Research Framework for a Review of Community Justice
Community Justice – Culture/Tradition/Diversity

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1. Key Themes (to be explored)

This chapter should be read closely with the chapter on "First Nations/Aboriginal Justice"

The origins of the design of any restorative/community program should come from the cultural/traditional/contemporary practices of the community. The community should be encouraged to reflect upon and record the values, principles and methods of conflict resolution historically practiced by them.

Is it that those traditional methods will likely have evolved under recent historical influences and the impositions of civil and criminal justice? Any community will, with varying degrees of acceptance, incorporate the realities of these influences into the way members of the community have come to think about justice contemporarily.

2. Research Questions

2.1. Impacts

What are the impacts (whether intended or unintended) of the restorative community justice on individuals in, or brought into, the justice system, or on the public at large?

Are there foreseeable specific impacts of the initiative on individuals who can be identified by membership in any of the following groups?
— women (please see "Diversity and Justice: Gender Perspectives — A Guide to Gender Equality Analysis")
— racialized minorities
— aboriginal people
— religious groups
— persons with disabilities
— youth and children
— the elderly
— social assistance recipients and the poor
— gays, lesbians, transgendered and bisexual persons
— persons with literacy problems

Are there foreseeable specific impacts on individuals who can be identified by membership in more than one of these groups?

2.2. Modifications

How could restorative community justice be modified to reduce or eliminate any identified negative impacts, or to create or accentuate positive ones?

If these modifications were made, would there be impacts on other groups in society or on the ability of restorative community justice to achieve its purpose?

3. Relevant Documents, Studies and Practices - Yukon

3.1. Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon – 1992 [1]

- There is also a reality that most communities have significant non-aboriginal populations which must be accommodated in any new justice approaches.

- Whitehorse will continue to have considerable aboriginal population which is likely to remain under the jurisdiction of the existing system whatever the outcome of administration of justice negotiations in communities.

[1] Laprairie, Carol, Report to Department, Yukon Territorial Government, First Nations, Yukon Territory, Justice Canada, Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon. September 1992.

4. Relevant Documents, Studies and Practices – Other Northern Territories

4.1. Inuit Women and the Nunavut Justice System - 2000[2]

- **Traditional Knowledge:** The most obvious departure from the previous government's program and policies is the Nunavut Government's current endeavour to incorporate Inuit Qaujimajatuqangit (IQ) as a fundamental policy and operating principle of its work.
    - Translated into English, IQ refers to the traditional knowledge of Inuit. What the IQ policy is and its relationship to the workings of the various departments is still being sorted out.
    - The example readily presented (by most Nunavut government officials, including those in the Department of Justice) to describe the role of IQ in policy development is the incorporation of the knowledge of Inuit hunters with western scientific knowledge when it comes to management of wildlife resources.
    - What IQ means for the justice system is not so apparent but this approach could compliment the recommendations of the NSDC.
- Certainly, improvements in the technical administration of justice and approaches to the justice system that are culturally sensitive would benefit all people who encounter the justice system in Nunavut.
    - Most of the documents listed in Appendix #1 noted that community-based justice initiatives responded to repeated calls for more community involvement in the justice system, and for resolution mechanisms that are responsive to traditional Inuit ways and cultural values.

Question: In your opinion, would alternative measures in certain cases make it possible to revive or apply traditional methods for resolving conflicts? [3]
Answer
· -must be careful that "traditional methods" or traditional practices are not used to simply get the easy way out, "created" to be used as an excuse for behaviour or conduct prohibited in the Criminal Code or other penal statute, or used to unduly influence a jury or other members of an alternative model like a diversion committee or justice committee or Inuk justice

Question: Is the justice committee as described in the Working Document in harmony with your cultural values?[4]
Answer
· -the Committee is still very much rooted in the existing criminal justice system, to the extent it gives back to the community some control over its own affairs, it is in harmony with our view that we are responsible for our own affairs but there is still some concern that when the "community" is given to control there are some who may abuse that power to the detriment of women and children who are victims of abuse and assault
· -in terms of the "committee" being within our "cultural values", it would be hard to say because we have not traditionally had justice committees

Culturally inappropriate community -based justice models[5]

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[2] Mary Crnkovich and Lisa Addario with Linda Archibald Division, Department of Justice Canada, Research Report, Research and Statistics, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.

[3] Pauktuutit, Inuit Women and the Administration of Justice, Phase II: Project Reports –Progress Report #1 (July 1, 1994 -December 31, 1994), Appendix 3 -Presentation to the Advisory Committee on the Administration of Justice in Inuit Communities cited in Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf. The participants of the justice workshop held in Ottawa August 12-16, 1994 presented their views, recommendations and response to the working document of the Quebec Advisory Committee on the Administration of Justice for Native Communities. Two representatives from the Ungava Coast and two representatives from the Hudson Coast accompanied Martha Flaherty and Ruby Arngna'naaq in the oral presentation to the Committee members. This presentation took place in Ottawa on August 16th before the Committee Chair, Judge Coutu. This was an Advisory Committee established in Quebec, however, the issues raised parallel the issues and concerns identified by women in Nunavut.
[4] Ibid.
[5] Pauktuutit, *Inuit Women and the Administration of Justice, Pauktuutit, Phase II: Project Reports -Progress Report #2* (January 1, 1995 - March 31, 1995) - Appendix #6 - Minutes of Proceedings and Evidence from the Standing Committee on Justice and Legal Affairs

Like many other community justice initiatives, Pauktuutit is concerned that the alternative measures provisions of Bill C-41 will sanction and result in the implementation of aboriginal models that do not relate to Inuit, or will focus on the needs of the offender to the exclusion of all others - namely women in the community. (p. 85-8)

Community-based systems are also said to offer Inuit and other Aboriginal communities the chance to deal with accused and offenders in ways that are more consistent with our own traditional cultural values. The expectation is that this will lead to less emphasis being placed on "retribution" or "mere punishment" and more on "restorative justice" that is directed at restoring harmony between the offender, the victim and his/her community. The underlying intent is to empower a community to deal with its own problems in a way that meets broader social goals, not just narrow legal ones. (p. 85:8)

#20 - "The demands for the return of the traditional systems of justice must be balanced against the needs of women and children not to be forced into reconciliation nor should they be required to surrender access to the mainstream justice initiatives.." (also #17) [6]

The reference to the "return to traditional systems" begs the question, who is requesting this and when they are, what are they really requesting? This phrase suggests that there are "systems" or "practices" within aboriginal cultures that are well known, shared and that can deal with matters presently dealt with through the criminal justice system.

What does it matter that an alternative initiative or system is identified as "aboriginal"? If it is the code for sanctioning greater inequalities and practices that put women and other victims at greater risks this has to be specifically addressed. A practice that is identified as part of an "aboriginal" system and part of "self government" (paragraph #21) may allow for certain flexibility that is not allowed for in policies and laws subject to the Charter.

We would certainly advocate that all alternatives are subject to the Charter, however, we know from our experiences in the Constitution negotiations and Aboriginal Justice Reform inquiries, that law makers, politicians and others that are not Aboriginal become very "hands off" about the "details" of many systems and practices in so far as it deals with matters of the victims. They can and do discuss the "rights" of the accused and the requirement to respect these rights, regardless of the system or practice being used. Self government rights do not collectively sanction internal inequalities based on gender or any other of the enumerated or non-enumerated grounds of the Charter. However, there appears to be a certain degree of complacency with or discomfort among these individuals in questioning and scrutinizing whether these alternatives are appropriate in addressing the "needs" or "interests" of victims. I do not mean culturally-appropriate, but rather or not they are appropriate in promoting equality among its members and not undermining the individual rights of those who are not as powerful or privileged as leaders in the communities. When identified as "aboriginal" those representing the larger "public" do not make certain demands or requiring certain standards to ensure women and others are not further victimized by the alternative system because it is "aboriginal". This clearly is not acceptable.

The reference to "systems" also implies not only that these systems exist but that there is a certain degree of homogeneity among Aboriginal peoples and within each indigenous people grouping, which is in fact not the case. Within Inuit communities in Canada., the practices and language of Inuit in each region varies. Accordingly, the variation between regions and communities will also result in different systems among Inuit, depending what region you locate yourself. Having said this, the predictability and professed universalism of the existing system may be more appealing because it is well known and experienced by many.

Respecting: Bill C -41, Tuesday February 28, 1995, Witnesses: Inuit Women's Association of Canada *cited in* Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.

[6] Pauktuuti*t,* Memorandum from Pauktuutit Justice Project Coordinator to General Counsel of Aboriginal Justice Directorate, David Arnot, Comments on the Justice Memorandum, November 7,1995 cited in Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.

There are certain safeguards in place in the existing system along with infrastructural supports where victims have some protection. So, if these are not available in the alternatives, then it would seem likely that women ultimately will choose what offers them the most protection. Yet, when the community - the accused and victims- are given the choice between the outside system and their "own", the pressure to choose their own system will be great. Those choosing the existing system gets interpreted as not supporting "their own" system. This further alienates the women and places unbearably, yet intangible, pressure making it difficult for them to choose the existing system.

In the context of Inuit culture, there is nothing so exact, complete as a "traditional system" or "traditional practices" you can immediately identify and implement. The traditional practices such as a shaming song, parties individually fighting one another, banishment, -are not being called upon by women to replace the existing system.

