentencing laws on Indigenous women has been particularly brutal with estimates, based on figures from the Northern Territory Correctional Services Department, of 'a 223% increase in the number of Indigenous women incarcerated in the first year of operation of the legislation. As of 30 June 1999, Indigenous

women made up 91 percent of all women prisoners' (HREOC, 1999: 92).

The most contact that Aboriginal people have with the law is with the police. This contact also has an historical context since law enforcement officers led massacres of Aboriginal people and came to take children away. They are rarely from the Aboriginal community and often believe the stereotypes perpetuated about Aboriginal people and this has played no small part in the high levels of incarceration of Aboriginal people (HREOC, 1991). One in four of our men are in jail. Aboriginal people are 20 times more likely to die in prison than a non-Aboriginal person is. Aboriginal people are more likely to be arrested for a summary offence than a non-Aboriginal person. Aboriginal people are held in police custody for longer periods than non-Aboriginal people are.

Given these statistics, it is not surprising that restorative conferencing schemes begin to look attractive as an option since a young person may avoid a conviction and get a 'second chance'. This brings the emphasis back to rehabilitation and responsibility rather than punishment. It also allows a greater role to be played by victims, families and the community in crime prevention.

If most Australians do not question the fairness and neutrality of Australia's legal system, this is not true of Aboriginal Australians. The first encounter that Aboriginal people had with the law of the British was when Captain Cook claimed the continent of Australia for the British sovereign. The legal doctrine of *terra nullius* kept Aboriginal people dispossessed until 1992. The dominant legal system is an instrument of colonization that allowed the state to legitimate its control over the lives of Aboriginal people while failing to protect their rights.

Cultural Traditions and Dispute Resolution

Land has always meant different things to Indigenous and non-Indigenous Australians. We bond with the universe and the land and everything that exists in the land. As my father says: 'You can no more sell our land than sell the sky.' He would describe our relationship to the land in the following way:

> Our affinity with the land is like the bonding between a parent and a child. You have responsibilities and obligations to look after and care for a child. You can speak for a child. But you don't own a child.

Even though Aboriginal people have been moved off their traditional lands, land remains an important need of Aboriginal communities. Even

urbanized communities maintain links with their traditional lands. Traditional land is needed so sacred sites that remain can be protected. Non-Aboriginal Australians have destroyed and defaced Aboriginal sacred sites. Non-Indigenous concern for land is mostly economic.

The values and priorities of the Aboriginal community conflict with those of the dominant legal system at many points. While acknowledging that there is vast diversity between the lifestyles and cultural practices and values of Indigenous Australians it is also fair to say that several similarities exist. The notion of a creation period in which laws were created, a 'Dreamtime' is one such commonality. The interconnection with the land – whether it is called custodianship or ownership or guardianship – exists throughout all Aboriginal groups. Interconnection occurs with all living entities and people through a totemic or clan system. Our culture is oral; this is how law and responsibility were handed down. Learning is gained through the example set by others, leading to more respect for those with life experience and wisdom. This world view is much more focussed on the community rather than the individual. The smallness of groups and their reliance on each other to ensure survival facilitated a strong sense of loyalty and responsibility to the group that today still facilitates notions of cooperation and consensus. There was also no hierarchical structure in our communities in the sense that it occurs in the class structure of European society. In this sense, it can be asserted that Aboriginal culture was more egalitarian than European or Western culture.

These cultural values are reflected in the process by which conflict was resolved in pre-invasion Aboriginal communities. Grievances were dealt with in several ways. The following examples were taken from a specific area so there will be some elements shared with other groups and some that were unique to the area.

A group of Elders would make decisions for groups and would also intervene in disputes if they had not been resolved between family members. Meetings between Elders were usually convened when groups met for ceremonies. These groups were not judicially formed bodies; no one had a vested authority to decide the outcome. Decision-making was less formal and less systematic. Women had a prominent part in the process, having the power to make decisions if the person who had broken the law was a woman (Gale, 1986).

In an example from the lower Murray (Berndt & Berndt, 1981), two clans sought to settle a dispute in the following manner:

- Members of each clan sat facing each other
- Members were arranged around their spokespeople
- A general discussion was undertaken

- The aggrieved parties then spoke, including their family members and any other person with an interest in the proceedings.

