

APPLYING RESTORATIVE JUSTICE PRINCIPLES
IN THE SENTENCING OF INDIGENOUS OFFENDERS
AND CHILDREN

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Restorative Justice

Justice is being done in a restorative manner when the process:

- Focuses on the harm done rather than the rules broken;
- Shows equal concern for victims and offenders and their communities and involves all three;
- Works towards restoring victims, responding to their needs and empowering them;
- Supports offenders while encouraging them to understand and accept the real human impact of their behaviour;
- Provides opportunities for dialogue, direct or indirect, between victim and offender where appropriate;
- Encourages collaboration and reintegration rather than coercion and isolation of the offender.

Restorative Justice involves an emphasis on reparation, rehabilitation and reconciliation rather than punishment, condemnation and retribution. It is about healing rather than hurting and usually involves some sort of community participation and involvement.

Governments have particularly encouraged, and legislated for the use of, Restorative Justice practices in the area of juvenile offending, perhaps because such a “soft option” is perceived to be more acceptable to the electorate in that context,. In Queensland adult victim/offender or Justice Mediation is available through the Department of Justice’s Dispute Resolution Centres. This service was for a short time offered state-wide but now, due to funding constraints, is available only in South East Queensland.

In New Zealand, since the enactment of the *Children, Young Persons and Their Families Act* in 1989, the vast majority of young offenders are diverted from the criminal justice system and approximately half of those going to court are dealt with by a family group conference process which has its roots in Maori traditions of dispute resolution.

In Australia, conferencing has become an integral part of the juvenile justice system in most States. In Queensland amendments in 1996 to the *Juvenile Justice Act* introduced a community conference process as an alternative to police charging young offenders. In addition the amendments provided the option for courts to refer young offenders to Youth Justice Conferences, either by way of an indefinite referral or prior to sentence.

Indigenous Justice Initiatives

More recently the application of Restorative Justice principles have (perhaps subconsciously) contributed to the philosophy behind a number of legislative and informal initiatives designed to make the sentencing of Indigenous offenders more meaningful and effective. These initiatives have evolved against a background of the gross over-representation of Indigenous people within the criminal justice system, particularly within prisons, and a high rate of offending within many Indigenous communities.

These initiatives appear to reflect an accepted view that mainstream Australian methods of dealing with and punishing offenders are not particularly effective in the rehabilitation of Indigenous offenders or as a deterrent to others from committing offences. It is argued that methods which involve community participation, particularly that of respected Elders, are more culturally appropriate and therefore more likely to be effective and that non-Indigenous judicial officers need assistance and guidance from community members in order to do justice in an Indigenous context. Indeed, just this week the Law Reform Commission of Western Australia has issued a discussion paper in which the recommendation is made that the cultural authority of Elders be enhanced by providing a role for Elders in the criminal justice system.

Whether the initiatives tried across Australia to date address the concerns and can truly be described as applying the principles of Restorative Justice is open to debate.

Urban Initiatives

Indigenous Justice practices across Australia have evolved in both urban and Indigenous community settings. The first Indigenous court, the Nunga Court, was convened by Magistrate Chris Vass in Port Adelaide, South Australia in 1999. In 2002 the Koori Court was established in Victoria and it now operates in a number of centres. In Queensland the Murri Court was established in Brisbane in 2002 to deal with Aboriginal & Torres Strait Islander offenders. It now also operates in Rockhampton, Townsville and Mount Isa. Circle sentencing courts in New South Wales have also been operating (initially Nowra) since 2002. Both the ACT and the NT commenced the operation of circle courts in 2005.

All of these courts are courts of summary jurisdiction. The offender must be Indigenous (although the Rockhampton Murri Court in Queensland will also deal with South Sea Islander offenders) and the offence must be admitted or a plea of guilty entered. The Magistrate retains the ultimate power to impose a penalty after consultation with Elders or respected persons.

The role of the Elder or respected person differs from jurisdiction to jurisdiction. Some simply give oral advice to the Magistrate or briefly address the offender while others have significant interaction with the offender and a substantial role in determining the sentence. Elders may play a part in monitoring the sentence (if it is community-based). The number of Elders involved varies across and within jurisdictions. For example, in the Brisbane Murri Court just one Elder sits with the

Magistrate, whereas in Rockhampton in Central Queensland as many Elders as possible are encouraged to attend.

Community Justice Groups

When Magistrates visited remote Aboriginal communities in the past many would establish relationships with respected Elders and seek their advice and assistance when dealing with offenders in their communities. In more recent years these practices have become more formalised.