There seems to be a practice adopted by those who write about aboriginal justice reform wherein they refer to "community-based initiatives" and "traditional practices" as if they are synonymous. People may be calling for 'community participation' but that does not necessarily mean a return to an actual "traditional practice". Traditional values and a return to these, may be what some are calling for - but that is not always the case.

There is a need for clarity and distinction between conventional community-based initiatives and traditional practices. These are seen to be one in the same by many observers. There is an assumption that because the members of the community are aboriginal therefore the alternative being proposed must be a "traditional practice", or at least, "aboriginal". I sense this is also a theme in this federal document-that I would suggest be confronted and dealt with.

It would be useful to examine the system or practice being advocated in the community (regardless of whether it is a traditional practice or a community-based initiative involving community people. designed by and implemented by local people), in terms of the issues raised above around creating further obstacles and barriers to victims. The criminal justice system as it operates in the community is identified and the alternatives (traditional or community-based) are presented here as two separate systems operating mutually exclusive of one another- the distinction being used (artificially) being non-traditional and traditional. Many of the alternatives being initiated and used in Inuit communities are initiatives such as diversion, mediation, sentencing circles and are part and parcel and very much dependent upon the existing criminal justice system as it exists to day. They are far from separate and apart from each other. In fact the amendments of Bill C-41 regarding alternative measures attempt to incorporate these alternatives into the system.

The right to choose between the systems or practices means that one of the group of rights, those of the accused, no doubt will be focused upon. Ultimately the "rights" of the accused vis-a-vis the "needs" or "interests" of victims, are perceived as paramount- so, where choice is an issue between what initiative is used, it is clear that the right of the accused, as defined by the existing system will be presented as be paramount to the "interests" of the victim. The right to choose, unless standards sanctioned by laws were in place that provided guidelines to be followed when making the choice, ultimately means the choice of the accused will prevail. The amendments to Bill C-41 regarding Alternative Measures and their use are vague in setting out guideline or standards- this is left to programs to be designed.

This begs the questions, how do you ensure the victim has a say in this determination or choice of what route to follow and that the victim is able to fully participate without coercion, harm or fear of reprisals? These questions must be asked and their response should help determine the standards and guidelines applying to the use of these alternatives and the election or choice of specific alternatives.

Individuals in the justice system must be sensitive, they must unlearn racism and they must be culturally aware without romanticizing Aboriginal life and culture. (p. 3)[7]

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[7] Department of Justice (Canada), Record of Proceedings: Aboriginal Women and Justice –Consultations - Inuit Women, - November, 1993 cited in Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.

4.2. Nunavut (Northern) Justice Issues - 2000 [8]

The role of tradition

- Many have held that traditional Inuit mechanisms for social control and addressing anti-social acts are ineffective in the modern world.
  - This is the result of both the policies that have oppressed Inuit communities, creating dependency and, in some cases, powerlessness, as well as the fact that many of the crimes that occur today did not occur in the past.
- However, the voices in this collection indicate that the *spirit* that guided the traditional mechanisms can be incorporated into modern-day situations and community-based initiatives.
- Traditional goals had both proactive and reactive elements. Traditional mechanisms created an environment that prevented anti-social acts, as well as a process that adequately addressed the issue(s) at hand, attempting to heal the parties to the offence.
- These are goals that can be attained through modern terms such as 'restitution', 'community service orders' and 'reintegration'.
- Amalgamating tradition with modern is a theme that underlies many of the initiatives underway.

4.3. A Framework for Community Justice in the Western Arctic – 1999[9]

Cultural Elements in the Program - When offenders are addressed in their own language by the Magistrate/Justice of the Peace, offenders, victims and community residents are more comfortable in the court setting. Ultimately charges are dealt with more readily which, in turn, reduces the volume of charges appearing on the dockets, takes the burden off the court system and allows it to focus on the most serious offenders. Other culturally appropriate processes, such as the opening and closing of court with an Aboriginal prayer, smudging", etc., as determined by the community should be included as an intrinsic part of the program.

[8] Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf

[9] Campbell Research Associates, Kelly & Associates, Smith & Associates, prepared for Government of Northwest Territories, Department of Justice, A Framework for Community Justice in the Western Arctic – June 1999

5. Relevant Documents, Studies and Practices – Other Canadian

5.1. The Criminal Justice System: Significant Challenges – 2002 [10]

Ailing and aging offenders in federal institutions. Certain kinds of illness may result directly or indirectly in arrest and incarceration—for example, substance addiction, fetal alcohol syndrome, and mental illness. Not enough information exists to determine how many people have come to the attention of the criminal justice system as a direct or indirect result of these problems. Nor is it known to what extent the criminal justice system is dealing with what are primarily public health and social problems. Increasingly, federal institutions have to treat offenders who have severe health problems. These critical problems are costly.

Correctional Service Canada has made the following estimates:

- Eighteen percent of its male inmates had been hospitalized in a mental health facility at some time before their admission to federal prisons.
- Forty percent of offenders in its custody have problems of moderate or serious substance abuse.
- A potentially significant number of offenders suffer from fetal alcohol syndrome.
- In federal institutions about 217 offenders have HIV/AIDS, a rate at least 10 times higher than in the general Canadian population.
- About 24 percent of inmates and 14 percent of staff tested positive for tuberculosis.
- Nineteen percent of inmates are known to be infected with hepatitis C.

The proportion of offenders in Correctional Service Canada facilities who are over 50 years old is growing rapidly; from 1993 to 1996, the number of inmates older than 50 and serving sentences of three years or longer grew by about 10 percent. Of those offenders, about 24 percent had been convicted of homicide and about 38 percent of a sexual offence. In May 1996, there were 1,379 offenders between 50 and 90. Correctional Service Canada indicates that older offenders have a high incidence of multiple and chronic health conditions such as heart disease, diabetes, and cancer. It says that geriatric inmates cost up to three times more than others to maintain.

5.2. Developing a Restorative Justice Programme - 2000[11]

- As emphasised in Part 1, the origins of the design of any RJ programme should come from the traditional practices of the community.
  - The community should be encouraged to reflect upon and record the values, principles and methods of conflict resolution historically practised by them.
  - However, it is equally true that those traditional methods will likely have evolved under recent historical influences, primarily colonialism, and the imposition of the European system of civil and criminal justice.
  - Any community will, with varying degrees of acceptance, incorporate the realities of these influences into the way members of the community have come to think about justice contemporarily.
  - That is, the degree to which the community can return to traditional methods has been affected by the harsh reality of a Constitutional Canada.
- When thinking about the introduction of an RJ programme, the community must accept, at least at present, that the Attorney General of each province has the ultimate authority with respect to the administration of justice 1 under

[10] Office of the Auditor General of Canada, The Criminal Justice System: Significant Challenges, Chapter 4, April 2002, http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0204ce.html

[11] Michael R. Peterson, Developing a Restorative Justice Programme, Part One, Justice As Healing Newsletter, Vol. 5, No.3 (Fall 2000) http://www.jahvol5no3.pdf

the *Constitution of Canada*[12], and that the *Constitution*, which includes the *Charter of Rights and Freedoms*, is the supreme authority in the country.[13]

- In pragmatic terms[14] this means that RJ programmes in Canada, and in British Columbia specifically require the participation of both the federal and provincial governments.

5.3. Aboriginal Justice Strategy (AJS) Evaluation -2000[15]

5.3.1. Cultural Relevance

- One of the long-term outcomes of the AJS is to meet Aboriginal needs through the availability of culturally appropriate community justice projects.
  - Results from case studies and interviews indicate that many of the projects funded through the AJS are based on traditional values, which means the procedures and dispositions are perceived as culturally relevant.
  - Though customs vary significantly, several examples include the use of circles, the inclusion of smudging and prayers, consensus decision-making, and equality of participants.
  - Dispositions are meant to address the underlying causes of criminal activity by addressing the needs of the 'whole' person (spiritual, mental, emotional and physical) with the intention of restoring balance and harmony.
  - It is believed that individuals may find a 'better way of being' through cultural reintegration, which include sweat lodges, healing circles, traditional life-skills projects, Elder counseling, and performing community service hours in Aboriginal organizations.
  - A range of other restorative options are offered by projects, including counseling for alcohol and/or drug abuse, anger management courses, and restitution or an apology to victims.

5.4. Diversity and Gender Equality[16]

The Department continues to co-chair with British Columbia the Federal-Provincial-Territorial Working Group on Diversity, Equality and Justice, which deals with diversity issues from an inter-jurisdictional perspective. The FPT Working Group is refining the Integrated Diversity and Equality Analysis Screen (IDEAS) to better assist in the assessment of the potential impact of justice initiatives on Aboriginal people, persons with disabilities, youth and children, racial minorities, women and other vulnerable groups.

Purpose

Diversity analysis flows from the rights accorded to vulnerable groups under both the Charter and the various human rights codes.