In grievances between individuals, aggrieved parties were given the chance to express the way they felt – even through shouting, yelling and screaming. Open displays of anger were seen as part of the resolution process. Disputants were encouraged to spend time getting their emotions under control before they faced the person that they were in dispute with. Women were especially important in this process, playing an active role in the procedures. Facilitation of a resolution was aided by the use of the interconnection of the community. Social pressure can be very powerful in a small, close-knit and interconnected community.

From this example, several points of conflict with Australia's dominant legal culture and legal system become apparent (See Table 9.1) (Behrendt, 1995). The emphasis on speaking from the heart which is fundamental in Indigenous dispute resolution processes is given no place in the dominant legal system that seeks to put a version of events forward in a non-emotive and factual form. The Indigenous focus on feelings, hurt and perspective when speaking also runs into conflict with the formal rules of evidence that curtail the events that a disputant is able to put forward in court. The emphasis on speaking from the heart meant that disputants themselves presented their grievance, rather than through the words of an advocate as the dominant legal system seeks to do. These factors help to underscore the difference between a system that is based on oral evidence and accounts and law to a system that seeks to put everything in writing and record with the power of the word. The absence of these strict rules gives a feeling of informality to Indigenous dispute resolution processes that is missing from the formal and imposing processes and rituals of the dominant legal system.

Indigenous dispute resolution was based in an inherent understanding of the interconnectedness of all people in the community through family and kinship ties and responsibilities. Dispute resolution methods were thus based on situations where disputants had complex relationships with each other and would continue to have to live together, perhaps closely, within the same community. There are many matters that arise for resolution in the dominant legal system where the parties will not have a continuing and on going relationship and this has implications for the form resolution of the dispute will take. In recognition of the on going relationship between the parties, there was flexibility in process and no time limit on when the dispute would be resolved since it was understood that feelings may need time to settle down, that time out might be needed, before the parties were ready to resume their negotiations.

Indigenous dispute resolution processes, with this focus on interconnection, encouraged participation by all those within the community who felt that they had an interest in the dispute and the outcome. Unlike the dominant legal system which has strict rules of standing, Indigenous dispute resolution processes take place in front of the family and community in a way that acknowledges the social context in which the dispute has arisen and must be resolved.

Another cultural conflict that arises is the emphasis on formal education and qualifications for participation in the dominant legal system. This lies in contrast to the emphasis on life experience as the indicator of knowledge and wisdom that is fundamental in Indigenous cultures and to the revered and respected role that Elders play in those communities.

Table 9.1 Aboriginal Dispute Resolution and the British Legal System

Aboriginal Disputes	British Legal System
Emotional response	Controlled response
Oral	Written
Disputants live together	Disputants often strangers
Experience as training	Formal legal training
No rules of evidence	Strict rules of evidence
Process in front of the community/family	Process in front of strangers
Disputants speak	Use of advocates
Time not an issue	Deadline intensive
Informal	Formal
Communal	Hierarchical

Cultural Conflict and Mediation

With these cultural conflicts endemic when Indigenous people have contact with the legal system, it is easy to see the attraction of mediation in these circumstances. Mediation was hailed as a way of alleviating these cultural conflicts and countering systemic racism and historical legacies. Mediation does recognize the inadequacy of litigation in certain circumstance that is costly and intimidating. It streamlines the court system and allows parties a better opportunity to express their opinions. Despite these benefits, there are still fundamental conflicts that arise in mediation models.

It is claimed that mediators are especially useful in dealing with disputes where there are cultural differences between the parties and that a mediator can reduce obstacles to communication through identifying cultural issues. It is asserted that mediation allows discussion of cultural beliefs and attitudes thus giving them importance and encouraging respect for those values without making people change their own values. Mediation assumes that people can resolve their issues. It allows disputants the control and the responsibility to decide the content of the conflict and the power to make a decision. In this way mediation encourages people to choose their own options for resolving disputes and in this way it empowers disputants.