Since 1993 the Queensland Government, through its Local Justice Initiatives Programme, has been assisting Indigenous communities to establish Community Justice Groups. Part of the rationale behind the formation of such groups is to provide a process for the community to become involved in the criminal justice system. The first three such groups were established in Kowanyama, Palm Island and Doomadgee in North Queensland and today there are 43 Community Justice Groups in both remote and urban areas in the State. The groups vary widely in their strength, size, the extent to which they are truly representative of their communities and the work they consider to be their priority. For example, whilst some groups actively seek involvement in the court process others place emphasis on working to prevent offending and particularly on working with children and young people.

Generally groups will attempt to mediate disputes within communities, work to reduce truancy and encourage parental responsibility for children, attend court and give the courts (written or verbal) reports on offenders, visit community members in prison and assist with the supervision of offenders on community-based orders. Ideally the Groups are given sufficient notice of upcoming matters to meet and discuss offences prior to the court dealing with them. These meetings are often attended by the offender and sometimes by the victim. The subsequent report includes the outcome of the meeting and recommendations with respect to rehabilitative measures and penalty.

In 2001 amendments were made to the *Penalties and Sentences Act* and the *Juvenile Justice Act* to provide that when sentencing an Aboriginal or Torres Strait Islander person, a court must have regard to any submissions made by a Community Justice Group from the offender's community that are relevant to the sentencing of the offender.

Most of the Indigenous Justice initiatives referred to thus far have been limited to courts of summary jurisdiction. In Queensland however Community Justice Groups play a role in Magistrates Courts, District Court and even on occasion in the Supreme Court. For example, since 1996 the District Court has visited remote Indigenous communities on circuit, frequently twice a year. In this way, members of the community can be sentenced in their community with the involvement of the Community Justice Groups.

There are expectations, particularly from government departments, and non-government organisations, that Community Justice Groups play a much broader role within their communities than assisting courts. For instance, they are usually

consulted on child safety and child protection issues, health professionals consult with them and utilise their expertise and experience, schools will often work with them and in recent years, those in remote areas have been expected to formulate alcohol management plans for their community (a very controversial and contentious role).

Community Justice Groups are in many ways now expected to be all things to all people. There are real dangers in this development. Community Justice Groups are not democratically elected bodies. The primary body in most Indigenous communities which has the authority to represent community members is the elected local government entity or council, headed by a mayor. By giving powers to Community Justice Groups (whose members are to be nominated by each “main Indigenous social grouping”), particularly the function to “regulate the possession and consumption of alcohol”, the government is effectively side-lining the official elected bodies on very important issues. The alcohol management plans in particular have brought justice groups and councils into conflict and created tension generally within communities. The sale of alcohol through the local canteen or tavern is an important source of income for community councils and the severe restrictions on the sale and consumption of alcohol in the communities subject to alcohol management plans has had very significant adverse financial implications for councils.

While government funding is generally available for the employment of a co-ordinator and for some essential resources, for example office equipment and a vehicle, Community Justice Group members give their time on a voluntary basis. Members hold other positions within the community and most members are high profile, if not pivotal, community members with large demands being made on their time. Often they are from the older generation and may have significant family responsibilities. Many are not in good health. The work they do will often bring them into conflict with other community, and even family, members. Additionally a number of Community Justice Group members have qualified as Justices of the Peace and sit on the local Justice of the Peace Court from time to time. Of course, Community Justice Group members live in small communities which, in the case of those in remote areas, can have road access cut for months at a time in the wet.

To date Community Justice Group members receive no payment for their time and effort. It must be particularly galling to be constantly required to be available for consultation with highly paid government employees, consultants or judicial officers who usually only fly into the community for a day. Nevertheless, Justice Groups are unstintingly generous in sharing their knowledge and experience with those who seek it.

Most Queensland Judges and Magistrates visiting remote Indigenous communities will now make an attempt to meet with the Community Justice Groups and welcome their presence in court and any submissions they wish to make.

Advantages and Limitations

All of these innovations and ways of doing Indigenous Justice are steps in the right direction. They allow Indigenous community members to take a role in the process so that justice can more readily be seen to be done in their communities. Judicial officers are better informed as to the background of the offender and the context in

which the offence took place. Penalties can be more creative, meaningful and appropriate to the offenders, their victims and their communities. Referral to appropriate treatment agencies and programs is more likely.