This screening instrument is intended to support recognition of those rights by providing a way to assess the impact policy initiatives could have on groups who frequently experience disadvantage in their dealings with the justice system, whether as parties to proceedings, as witnesses, as victims or as members of the public. Based on key guiding principles,

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[12] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, at s.92(14). Under s.91(27) the federal government makes the criminal law and the law on criminal procedure. Also relevant is s.91(24), which gives the federal government authority over "Indians and lands reserved for Indians."
[13] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 52 states that the *Constitution* is the "supreme law of Canada."
[14] The focus of this workshop does not require that I go into continuing progress in the definition of s.35 rights under the *Constitution*, although progress with respect to the *Constitution* is reflected in treaty negotiations, self-government agreements and other initiatives relating to the self-determination of Aboriginal peoples.
[15] Department of Justice Canada, Evaluation Division, Final Evaluation Aboriginal Justice Strategy, Technical Report, October 2000
[16] Department of Justice Canada, Performance Report, For the period ending, March 31, 2001 http://www.tbs-sct.gc.ca/rma/eppi-ibdrp/est-bd/p3dep/dpr_i-m_e.htm#J

it uses a few focussed questions to elicit information which might otherwise not come to the attention of decision-makers.

Diversity analysis does not attempt to determine whether an initiative should proceed; rather, it provides information on the impacts of the initiative on diverse groups. For some initiatives, alternatives may be suggested to modify the impact of the initiative on diverse groups. Upon completion of the analysis, decision-makers could assess the initiative in light of its impact and determine if the initiative should proceed or be modified.

Guiding Principles

Diversity analysis involves an assessment of the substantive equality of the outcomes a proposed initiative would produce for diverse groups; it is not accomplished by ascertaining that the initiative would treat everyone the same.

Diversity analysis is most effective if applied early but should be continued throughout the policy development process.

The Instrument

To apply the diversity and equality screening instrument, the following questions should be addressed:

Status

What is the initiative; what is its purpose; what stage is it at; what research or consultation has been done; what is the target date for completion?

Impacts

a) What are the impacts (whether intended or unintended) of the initiative on individuals in, or brought into, the justice system, or on the public at large?

b) Are there foreseeable specific impacts of the initiative on individuals who can be identified by membership in any of the following groups?
— women (please see "Diversity and Justice: Gender Perspectives — A Guide to Gender Equality Analysis")
— racialized minorities
— aboriginal people
— religious groups
— persons with disabilities
— refugees
— recent immigrants
— youth and children
— the elderly
— social assistance recipients and the poor
— gays, lesbians, transgendered and bisexual persons
— persons who have difficulty functioning in either official language
— persons with literacy problems

c) Are there foreseeable specific impacts on individuals who can be identified by membership in more than one of these groups?

Modifications

a) How could the initiative be modified to reduce or eliminate any identified negative impacts, or to create or accentuate positive ones?

b) If these modifications were made, would there be impacts on other groups in society or on the ability of the initiative to achieve its purpose?

Further Research

Given what has been learned in the analysis undertaken to this point, what additional research or consultation is desirable/essential to better appreciate the impacts of the proposal on diverse groups?

5.5. Restorative Justice/Criminal Justice–Identifying Some Preliminary Questions, Issues/Concerns - 1998[17]

- A number of questions emerge when contemplating the use of this set of principles as a guide to policy makers and program administrators. For example, further examination of the following is necessary:
    - The host of additional questions with respect to the extent to which this philosophical approach had been tested as a framework for justice in a modern, western industrial society.

- It is evident from even a cursory review of the literature on restorative justice that there is little attention to diversity as analytical constructs.
    - The terminology of 'victims', 'community', and 'offenders' are invariably used without any kind of accompanying diversity analysis.
    - nor is there any analysis of the particular dynamics of violence and abuse in relation to other minority and marginalized members of society.
    - In a related vein, an equality rights analysis was nowhere to be found in the literature review.

Consideration of Implications for Ethnic/Cultural Communities

- There is an additional concern that the implications of these reforms for ethnic/cultural communities have not been studied in any kind of systematic or rigorous fashion.
- 'Reintegrative shaming' that comes out of a family group conference may mean something positive for an offender in Australia but something completely different and not necessarily positive, for a Canadian.
    - This type of cultural and ethnic nuance has to be examined through research and consultation.

- Further, where English is a second language, there is a need to ensure that translation services are an integral component of both local victim support services and community-based restorative programs.
- Representatives of ethnic/cultural communities need to be involved in the development of policy around these initiatives.
    - Extensive consultation with members of these communities should be conducted.
    - As well, there are victim service providers who are themselves members of these communities and/or have significant expertise with respect to the identification of the issues for offenders and victims who come from these communities.
    - Similarly, these same individuals are aware of what types of support services are required for victims from these communities.

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[17] Goundry, Sandra A., Legal Consulting and Research Services, Restorative Justice and Criminal Justice, Reform in British Columbia – Identifying Some Preliminary Questions, Issues and Concerns, Prepared for: BC Association of Specialized Victim Assistance & Counseling Programs, 30 April, 1998

5.6. The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate -1998 [18]

Socio-Cultural Insensitivities

- It has already been suggested elsewhere that some evidence exists to suggest that ADR is developing as a "white, middle-class" alternative to the conventional justice system75. The possibility that other ethnic groups and social classes may be, however inadvertently[19]76, excluded from participation is only one side of the socio-cultural insensitivity issue. Perhaps the more insidious side is summarized in the charge by Delgado (1988) that:
    - "Relegating many problems to alternative forums is enormously beneficial to those in power. It takes the sharp edge off claims, diffusing them into generalized grievances to be worked out, harmoniously is possible, on a case-by-case basis. It is an excellent way of seeming to be doing something about intractable social problems while actually doing relatively little. It enables us to bury claims in a mass of irrelevant detail ADR, in short, is a powerful means of replicating current social arrangements and power distributions." [20]
- Delgado argues that, while the conventional justice process (imperfect as it may be shown to be) contains numerous safeguards against bias and prejudice (e.g., the jury selection process, judicial disqualification for bias, rules of evidence, etc.),[21] ADR not only incorporates few, if any of these safeguards, it is actually championed for its lack of procedural rigor on the basis that the process is "speedy, flexible and nonintimjdating". [22]*By* any analysis, informality and absence of procedural rigor must work to the advantage of some and the disadvantage of others. In all likelihood, Delgado argues79, ADR procedures will act to the advantage of the already empowered and the already enfranchised. He concludes by saying:
    - 'When ADR cannot avoid dealing with sharply contested claims, its structureless setting and absence of formal rules increase the likelihood of an outcome colored by prejudice, with the result that the haves once again come out ahead'
- Space precludes examining this problem in more detail but Delgado's arguments indicate some real cause for concern in this area.

5.7. Re-examining culturally appropriate models in criminal justice applications -1997 [23]

[18] Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: *Playing Devil's Advocate ,* 1998 http://www.law.ualberta.ca/centres/civilj/full-text/montgomery.htm

[19] Gehm, John R. 1998. Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks. Western Criminology Review, 1(1). Located on the internet at http:llwcr.sonoma, edu/vlnl/gehm.html

[20] Loc. cit. footnote 64.

[21] Delgado, Richard. 1988. Law and Social Inquiry. Journal of the American Bar Association. Vol.13, No.1, at p. 150-151.

[22] Ibid. footnote 77, at p. 152.

[23] LaRocque, Emma "Re-examining culturally appropriate models in criminal justice applications" in Aboriginal Treaty Rights in Canada*:* Essays on law, equality and respect for difference. Ed. Michael Asch. UBC Press, 1997. ISBN 0774805803 cited in University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

5.8. The State, The Community and Restorative Justice - 1996 [24]

- **Customary and colonial law:** We had the opportunity to look at the imposition of colonial law onto a number of customary practices through a review of the literature about a wide variety of indigenous groups.
  - Although this study was not exhaustive and the sources suffered from the usual weaknesses of contemporary science including ethnocentrism we believed we could see a pattern in the way in which the meetings of customary and colonial approaches to social harm were determined.
  - "The most prominent pattern which emerges from the case studies indicates that attempts to accommodate customary law have often been at the expense and integrity of the Indigenous form.
  - In each case the Indigenous model has evolved in the direction of emulating the philosophy, principles, and practices of the dominant colonial approach to the administrative of justice. ...This trend of the displacing of customary law to a lower status is apparent when one looks more specifically at certain junctures in the justice system of the countries discussed in the case studies." [25]

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[24] Ron Schriml, (Director of Prairie Justice Research, University of Regina, and Professor at the School of Human Justice, University of Regina. Professor Schriml has had a long standing interest in researching and teaching about alternatives to current criminal justice practices, particularly in the development of restorative and community justice.) The State, The Community and Restorative Justice, Justice as Healing vol.1 No. 1 (Spring 1996) http://www.usask.ca/nativelaw/jah_schriml.html

[25] Schriml, R. & Gianoli, M. "The Interface of Customary and Colonial Law", presented at the Western Association of Sociology and Anthropology Annual Meeting, Winnipeg, 1985 p. 24-25 *cited in.* Ron Schriml, The State, The Community and Restorative Justice, Justice as Healing vol.1 No. 1 (Spring 1996) http://www.usask.ca/nativelaw/jah_schriml.html

6. Relevant Documents, Studies and Practices – USA

6.1. Resolving Disputes Locally: Alternatives for Rural Alaska - 1992[26]

Cultural Cohesiveness. The three organizations studied differ in the degree of cultural cohesiveness within their communities and their participants. Sitka's tribal court operates in the fourth-largest Alaska community and serves not only Tlingit, but also other Alaska Natives and Indians from other states. Indianness predominates among Sitka Tribal Court disputants, although some are non-Indians related through marriage or joint parenthood to Indian disputants. In Minto, participants are more alike, ethnically and culturally, than they are different. In contrast to these two, PACT offers conciliation services in Barrow to a wide range of cultures. Cultural or ethnic cohesiveness of the community may be helpful, but does not appear to be at all necessary.