This allows consensus in the outcome of the dispute and that means that it is more likely to be implemented by the parties involved. The obvious advantages with using mediation have made it the model used in pilot programs to implement alternative dispute resolution into the Aboriginal community, especially in areas related to families and land. It is also part of the process to review claims made under the Native Title Act 1993 (Cth) to the Native Title Tribunal.

Mediators have noted that mediation between parties from different cultural backgrounds can lead to specific types of problems in mediation. Proponents of mediation are quick to point to the following 'cultural issues':

- *Language issues* that lead to miscommunication and misinterpretation;
- *Incorrect assumptions* about diverse cultures;
- *Expectations* that others will conform;
- *Biases* against the unfamiliar; and,
- *Values in conflict* when the values of the dominant culture conflict with those of another culture. (Myers & Filner, 1993)

Training is the method by which most people working in mediation try to counter the cross-cultural bias. This is attempted in two ways:

- through 'cross-cultural' training;
- by training Aboriginal people as mediators.

Cross-cultural training sometimes includes components on Aboriginal culture and history but it is hard to believe that even a week of study could really allow someone to immerse himself or herself in an Indigenous world view. (Many cross-cultural training sessions to teach Aboriginal history and culture are a day or less.) This is inadequate to provide a thorough understanding of the weight of Aboriginal experience and perspective. These methods of trying to compensate for bias do not address the fundamental cultural conflicts in the mediation model and fail to alter the inherent bias in alternative dispute resolution.

Fundamental conflicts occur in the mediation model in the following ways:

- *The use of a neutral third party*: the mediation model relies on a neutral, impartial third party to facilitate. This poses a special problem for use in Indigenous communities in that it is counter to the philosophy of who has the right to speak within the community. Getting over the hurdle of having a stranger, an outsider, have the power to facilitate the dispute resolution is not something addressed within the mediation model.
- *The training of mediators*: the use of trained mediators gives rise to another inherent cultural conflict. It places the emphasis on formal training rather than life experience. This is a conflict with the value of life experience in Indigenous communities. It also inadequately 'trains' the mediator to have an understanding of Indigenous cultural and historical perspectives.
- *The power imbalance between the parties*: the mediation model does not level the economic or legal playing field.
- *Focus on the individual*: the mediation model is concerned with settling disputes between parties but deals primarily with disputes between individuals. When the dispute involves a community, the community usually resolves the dispute through representatives rather providing for a broad range of input.
- *Cultural bias*: the mediation process is not derived from Aboriginal and Torres Strait Islander methods of dispute resolution. Any cultural compatibility is purely coincidence. In fact, the logic of using mediation models in Indigenous communities derives from the belief by proponents of the mediation process that because they work well in other contexts they may work well in Aboriginal and Torres Strait Islander communities.

Mediation is really just an extension of the legal system and all its problems. This perspective is absent from proponents of mediation who are not conscious of or interested in challenging the fundamental aspects of that system. Their focus is usually on diverting Indigenous people from the litigation process. They are only interested in alleviating the impact of litigation. While that is a worthwhile pursuit that can have benefits for the Indigenous people who would otherwise be facing a court case, it has its limitations.

Although the training of Indigenous people as mediators is a better option and overcomes the problems of trying to give a different cultural perspective and experience to someone else, it is still flawed. It fails to get over some of the following fundamental conflicts in the model itself.

There are two points to note on the use of Indigenous mediators:

- They will not necessarily counter a cultural bias. An Indigenous person will be able to have a much better understanding of the Indigenous experience such as the way that the Aborigines Protection Board has permeated the lives of our people, and know what kind of racism is experienced by Indigenous people. But this may not be enough. Indigenous communities are not culturally homogeneous. These cultural differences may not all be countered if the person is not from the community in which the mediation is taking place.
- They may not solve the problem of a 'neutral' third party acting as facilitator unless the person is associated or in some way connected with the group, when the inappropriateness and distrust that may be generated by having a stranger come in to resolve a dispute may be alleviated.

The problem that many of those who embraced mediation as a better option to litigation – and I do not dispute the fact that it was a better option than going to court – was that it was implemented in a way that sought to take the model used in one environment and place it into another one with an attempt at 'cultural sensitivity training'. This of course did nothing to change the inherent imbalances within the system. This point was not picked up by those staunch advocates of mediation because they seemed to forget that mediation may have been an alternative dispute resolution process but it was not an alternative to the dominant legal system; it was only an extension of it.