Elders in communities are better informed about the court process, the reasoning behind sentences and the actual effect of penalties. There can be elements of “shaming” in the involvement of community members in the process which can be a powerful factor in sentencing and rehabilitation, and offenders are given the opportunity to take responsibility for their actions and criminal behaviour. There is often an opportunity for the victim to have a real voice in the process.

However, while some studies have indicated a positive effect on the rate of recidivism, to date a definitive evaluation of this crucial issue (certainly in Queensland) has yet to be concluded

On the other hand, a number of criticisms have been levelled at Indigenous Justice processes. Indigenous Justice has been labelled “apartheid justice” in that it delivers a different (although not necessarily superior) version of justice to Indigenous people. Why should these processes be limited to Indigenous offenders?

In Queensland Community Justice Groups are under-resourced and under-trained. Huge demands are placed on people who have little experience with the criminal justice system, many of whom no doubt find courts and lawyers, in particular judicial officers, intimidating and frightening. The very real issues of conflicts of interest when members who are related to offenders or victims make submissions on sentence is one which arises frequently but has not been adequately addressed in terms of training and strategy.

Many of these initiatives are essentially personality driven. Governments may provide some resources and the necessary legislation but the success of such initiatives is often reliant on the enthusiasm and drive of the judicial officer concerned. In Queensland the remote communities are visited, if at all possible by the same Judges from year to year. These Judges are either the regional Judges who are based in a centre closer to the remote community, or a member of the District Court’s Aboriginal and Torres Strait Islander Committee. This policy allows a relationship of trust and respect to be fostered between the Community Justice Group and the visiting judge.

There are arguments about the reality of the consultation with communities when Indigenous Justice initiatives are put into place. Are circle sentencing and Community Justice Groups a response to Indigenous demands for justice or are they yet further examples of white constructs imposed on Indigenous communities by those in power?

For Indigenous Justice to be truly effective it requires the full cooperation of all involved in the process, including the police, the prosecuting authority, the defence legal services, the corrections staff, the juvenile justice staff, court administrative staff and judicial officers. It is rare that all these players approach the process with equal commitment and enthusiasm.

The one major resource which is often scarce and which militates against the success of Indigenous Justice initiatives, is time. Circle Courts and Murri Courts are time intensive. Effectively involving Community Justice Groups in the court process involves time spent developing relationships of respect between judicial officers, other players in the process and the Groups. Adding their voice to the process inevitably lengthens the time a matter takes to be finalised. In circumstances where, for example, a Magistrate visiting Aurukun on Cape York may have to deal with over 60 defendants in one day, that time is simply unavailable.

While Indigenous Justice invites judicial officers to be creative in their sentencing they are nevertheless limited to the sentencing options provided by the relevant legislation. In Queensland for example, it is not possible to impose conditions in an order suspending a term of imprisonment, a sentencing tool which would frequently be appropriate for Indigenous offenders. Of course any mandatory sentences would limit the success of Indigenous Justice and be contrary to its spirit.

As mentioned, for Indigenous Justice processes to be successful the judicial officers involved need to be able to build relationships of trust and respect with communities. Problems of continuity of practice and consistency in sentencing (so important in small communities) can arise when a succession of different judicial officers circuit to communities or sit in urban Indigenous courts.

The use of Indigenous Justice processes only in certain settings can give rise to perceptions of unfair or harsher treatment of offenders in different circumstances. For example, Judges from the District Court travel twice a year to most Indigenous communities on Cape York. In these communities, offenders who remain in their communities on bail and who plead guilty can be dealt with, usually in a process involving the local Community Justice Group. But offenders who are on remand in custody or who plead not guilty must be dealt with in Cairns often hundreds of kilometres away from their communities. Steps have recently been taken to give the relevant Community Justice Groups the opportunity to report to the court prior to sentence in cases tried in Cairns and increasingly this occurs. Slowly Community Justice Groups are feeling confident enough to appear during sentencing hearings by telephone or video link.

There can be an assumption made that a submission from Elders or respected persons will favour the offender. However, Community Justice Group submissions are not always favourable to the defendant and the Groups often see their role as one of presenting a community point of view of the offence and will regularly include the victim's attitude in their submission. There can be difficulties in defence being given the opportunity to test such adverse submissions and in reality they will often have little notice of them.