6.2. Restorative Justice When the System is the Offender -2002[27]

Restorative justice policies and programs have been gaining momentum in the criminal justice system for the past 25 years. It is estimated that 45 or more states have active restorative justice programs, many of them partially supported by state and county governments.

Clearly the restorative justice community is doing good work. The restorative justice approach to restoring offenders and strengthening the community has provided the criminal justice system with a much-needed alternative. A high level of satisfaction with the outcome of such programs instills confidence in a system where confidence has eroded for many whites. For many Native Americans and other people of color groups, confidence in the system is non-existent.

Minorities dealing with these systems see clearly that the system is racist. Racial profiling is illegal. Discrimination based on race is illegal. By engaging in these practices, the legal system itself is breaking the law and therefore fits the offender profile in the restorative justice model.

The restorative justice model uses processes such as victim-offender conferencing and victim-offender mediation as a way to promote offender accountability, victim involvement and community participation. Victim advocates are concerned that criminals are ready to admit their wrong before they can get involved in these kinds of programs. It is equally important for victim advocates and restorative justice volunteers to expand their definition of victim. It must include people of color and Native Americans who-even if guilty of the offence they are charged with-can still see themselves as victims. People of color and Native Americans are targeted by the legal system, making it an offender. In the restorative justice atmosphere, offenders are compelled to account for the wrongs they have done, empathize with the victim and realize the impact of their actions on the victim.

The restorative justice volunteer should be prepared to respond to the person of color who says, "Wait a minute, let me tell you what has happened to me since this all started."

For example, the American Bar Association's *Facts about Children and the Law* says, "In the United States, there is a strong Disproportionate Minority Confinement (DMC). African American and Latino youth are over represented at every level of the juvenile justice system. . . . Minority youth are less likely be released pending trial, less likely to be represented by a

[26] Alaska Judicial Council, Resolving Disputes Locally: Alternatives for Rural Alaska, August 1992, http://www.ajc.state.ak.us/Reports/rjrepframe.htm
[27] Conrad Moore, He works half-time with Mennonite Central Committee U.S. as co-coordinator for the Damascus Road anti-racism process and half time with MCC East Coast peace education, Restorative Justice When the System is the Offender, Conciliation Quarterly Vol. 20, No. 3 http://www.restorativejustice.org/rj3/Feature/MARCH2002/Conciliation/system.htm

lawyer, more likely to be convicted, and more likely to be sentenced to secure detention than their white counterparts who commit the same type of offense. Non-white youth are more likely to be placed in public secure facilities, while white youth are placed in private facilities or diverted from the juvenile justice system." Diverted to restorative justice programs.

Similarly a report released in April, 2000, commissioned by the Building Blocks for Youth Initiative, a coalition led by the Youth Law Center, has been called the most comprehensive effort ever to quantify DMC. The report titled *And Justice for Some* reports that African American youngsters comprise 15 percent of the youth population (10 to 17 year-olds) but represent 26 percent of total youth arrested. Data from Amnesty International's fact sheet, *War on Juveniles*, puts African-American youth at a startling 30 percent of youth arrested, 40 percent of youth held in custody, 50 percent of the cases transferred to adult courts, and 58 percent of the youth sent to adult prison. At least 47 states have adopted laws that allow children to be tried as adults. The justice decision-makers view African American and Latino youth as more dangerous. Therefore they believe they are responding to a statistical imperative.

In the midst of these staggering statistics, federal and state governments are turning to the restorative justice model. Many restorative justice programs get their start working with nonviolent juvenile offenders. The restorative justice model conflicts with the current retributive, punitive and racist system. That's good.

People of color and Native Americans are targeted by the legal system, making it an offender.

In some ways, restorative justice is in its infancy and is dependent upon the current system to feed it. However, without naming racism and taking a stand, it is perpetuating the status quo rather than conflicting with it. Restorative justice initiatives have the opportunity to affect the criminal justice system and gain credibility with the community of color by declaring themselves anti-racist organizations. Institutions should have clear, measurable goals to live out that declaration in their institutional life. "Nevertheless," you may ask, "racism is such a large problem. What can my little struggling organization do about it?"

The first step could be to adopt an antiracist institutional identity. Board members, staff and volunteers should have anti-racism training. Second, they should serve notice to the system that they are anti-racist and are monitoring cases referred to them. Visionary state and local governments could, through education, see how this may help them to get their DMC numbers down.

However, the focused goal here is for restorative justice agencies to operate in anti-racist ways.
Credibility will increase in the community of color and restorative justice will achieve a new level of integrity once racism is named and restorative justice agencies claim an anti-racist identity.

Credibility will increase in the community of color and restorative justice will achieve a new level of integrity once racism is named and restorative justice agencies claim an anti-racist identity.

At the core of racism are power, privilege and preference for white people. The reason for the Disproportionate Minority Confinement rate is racism-clear and simple. Victim offender mediation volunteers, restorative justice trainers, board members and other staff have without hesitation admitted that they know there is racism in the system. Many are eager to break racism's stranglehold. Some are beginning to work at it. We cannot educate racism away but can work at dismantling it. The restorative justice community can influence these institutions rather than perpetuate the status quo.

7. Relevant Documents, Studies and Practices – International

7.1. Restorative Justice Programs in Australia - 2001 [28]

Restorative justice and Indigenous communities

- Perhaps the most controversial aspect of restorative justice programs in Australia concerns the question of their appropriateness and effectiveness in Indigenous communities.
    - Cunneen (1997) summarised the criticisms as follows:
        - a failure of those setting up restorative programs to negotiate and consult with Aboriginal communities and organisations;
        - concerns about the discretionary powers of police over access to programs;
        - inadequate attention to cultural differences;
        - the undermining of self-determination through a tokenistic recognition of Indigenous rights.
    - Bargen has addressed this subject from an operational point of view. In reviewing the first year of operation of the NSW program in 1999 she observed:
        - '...disappointingly, but perhaps not surprisingly, the Act is not yet working as it should in Indigenous communities. Cautioning rates and conference referral numbers for Indigenous children and young people remain low in many parts of the state. I
        - It is not always possible for an administrator to appoint an Aboriginal convenor in all appropriate cases. Many Indigenous people are still not aware of the existence of the Act nor of the part they can play in its operation nor of its potential to reduce the entry of significant numbers of Aboriginal children into the juvenile justice and ultimately adult criminal justice systems' (unpublished, p 19).
    - Wundersitz (1996) in her South Australian evaluation also observed that conferences did not appear to be working as well for Aboriginal cases, with around 12 percent of Aboriginal youths failing to appear for conferences.
        - However, she noted that steps had been taken to address some of their special needs: wherever possible an Aboriginal conference convenor was assigned to the case and, rather than attempting contact by phone, these convenors preferred to visit Aboriginal youth and their families at home.
        - Wundersitz suggested that '[T]his face to face contact is important in breaking down some of the mistrust which Aboriginal people often feel towards the criminal justice system, and it makes it easier for the coordinator to identify who, of the extended kin network, needs to be invited to the conference' (p 117-118).
        - Similar efforts are being made in NSW and Queensland too (Strang & Braithwaite forthcoming).

Restorative justice and ethnic communities

- Problems exist in extending the reach of the new legislation into ethnic communities.
- The 'structural' criticism of conferencing concerns its inability to address the social causes of crime, while at the same time both referral practices and the conference process itself may favour middle class, articulate participants.
- Despite the criticisms of Cunneen (1997) and others (see for example Kelly & Oxley 1999) about strategies to involve minority groups, much effort has been made in NSW to rectify this situation: for example, administrators in the Sydney region in 1999 used an innovative recruitment and training method developed in close association with those communities, resulting in an extra fifty new convenors.