A better way is a ground-up approach, one that starts with the community developing the process, not the process being adapted to the community. This ground-up approach has the added advantage of enabling Indigenous people to take control of dispute resolution in their own community; to, in a sense, exert self-determination.

The benefits for this will not only be a reinvigoration of those communities with the empowerment that comes over making decisions within and as a community, but it will also help to regenerate roles within the community – roles of family, roles for elders, roles for youth. Restorative conferencing should have a strong role to play if it can facilitate reconnection within the Indigenous community.

This is especially so in the role restorative justice models can play in relation to family violence. As Loretta Kelly argues (this volume), restorative justice principles are essential to the functionality and harmony of the community. Restorative conferencing programs need to understand that most Indigenous communities are engaged in a healing process and need to come to terms with the very personal cost of the colonization process. These legacies of colonialism – cyclical breakdown of families, substance abuse, unemployment and poverty – are often

cited as the root causes of family fracturing and conflict. Such programs must not proceed with the same uncritical application that advocates of mediation have employed. The unquestioned placement of mediation models into situations where cultural conflict arises has shown that there can be more interest in the method and models than with the results.

Some restorative conferencing schemes have been subject to some criticism, including the extent of police involvement and the severity of penalties imposed. The HREOC Report also noted that despite 'chronic over-representation' in the juvenile justice system, Indigenous people are 'not being diverted from the system at the same rate as non-Indigenous children' (HREOC, 1999: 103). This may be due partly to the effect of prior records or the manner of the exercise of discretionary powers in some cases.

The Report identified the same problems of 'fitting' restorative conference models into Indigenous communities that have been identified as problematic in the employment of mediation models:

> ... some Australian models have been criticised because they lack commitment to negotiation with Indigenous communities and fail to recognise the principle of self-determination. Some have involved a 'one size fits all' approach, imposing a rigid model without due regard to the needs and circumstances of particular communities. In addition, there is potential for conferencing to increase the already high level of blaming and stigmatisation directed to young Indigenous people who come into conflict with the law. (HREOC, 1999: 104)

As well as recommending that Indigenous communities are able to develop and run their own conferencing models, the HREOC Report also emphasized:

- the desirability of diversionary schemes being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community-based lawyer;
- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence;
- the need to ensure that young people do not get a criminal record as a result of participating in conferencing;
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person; and
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system.

Empowerment through alternative dispute resolution and sentencing processes is a small step forward in asserting the Indigenous self-determination that colonization has sought to curtail. However, even with this role, mediation or conferencing can only alleviate the ills, not solve them completely.

Conclusions: Empowerment through Dispute Resolution

If the high levels of family violence in Indigenous communities are a legacy of colonization, solutions to these extraordinary levels of conflict must match diversionary and specific solutions such as conferencing and alternative dispute resolution models with attempts to alter larger, institutional and contextual factors.

Indigenous people in Australia have not been given space within which to exert their own jurisdiction because there is no recognition of sovereignty. Control over decision-making is only acknowledged in circumstances in which ultimate control is still exercised by the dominant culture and its institutions and this takes place when all parties involved are Indigenous. Indigenous law and customs need to be recognized in subversive pockets of dispute resolution and decision-making *within* Indigenous communities but only when *all parties* involved are Indigenous.

This situation will only change if Indigenous sovereignty is recognized to an extent that allows Indigenous people jurisdiction and decision-making powers through the inherent right to self-government. To facilitate this, space needs to be made available for Indigenous communities and families to develop and exercise control over their own decision-making and civil and criminal processes.

Until real alternatives to the dominant legal system are provided for Aboriginal disputants, Australia's Indigenous communities are going to continue to be disadvantaged by institutional racism and biases within the legal system whatever band-aid, diversionary schemes are adopted. Empowerment through community-based dispute resolution processes is a small step forward in asserting the Aboriginal self-determination that colonization has sought to curtail. These principles of self-determination and empowerment need to guide any restorative justice strategy that seeks to navigate and negate the dynamics and forces that encourage family violence to flourish.