A troubling issue that often arises is the status of matters disclosed to the Groups during meetings with offenders and victims. Uncharged offences may be referred to, different versions of the facts given (including versions which disclose possible defences), and very personal (sometimes painful) details of the defendant revealed. Such matters are not necessarily regarded as confidential and can be disclosed in a report to the court, but whether the defendant was aware of this possibility prior to participating in the meeting is often doubtful.

Youth Justice Conferencing

Despite conferencing being a part of the juvenile justice regime in Queensland for nearly ten years, there is still a lack of knowledge or appreciation of the process by both prosecution and defence. Although it is mandatory that a judicial officer consider the possibility of a referral to a Youth Justice Conference prior to sentencing, it is rare that the issue is raised by either prosecution or defence in my court.

Staffing constraints can mean delays in the holding of conferences, especially those involving remote communities. There are particular logistical difficulties in conferencing when the young offender is in detention on remand (the only juvenile detention centre in North Queensland is in Townsville which is over 1000 kms away from some communities in my jurisdiction).

Under the Queensland framework the court does not play a role in the conferencing process itself. The court simply refers the matter to conferencing and following the completion of the process receives a report on its outcome and details of any agreement reached. In the past detailed reports describing the offender and victim's response and the way the conference progressed, were provided. Unfortunately now due to concerns about confidentiality and legislative constraints, only the briefest of reports are now provided. This is disappointing as a more detailed report can be very useful to a judicial officer in assessing the real effectiveness of the process and in the determining an appropriate penalty.

Successful conferencing usually results in the offenders gaining empathy for the victim and taking responsibility for the consequences of their behaviour. The process can allow healing for the victim.

In the case of Indigenous Juvenile offenders the involvement of an appropriate Community Justice Group in the conferencing process can have significant benefits. A true community voice is included and the involvement of respected Elders can have a very positive effect on the young offender. Justice Groups can be well placed to oversee the completion of any agreement arrived at during the conference and supervise any community-based penalty imposed by the court. The Youth Justice Conferencing unit in Cairns has worked hard to create close relationships with Community Justice Groups and one or two Group members who are both clan and gender appropriate to the offender and victim, do participate. However communities vary widely in their capacity to put into practice agreements reached during conferencing and such agreements must be properly 'reality tested'.

Recently in Cairns, an eight year old, an eleven year old and a thirteen year old were accused of raping a three year old girl. No criminal justice action could be taken against the eight year old alleged offender as he was below the age of criminal responsibility. The thirteen year old was referred by police to a Youth Justice Conference and the eleven year old was charged with criminal offences. In due course, I, or a colleague, will most likely have to consider whether to refer the eleven year old to a Youth Justice Conference.

Conferencing units are increasingly being asked to conference sexual assault matters. For example, in a recent four month period the Cairns Youth Justice Conferencing unit received nine police referrals involving sexual assault.

There is debate about the appropriateness of such referrals and there are real issues involving the safety of the complainant, the potential for re-victimisation, risk management generally and the capacity of the process to deal with the issues raised therein.

Conferencing is a facilitative process which at its best provides the offender and his/her family with the opportunity to confront his/her guilt and move on, and the victim and his/her family with the opportunity to commence healing. But, particularly when sexual assault cases are being conferenced, there can be unrealistic expectations that therapeutic measures can be provided. While there is some scope within conference agreements to include measures such as counselling for the offender, the reality is that such specialised therapy is often unavailable locally, or way beyond the financial capacity of the offender or his/her family to access.

The Future

For those of us who are convinced of the benefits of applying Restorative Justice principles when sentencing, the current political and community climate presents challenges. There is an obvious tension between an instinctive attraction towards the application of Restorative Justice principles and the pressure through the media of political and community perceptions that the system is “soft” on criminals and sentences too light.

The reality is that, certainly in Queensland, the judiciary has in recent years been taking a tougher approach and custodial penalties are increasing in quantity and in length.

On the one hand governments speak, for example, of abolishing remissions and parole and on the other they are prepared to support some Restorative Justice Initiatives (not necessarily wholeheartedly). Politically these initiatives are easier to sell if applied only to “problem” groups such as Indigenous offenders and juvenile offenders, although of course, there is no reason why the principles cannot have universal application.

It does seem that in practice the most successful Indigenous Justice initiatives are those created by communities themselves with the co-operation of sympathetic judicial officers. The message then to judicial officers is to take the time to engage with and listen to the communities you serve and give yourself the freedom to do things differently. To advocates for offenders, consider if your client would benefit from elements of Restorative Justice and don't be afraid to argue for the inclusion of such elements in the process your client faces.

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