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[28] Criminology Research Council, Heather Strang, Director, Centre for Restorative Justice, Research School of Social Sciences, Australian National University A Report to the Criminology Research Council, Restorative Justice Programs in Australia, March 2001, http://www.aic.gov.au/crc/oldreports/strang/adult.html

7.2. Restorative Justice in Diverse and Unequal Societies -1999[29]

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Law in Context (forthcoming, 2000) Special Issue on Criminal Justice in Diverse Communities, Vol. 17 (June).
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Brisbane. October 1999Restorative Justice in Diverse and Unequal Societies http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper5.pdf

Restorative Justice in Diverse and Unequal Societies

by Kathleen Daly

Can restorative justice deliver a better or more effective kind of justice in diverse societies, that is, those structured by socio-economic and political inequalities, and with age, gender, racial-ethnic divisions? It would be absurd to think I could answer this grand question with any degree of certainty or accuracy: the modern idea of restorative justice is only in its infancy. Moreover, an 'answer' presumes that we know what 'restorative justice' is and that we can agree on the meaning(s) and comparative referent for 'better' and 'more effective' kinds of justice. Despite these formidable challenges, I respond to the question by reviewing available research and by placing restorative justice in political context. My focus will be mainly on racial-ethnic divisions and one form of restorative justice -- conferencing -- as it is practiced in Australia and New Zealand.[1]

Defining restorative justice

Restorative justice is an umbrella concept that refers to many things. As applied to criminal matters, it can be defined as a method of responding to crime that includes the key parties to the dispute (that is, victim and offender) with the aim of repairing the harm. To date, restorative justice has been used primarily in cases where people have admitted they have done something wrong; it thus focuses on the penalty phase of the criminal process, not on the fact-finding phase. Restorative justice may refer to *diversion* from formal court process, to *actions taken in parallel* with court decisions, and to meetings between offenders and victims *at any stage* of the criminal process (arrest, pre-sentencing, sentencing, and prison release). It is used not only in responding to

adolescent and adult crime, but in a range of civil matters. In the past 25 years and around the world, it has been called many things: informal justice, reparative justice, transformative justice, among others. The concept is now being applied *after the fact* to programs and policies, which have been in place for some time. For example, in New Zealand where a strong version of restorative justice is in place legislatively, the naming of family group conferencing as restorative justice came several years after the passage of the *Children, Young Persons and Their Families Act 1989*. So too in South Australia, where youth justice coordinators began to associate their practices with restorative justice several years after the passage of the *Young Offenders Act 1993*.

Justice contrasts

When one first dips into the restorative justice literature, the first thing one 'learns' is that restorative justice differs sharply from retributive and rehabilitative justice. For example, it is said that restorative justice focuses on *repairing the harm* caused by crime, whereas retributive justice focuses on *punishing an offence*; or that restorative justice is characterised by *dialogue and negotiation* among the parties, whereas retributive justice is characterised by *adversarial relations* among the parties; or that restorative justice assumes that *community members or organisations take a more active role*, whereas for retributive justice, *'the community' is represented by the state*. And so forth (see Appendix 1). Most striking is that all the elements associated with retributive justice are depicted as residing on the inferior side of the justice dualism.

Strong contrasts may be comforting, but they seduce us into complacent, dichotomous thinking about justice practices. The hard and challenging work ahead is to think more deeply and to

visualise more shades of grey in imagining how this emerging justice form will articulate with the 'old' -- both in terms of the *aims* of restorative justice (e.g., repair of harm) and the *practices* of restorative justice (an informal legal process).

My critique of strong justice contrasts is three-fold. First, I do not accept the oppositional framings of retributive, rehabilitative, and restorative justice on empirical and philosophical grounds. I have put forth this position for some time (Daly, 1996, 1998; Daly and Immarigeon, 1998), at first tentatively, but now with greater confidence, having spent time in the field conducting a major project on conferencing in South Australia (Daly et al., 1998). As practiced, restorative justice contains emotional and psychological elements of both retributive and rehabilitative justice. Philosophically, a mix of apparently contrary justice practices -- that is, of punishment and reparation -- can be accommodated in philosophical arguments (Duff, 1992, 1996; Daly, 1999). To be sure, there are several key differences between restorative justice and other justice modes: the process is designed to include victims as central actors and to use a more informal, negotiated decision-making process that includes both lay and legal actors. But on core elements of justice aims and purposes (e.g., to punish, rehabilitate, provide restitution, repair harm), the oppositional contrast is not appropriate.

Second, I am not convinced that we can (or should) remove the idea of punishment from a restorative justice process or outcome, even in its most ideal form (Daly, 1999; see also Zedner, 1994). Rather, we might consider how the idea of punishment can be part of restorative justice.

Finally, most people today admit that restorative justice cannot replace current penal law and procedures. Rather, the idea is that informal (and non-criminalising, non-stigmatising) processes of social control, coupled with the use of dialogue and persuasion, should form a larger share of justice system activity than is now the case.

In sum, characterising restorative justice as being the 'opposite' of retributive justice cannot be sustained empirically when one examines conference practices. In any new justice venture, we should expect to find both the 'old' and the 'new' working alongside each other. Indeed, the strength of conferencing as one practice of restorative justice is that it permits multiple justice aims -- of retribution, restitution, and rehabilitation -- to be accommodated in one process. Commentators would do well to shift their rhetorical claims away from an oppositional (and adversarial) framing of retributive and restorative justice and move towards a more complex reading of justice principles and practices that reflects what conference participants (not just the professionals) are thinking and doing.

Varieties of restorative justice

Looking around the world today, the following practices fall under the rubric of restorative justice:

- 'Conferencing' of several varieties in Australia, New Zealand, England, the USA, and Canada. Whereas the northern hemisphere version of conferencing is generally police-run, the southern hemisphere version is not.[3]
- 'Sentencing circles', which arose in Canadian First Nations (or indigenous) groups, and which are now being taken up in justice practices for indigenous and non-indigenous groups in Canada and the USA.

- Victim-offender mediation schemes, which include a variety of practices in the UK, European, and Scandinavian countries.
- Other practices such as 'reparation boards' in Vermont, services to crime victims, meetings between imprisoned offenders and victims (or their family members)

Turning to the Antipodes, there is diversity in how conferencing is practiced and where it is located organisationally. Compared to other countries in the world, New Zealand has the most developed and systemic model of restorative justice in place. All juvenile cases that are not disposed of by the police go to a conference at some stage, including those sentenced in court. New Zealand is also unique in that the conference idea emerged not only from the interests of state officials and professional workers, but it also came out of a political process that involved both 'top down' activism (by judges) and 'bottom up' activism by Maori groups. No other jurisdiction in the Antipodes has had this kind of majority-minority group political history in fashioning welfare and justice policies. In Australia, my impression is that the idea of conferencing moved into the policy and legislative process almost entirely via mid-level administrators and professionals (including the police), largely sidestepping politics 'from below' (see also Cunneen, 1997).

Although New Zealand is considered an exemplary place for restorative justice, not all is going according to plan. At a conference in Wellington in October 1998, I learned that the major stakeholders in New Zealand all agreed on the principles, but there were insufficient resources to follow through on them. Earlier that year, in July 1998, a conference examining Maori-state relationships in the criminal

justice system was held; one commentator reports that 'the majority of Maori presenters ... condemned the government' for the sorts of policies that had emerged in the previous decade (Tauri, 1999:164).

For Australia, here are highlights of what's happening today, drawing from legislation, administrative guidelines, and procedure manuals:

- All eight states and the territories have used conference, but there are five in which conferencing is active in youth justice cases: South Australia, Western Australia, Queensland, and New South Wales, which legislatively established conferences during 1993-97. The fifth jurisdiction is the Australian Capital Territory (ACT), which has no legislative basis and where the police have run conferences since 1995 in connection with the Re-Integrative Shaming Experiments (RISE). In Victoria, conferencing is used only for pre-sentence matters and operated by a non-state organisation. Tasmania passed legislation in 1997, which includes conferences, but the state is undecided on how they should be implemented. In 1999, the Northern Territory introduced diversionary conferences as one of several diversion programs for a selected set of offenders and offences.[2]
- For the five more active jurisdictions, conferences are typically used in juvenile criminal matters, not adult matters, except in the ACT during 1995-97 in the handling of drink driving cases. Also in Queensland, while not part of the legislation, there is an administrative understanding that conferences can be used for some adult cases. Conferencing is mainly used in criminal matters, not in care and protection decision-making, except in South Australia.

Turning to youth justice cases:

- There is great variety in the numbers of conferences held in each jurisdiction annually: South Australia completes over 1 400 conferences a year; in Western Australia, the estimate is 1 200 to 1 400 (although it is difficult to get a precise number); in the ACT, 200 to 250 a year; in Queensland, which is only operating pilots, about 200 a year; in Victoria, which only uses conferences in selected sentencing matters, about 40 a year; and in New South Wales, it is too early to say since the state just began operations in June 1998. (For comparison, the annual number of youth justice conferences in New Zealand ranges from 5 850 to 6 600.) [4]
- Some jurisdictions tie their practices to the theories of 'restorative justice', others to 'reintegrative shaming', and others to a mixture of both and additional elements. Such theories are not given in the legislation, but rather in procedure or practice manuals.
- Referral to conference is typically used as a diversion from court process, but in several jurisdictions (Queensland and New South Wales), conferences can also be used as a pre-sentencing option.
- While conferencing is mainly used in handling cases that come to police attention, it is also used in schools and workplace disputes in Queensland and New South Wales, as part of Transformative Justice Australia.
- In one jurisdiction (Queensland) victims have veto power over whether a conference can be held, and in three jurisdictions (Western Australia, Queensland, and New South Wales), victims have veto power over the conference agreement or plan if they are present at the conference.

Although it is possible to highlight what Australian jurisdictions are doing (see also Bargen, 1996, 2000), actual practices may differ from what is stated in legislation or administrative guidelines. Each Australian jurisdiction has a

different history and politics of what preceded conferencing, and these affect how the idea has taken hold and will evolve in that jurisdiction. Not only is there jurisdictional variation in how justice system workers are experimenting with conferencing, but also in any one jurisdiction, police officers and conference coordinators (or other practitioners) may have different views on what they are trying to accomplish. This diversity of *ideological perspective* and *actual practice* has yet to be mapped and analysed, but it is crucial task in depicting 'what is going on' in Australia today.

Can restorative justice deliver a 'better' or 'more effective' kind of justice in diverse societies?

New Zealand and Australia are engaged in a large experiment with restorative justice, one with a restricted time frame (ten years in New Zealand, five in Australia) and with varied political histories, organisational sites, and state support. Despite these qualifications, the short answer I give is a qualified 'yes': within the constraints of liberal law, restorative justice can deliver a 'better' or 'more effective' kind of justice in diverse and unequal societies *if* it is tied to a political process and *if* it is well resourced. For now, I leave to the side the problem of assessing 'better' and 'more effective' justice. (For example, what indicators would one choose for 'effective'? For which groups and for what conflicts is any justice practice better or more effective? What is restorative justice to be compared to?) I assume any society will require multiple justice modalities, not just one. Other assumptions ground my claims about justice system practices in diverse and unequal societies:

- Any justice practice, however well intentioned, can be expected to reproduce existing relations of inequality (Abel, 1982; Matthews, 1988).

- Efforts to achieve a more just society will come largely from policies of redistributing wealth and political power, along with changes in divisions and value of labour, not from justice system policies. However, we can identify more and less 'just' responses to crime in unequal societies.
- A major tension in justice systems -- the twin demand for an 'individual' and 'uniform' response -- cannot be satisfied in a single justice model. We have seen in the past century great injustices arising from strong applications of both 'equal' and 'individualised' treatment.
- Relations of inequality do not work in the same way for different groups. There are distinctive influences of gender, compared to class or race-ethnicity, on lawbreaking and the state's response to crime. Gender does not seem to fit the expectable pattern of inequality and criminalisation, in which the more subordinated members of society are more likely subject to state social control (Daly and Tonry, 1997).

If the idea of restorative justice is to succeed, it must be tied to a political process, and by that I mean a process of engagement among and between the interests of political minority groups (e.g., indigenous and feminist) and governments, although it would be mistaken to limit such engagement to relatively powerless segments of society. As Braithwaite (1996:8-9) emphasises, restorative justice has great potential in responding to corporate and state crime.

For research, I shall draw from studies of conferencing in New Zealand, findings from the Re-Integrative Shaming Experiments (RISE) in the ACT, a preliminary study I conducted of conferencing in the ACT and South Australia, findings from the South Australia Juvenile Justice (SAJJ) Research on

Conferencing project, and other research in Western Australia, Queensland, and South Australia.[5]

New Zealand

Commentators often say that New Zealand's family group conferencing reflects 'traditional' Maori practices of dispute resolution. This is only partly right, and it has led to the misleading claim that the conference process is an 'indigenous' practice. The more accurate story is that Maori people's struggles during the 1980s for a greater voice in care and protection cases, via family decision-making, led to the development of family conferencing as a method of decision-making. (Its use in youth justice cases came as an after-thought.) The idea was that better decisions would result with increasing participation of Maori 'family groups' and with decreasing involvement of state social workers or other professionals.

The following highlights findings from research carried out in New Zealand during 1990-91 (Maxwell and Morris, 1993; Morris and Maxwell, 1993), coupled with more recent studies by them.

- Most families and young people (offenders) felt involved in the decision-making process.
- Most families and young people were satisfied with the outcomes reached.
- Almost all conferences resulted in agreed outcomes.
- Most young people carried out agreements made in the conference (that is, performed the community work, made apologies, and the like).
- Compared to young people and their families, victim participation was substantially less (half of victims attended conferences), and victims' levels of satisfaction with the process were not as high.

- The 1989 Act 'specifically advocates the use of culturally appropriate processes and the provision of culturally appropriate services' (Morris, 1999:4). However, Maxwell and Morris (1996:95-96) report that while 'conferences could transcend tokenism and embody a Maori process, they often failed to respond to the spirit of Maori or [to reach outcomes] in accord with Maori philosophies and values'. (They note that traditional Maori 'methods of justice were not always benign' in that they included death, slavery, and exile.) They find that 'the new system remains largely unresponsive to cultural differences' and that this is partly a consequence of the government not honouring its commitment to provide resources. They also note that there can be problems of communication and understanding when differing cultural groups are represented as crime offenders and victims.

For system effects in New Zealand, there has been a two-thirds reduction in juvenile court appearances from 1987 to 1996 and a 50 percent reduction in custodial sentences for juveniles during this time, although adult incarceration rates have not decreased (Morris, 1999:5). Somewhat paradoxically, in light of this apparent decarceration trend, the New Zealand government's 'Budget in Brief' for 1999 announced plans to establish seven youth prisons with the stated aims of getting 'young people out of adult prisons', keeping 'young prisoners close to their families', and providing 'better education services'.[6]

Maxwell and Morris have carried out several studies on whether the experience of going to a conference may reduce re-offending, and their work is all that we currently have on this question. In an early study, they report that of the young people in their conference sample in 1990, four years

later, the majority (58 percent) had been convicted of a criminal or traffic offence in youth or an adult court. They find that 'the young people who became re-offenders or persistent re-offenders were more likely to have committed a larger number of offences initially and to have had a previous a criminal history when entering the sample; they were more likely to be older and Maori', among other dimensions (Maxwell and Morris, 1996:107). In a second study of their sample, six and half years later, Maxwell (1999) finds that those who were 'persistently re-convicted' (defined as having appeared in court five or more times on criminal matters, 28 percent of the sample) could be distinguished from those who had not been convicted (29 percent) by a series of variables indicative of the young person's problems in early childhood, by how the young person and their family supporters felt during the conference, and by subsequent events in the young person's life. Maxwell (1999:7) concludes that that 'successful early intervention is likely to be the most effective strategy' in preventing offending; however, conferences may play a role if certain elements are present: when young people and their supporters see the outcome as having been achieved fairly, when they leave the conference not feeling badly about themselves, and when young people feel they are 'truly sorry' for what they have done.

Compared to Australia, the New Zealand government has given more attention to addressing indigenous (Maori) over-representation in the system. Despite such attention, New Zealand academic commentary ranges from hesitantly positive or lukewarm (Olsen et al., 1995; Maxwell and Morris, 1996; Tauri and Morris, 1997) to strongly critical (Tauri, 1999) of how well the conference process has grappled with cultural, class, and racial differences.

Re-Integrative Shaming Experiments (RISE) (Canberra)
RISE is important because it compares justice practices in courts and conferences, and it does so with a random assignment of cases to court and conference. RISE's limitations are that
(1) conferences in Canberra are used for relatively minor offences (especially in comparison to South Australia), although conferencing had been used in cases of adult drink driving, and
(2) conferences use the Wagga-style model (police-run conferences), which is atypical for Australia. Here are highlights of what we have learned from RISE, based on data gathered from court proceedings and conferences observed, along with interviews conducted during 1995-97 (Sherman et al., 1998; Strang, 1999):

- Offenders report greater procedural justice (defined as being treated fairly and with respect) in conferences than in court proceedings.
- Offenders report higher levels of restorative justice (defined as the opportunity to repair the harm they had caused) in conferences than in court.
- Conferences more than court increased offenders' respect for the police and law.
- Victims' sense of restorative justice is higher for those who went to conferences rather than to court (e.g., recovery from anger and embarrassment).
- Victims in conferences report high levels of procedural justice, but this could not be measured for court victims because they rarely attended.

RISE suggests that conferences deliver a better kind of justice than does court. To date, analyses have not yet explored whether judgments of procedural and restorative

justice vary by social location (e.g., gender and race/ethnicity).

My preliminary research in Australia

During 1995-96 when I was a Senior Fulbright Scholar at the Australian National University, I observed 24 youth justice conferences in the ACT and South Australia, and I travelled to Alice Springs to learn about a pilot police-run conferencing project (Daly, 1996). I was interested to explore several critiques of conferencing, among them, anti-racist and feminist arguments (Blagg, 1997; Stubbs, 1995). Blagg was critical of Wagga-style conferencing, which, he believed, would give the police increased powers over Aboriginal youth and which would mobilise 'shame' inappropriately in conferences controlled by non-Aboriginals. Replying to Braithwaite and Daly's (1994) arguments for using conferencing in family violence and rape cases, Stubbs (1995) noted potential problems of gender power imbalances and of victims feeling worse from a conference (citing results from Maxwell and Morris, 1993:119-120). In addressing the anti-racist critique, I found that conference dynamics worked more smoothly when, addition to offenders (or victims), there were other Aboriginal participants at the conference such as police aids, community workers, or Aboriginal Legal Rights Movement representatives. Contrary to Blagg's concern of increasing police powers, statistics from South Australia (Wundersitz, 1996; Doherty, 1999) and Western Australia (Jones, 1994) show that the proportions of Aboriginal and non-Aboriginal youth referred to conference are about the same.

For the feminist critique, I found support for concerns of potential re-victimisation of women in conferences. Of the 28 victims at the conferences, I judged seven to have either been treated with disrespect and to have been emotionally

distraught as a result of the conference. Six were women; and the one male was an Aboriginal boy. While gender power imbalances such as men dominating discussion or having more sway in decision-making were not apparent, I did note that conferences were gendered events. While few offenders were female (15 percent), women were 52 percent of the offender's supporters; and more mothers than fathers of young people were present at conferences, although women were not more involved than men in supervising the completion of agreements. These findings, which I view as tentative and suggestive, were explored further in a larger study of conferencing, which I launched in 1998, the SAJJ project.

South Australia Juvenile Justice (SAJJ) Research on Conferencing

SAJJ gathered observational and interview data during 1998-99 on 89 conferences and 172 offenders and victims; in addition, police officers and coordinators completed surveys for each conference, and they were interviewed at the end of the research period. SAJJ differs from RISE in that it focuses on conferences alone, its sample size is smaller, and it examines conferences run on the New Zealand, not the Wagga model (Daly et al., 1998). Data reduction and analysis has just begun, but these findings can be highlighted:

- Conferences receive high marks by the four key conference groups (police, coordinators, victims, and offenders) on measures of procedural justice, including being treated with respect and fairness, having a voice in the process, among others. Analyses by participants' social locations such as gender and race/ethnicity show no differences.
- Compared to the very high marks for procedural justice, there are somewhat lower levels of restorative justice (defined as 'movement' between victim and offender toward greater empathy or understanding of the other's situation).

This suggests that while it is possible to have a process perceived as fair, it is relatively harder for victims and offenders to resolve their conflict completely or to find common ground -- at least at the conference itself.

- Systematic observations of conferences were carried out to determine if power imbalances were present, if victims were re-victimised, and if derogatory comments were made. In the interviews, we asked young people (offenders) and victims whether they felt disadvantaged in the conference because of their sex or race-ethnic identity. Instances of explicit expressions of prejudice and power, or of felt disadvantage, were rare.

Other research in Western Australia and Queensland

From all studies of conferencing to date -- from New Zealand, the ACT, and South Australia -- the strongest and most consistent finding is that the process is viewed as fair by participants and there are generally high levels of satisfaction with processes and outcomes. These findings are also evinced in reports from Western Australia (Cant and Downie, 1998) and Queensland (Palk et al., 1998). With some exceptions (e.g., Maxwell and Morris, 1993; Olsen et al., 1995, on Maori participants), comparatively little is known about how ideas of 'fairness' and 'satisfaction' may vary by racial-ethnic identities. Cant and Downie (1998:61) find that in Western Australia, 35 percent of Aboriginal youth cases, which were referred to metropolitan Justice Teams, were returned to the police or to the court 'as unsuitable or unsuccessful compared with 17 percent of non-Aboriginal referrals'. The reasons were an inability to locate the youth, the youth not attending the meeting (conference), and the youth not completing the action plan. Interviews were conducted with a small number of Aboriginal families (a total

of seven) in the metropolitan and country areas, who gave positive and negative reactions in roughly equal measure.

South Australian report on Aboriginal and non-Aboriginal contact with the justice system

It is plain that the introduction of any new justice measure by a dominant 'white' system, however well-meaning or well-resourced, is going to be met with wariness by indigenous people. Moreover, any new measure cannot erase a long history of police practices, with the accumulated memories of distrust and anger on both sides. I want now to turn to a statistical report, just released from the South Australia Office of Crime Statistics (Doherty, 1999), using 1997 data from South Australia, which compares patterns of Aboriginal and non-Aboriginal contact with the juvenile justice system. Reports like this are valuable for showing the system-wide handling of crime, not just the portion dealt with by conference. At the same time, the atheoretical tenor of such reports, which intend to discuss 'race differences' without a theory of 'race', is unsatisfactory.

When the Doherty (1999) report was first issued, a news story appeared in the *Adelaide Advertiser*, headlined 'Justice system "fails young"' (9 June 1999:31), with a focus on the system's failure for Aboriginal youth. The newspaper story excerpted verbatim from an Aboriginal Legal Rights Movement analysis of the report (Booth, 1999), which drew on the statistics to demonstrate the continuing disadvantages of Aboriginal youth in the system. My reading of the Doherty report suggests that a more realistic and a more critical interpretation of the statistics is called for. From a realistic point of view, culpability for Aboriginal youth over-representation in arrest, court, and secure care facilities lies less in the justice system responses to crime

and more in the structure of Australian society, along with its historical and contemporary policies toward Aboriginal people. These structural determinants have severely eroded effective methods of social control of young people (especially its boys and young men) by adults, and they have severely eroded Aboriginal people's trust or belief in the legitimacy of white justice. Simultaneously, the statistics need to be interpreted more critically. Doherty (1999:100) rightly notes that the 'justice system itself does not have the capacity to redress the major structural inequalities facing the Aboriginal community'. However, she does not explicate the claim that 'the justice system has a responsibility to ensure that, once a young person, whether Aboriginal and non-Aboriginal, comes into contact with the police for suspected offending, that young person is dealt with effectively and equitably' (Doherty, 1999:100). I shall unpack this claim in a moment, but first, I highlight these findings from the report:

- In 1997, Aboriginal youth were 2 percent of South Australia's population, but they comprised 14 percent of all police apprehensions and 23 percent of admissions into secure care (detention, police custody, or remand) (pp. ix, 86).
- A higher share of Aboriginal (14 percent) than non-Aboriginal (4 percent) youth were 10 to 12 years old when apprehended (p. 6).
- Of Aboriginal youth apprehended, a higher share were arrested (47 percent) compared to non-Aboriginal youth (27 percent) (p. 22).
- Policing activity varies by place: most Aboriginal youth were apprehended in country divisions (57 percent), whereas most non-Aboriginal youth were apprehended in metropolitan divisions (77 percent) (p. 8). Nothing was made in the report of this striking difference.[7]

- Of Aboriginal youth apprehended, 13 percent received a formal caution, 18 percent were referred to a family conference, and 66 percent were referred to court (the rest were withdrawn). For non-Aboriginal youth, the respective percentages were 36 percent (formal caution), 18 percent (family conference), and 43 percent (court) (p. 27). Clearly, then, diversion from court is more likely for non-Aboriginal (54 percent) than Aboriginal (31 percent) youth.
- For a higher proportion of Aboriginal (19 percent) than non-Aboriginal (8 percent) youth, the conference did not go forward, the major reason being that the young person didn't show up (p. 43).
- More Aboriginal (27 percent) than non-Aboriginal (12 percent) youth failed to comply with the conditions of the conference agreement (p. 55).
- Because the broad offence categories for which youth were brought into the system do not differ by racial group, one cannot explain these differences by variation in offence category. However, the report offers no data on previous criminal history that might explain, in part, some of these differences.

Interpreting statistics: the need to move beyond liberal readings of racial difference

Statistical depictions of complex justice events can be difficult to interpret without knowing what is happening on the ground. For example, would we say that the reason that a higher proportion of Aboriginal youth did not show up on the day of a conference was because the youth justice coordinators didn't work hard enough or weren't sufficiently 'sensitive' to these cases? Or would we say that Aboriginal youth are disaffected with *any* justice system process, whether it is caution, conference, or court? From my research in South

Australia, I find no support for the former interpretation, but a good deal more support for the latter.

And how do we interpret the higher failure of Aboriginal youth to complete their conference agreements? Would we say that their family supports are not there to aid and assist them? That the undertakings are 'too hard' for them to complete? That Aboriginal youth see no value to completing the undertaking since it is just another 'shame job' that white justice has imposed? Surely, there must be a connection between the failure to complete agreements and subsequent police decisions to not refer certain cases to conference.

Which brings us to the key actors in the diversionary process: police officers. How *do* we explain police referral decisions, i.e., their relatively lower referrals to formal caution and higher referrals to court for Aboriginal than non-Aboriginal young people? Would we say that the police are 'overreacting' to Aboriginal youth, not dispensing sufficient discretionary leniency? Or would we say that more Aboriginal youth are refusing to admit they have done something wrong, thus foreclosing the opportunity either for a formal caution or a referral to conference? Perhaps we would say that because Aboriginal youth have a greater likelihood of previous contacts with the police than non-Aboriginal youth (for a variety of reasons) and because Aboriginal youth are less likely to complete agreements, the police have 'given up' seeing the value of diversion for those apprehended many times or who have 'failed' to honour conference agreements. Statistical data alone cannot tell us what the police or young people are doing and saying, and *why*.

We need to address the harder and more complex questions about how justice system practices are saturated and marked by

racial-ethnic (and other) divisions, both past and present. The Doherty report, like others of its kind, fails to get beyond numerical counts of things, sliced and diced in so many tables. It also fails to get beyond a liberal understanding of legal process and methods of interpreting racial-ethnic differences (Daly, 1994a, 1994b). For example, what is the meaning of 'equitable treatment' for Aboriginal young people when the equality standard is white-centred? What is the meaning of 'effective treatment' when a dominant white culture and justice system may simply decide that incapacitation is more 'effective' for Aboriginal young people? Why, in short, do commentators continue to construe justice as 'sameness of treatment'? Why would commentators ever assume that outcomes for heavily marginalised members of a society would be 'similar' to those of its more conventional members?

There is, of course, legitimate moral force in calling attention to the over-representation of marginalised groups in criminal justice systems, and Australia's Aboriginal peoples (especially its males) are no exception.[8] However, we require a more critical reading of the statistics, which does not naively assume 'equality of outcomes' in an unequal society. The subsequent politicisation of the statistics (e.g., Booth, 1999 or media stories) does not, unfortunately, move an anti-racist political agenda forward. Rather, positions become hardened on both sides, derailing a dialogue of racial engagement. Looking to a future in which indigenous groups' sovereignty will be on the agenda (Murphy, 1999; Tauri, 1999), we shall need to contemplate several justice systems (not just the dominant 'white' system), working in parallel or articulated with one another in some way. When devising measures of the viability of these sovereign (if articulated) systems, we should not necessarily assume 'equality of

outcome' or 'equitable treatment' -- whatever people mean by those terms.

Conclusion

Restorative justice principles and practices have the *potential* to deliver a better kind of justice than what exists currently. With respect to racial-ethnic and cultural differences, the potential exists in the openness of the process to differing cultural sensibilities and to addressing relations of inequality (see LaPrairie, 1995). It has the potential to promote a 'dialogic view of morality' compared to the 'monologic voice of law' (Hudson, 1998, drawing from Habermas, 1984, 1987). It can make the justice system process more humane. But that potential cannot be assumed in the abstract or by passing a new law. It needs to be part of a broader engagement with the politics of race, class, and culture. That means, in part, that majority group justice system workers and citizens must begin to understand that 'assimilation' of minority group members into a white-centred process is not sufficient (or perhaps even acceptable) in creating a better justice system. Majority group members must change and accommodate as well. To date, the idea of restorative justice, as applied in Australia, claims to draw from indigenous justice forms, but as Blagg (1997) suggests, this 'Orientalist' appropriation may result in yet another 'failure' of Aboriginal people to perform according to a white-centred 'indigenous' justice script. Writing from the Canadian context, LaPrairie (1999) argues that the potential positive impact of restorative justice (and other alternatives) for indigenous people will not be realised unless there are sufficient resources and those resources are tied to the kinds of offences (and offenders) that are vulnerable to imprisonment. Otherwise, restorative justice

will be mere window dressing as racial disproportionalites in rates of imprisonment continue.

I have largely focused on racial-ethnic relations as one component of 'diversity' and restorative justice, and I have done so because 'race' *is* the social relation that recurringly politicises crime and justice. However, I would emphasise the importance of analysing race and gender together. In so doing, we may ask, why are Aboriginal *males* so much more likely to be caught up in the juvenile and criminal justice system than Aboriginal females? That is, does 'police-Aboriginal youth conflict' arise as much from gender as from race relations? How do gender hierarchies work in racial-ethnic groups, and how might this affect decision-making in informal legal processes like restorative justice?

Citizens, policymakers, and politicians mostly frequently ask, does restorative justice 'work'? And by that, they are asking, will it reduce re-offending? This is a too narrow way to judge any justice system practice. Rather we should ask, what should be the objectives of a 'just' response to crime? Should it be to do less harm? To control or prevent crime? To reduce the use of incarceration as punishment? To promote other justice ideals such as 'safer communities' or 'responsible citizenship'? Research suggests that within the constraints of liberal law, restorative justice does less harm compared to a court process and that people view the process as more fair than what happens in court. Whether restorative justice can accomplish other desirable justice goals is not as yet clear.

** See remainder of document on line for references

7.3. Restorative Justice: The Public Submissions-1998[30]

Cultural Issues

Overview
Mäori
Pacific peoples

Overview

[30] Ministry of Justice – New Zealand - Restorative Justice: The Public Submissions First published in June 1998, © Crown Copyright http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/ex_summary.html

Some submissions had reservations about the consideration of cultural issues:

Justice must result in "like" cases being treated in "like" ways. Culture should never be used as an excuse for undermining the application of justice. Culture must never be used to invoke "soft" options in response to offending.

Sensitivity to any culture should be determined on a case by case basis. This could be Celtic, Asian, Mäori, Tokalauan or anything else. We are a multi-cultural society with high proportions of certain categories. Sensitivity however, should not be used as a basis for changing the pre-determined rules. (Christian Coalition, 46)

The desire to make the justice system more culturally relevant was also seen as looking backwards to the past.

However, others believed that for the justice system to be effective it had to be culturally appropriate. Some even saw restorative justice as moving beyond cultural appropriateness to a more appropriate approach generally:

While Moana Jackson (1988) has argued that many Mäori feel alienated from Western criminal justice systems, it is equally the case that many Päkehä also feel the current system has little relevance to their lives. The reasons for setting up restorative justice then should not be based on the premise that it is culturally relevant, as the process is one which could be "relevant" to all cultures in New Zealand. (Carbonatto, Thorburn & Pratt, 62)

The point was made that all ethnic groups needed careful consideration and that new settlers, in particular, need help with coming to terms with the justice system. Age, class and gender were mentioned as well as ethnicity, with some respondents feeling strongly that people in many groups need support in dealing with the present "male Päkehä system". (National Council of Women, 40)

Several submissions commented on the usefulness of data collected overseas. Some referred to successful overseas initiatives, arguing that much could be learnt from them, while others argued that it was also vital to study systems in the New Zealand context (seven submissions). The submission of the New Zealand Mäori Council also noted that indigenous justice processes in other countries are based on restorative principles.

Maori

This section considers the submissions that commented on cultural issues in relation to Mäori. The views described, while including those made by Mäori, are not necessarily representative of Mäori opinion.

Eleven submissions viewed the existing system as culturally inappropriate for, and failing Mäori. Six submissions referred to the over-representation of Mäori in a number of statistics such as suicides in custody, prison inmates, and recidivist offending.

In general terms, restorative justice was seen in seven submissions as being potentially more culturally sensitive than the existing justice system. Culture and ethnicity was seen as an area in need of exploration and careful consideration. Therefore, for restorative justice to be effective, it was believed that attention must be paid to cultural issues. Calls for restorative justice were seen as recognising diversity, with two submissions stating that restorative justice had the potential to provide for cultural diversity while preserving a single justice system. Five submissions suggested that much could be learnt from Mäori, and that restorative justice was not necessarily a new paradigm for all cultures in New Zealand.

A view was that restorative justice could:

...provide a complementary system of justice which can reside within the communities of New Zealand, both Päkehä and Mäori, and which can operate alongside court-based processes as an integral part of the whole system. (New Zealand Mäori Council, 112)

Restorative justice was also seen as potentially providing a mechanism whereby the power of Mäori communities could be affirmed and strengthened. As Mäori would then have a defined interest in the justice system, it would be more likely to command their respect.

Reference was made in 10 submissions to existing programmes and informal processes currently in operation under similar principles to restorative justice. These included several marae-based initiatives. Seven submissions saw value in marae-based programmes.

For iwi to bring back the Tribal Committees to focus on Youth Justice and Adult Justice for petty crimes. Also utilising the Justice of the Peace for those areas. (Te Runanga o Ngati Hine, 28)

Another suggested:

In recent years there have been a number of experiments which have aimed to revive aspects of traditional practice, for instance in dealing with sex offenders through "marae justice", by holding judicial hearings on marae, and in dealing with young offenders on marae. However, these are relatively minor changes to fundamentally Western process that do not go to the heart of a Mäori perspective. (New Zealand Mäori Council, 112).

Other alternatives to existing sanctions for Mäori were proposed, with community-based options being viewed as preferable. State intervention in these programmes would be problematic, serving to compromise the mana of the programmes. Several submissions suggested that any restorative initiatives on the marae would need to be appropriately resourced, with adequate training for facilitators in cultural matters and mediation techniques.

Cross cultural issues were also discussed. Difficulties were anticipated where victims and offenders were members of different cultural communities, particularly those with no restorative tradition. Non-Mäori discomfort with marae-based programmes was identified in several submissions as a potential barrier to restorative programmes but there was also a view that these issues could also be addressed.

Several submissions noted that processes such as discussion, and family and community group conferences were familiar to Mäori and other traditional indigenous justice systems. Four suggested that such systems also had parallels to restorative processes. The Children, Young Persons and Their Families Act was seen as moving towards, or having the potential for more restorative and more culturally responsive outcomes. One submission believed that family group and community group conferences were more appropriate for adults in cultures where family ties were stronger (such as Mäori societies). Other submissions also noted the importance of whänau and community involvement to Mäori.

However, restorative justice as a means of making the law more culturally relevant for Mäori was explicitly rejected by some.

Recent reforms to children and young persons law and the introduction of family group conferences into this area are heralded as injecting a Mäori dimension into this part of the justice system. The call for a restorative justice system justifies itself in a similar manner stating that such a system is more akin to Mäori dispute resolution. We do not support the implementation of a restorative justice system on the basis of it making the law culturally relevant. Such justification ignores the call for pluralism in the law and diminishes the legitimate demand for tino rangatiratanga made by writers such as Moana Jackson. (Dunedin Community Law Centre, 5)

Another submission believed that a restorative justice model integrated with the justice system could be seen as a criminological advance but not as an institutional expression of Treaty partnership since:

...Mäori processes cannot be in a position of subservience to Päkehä ones. (Auckland Unemployed Workers Rights Centre, 33)

Six submissions stated that in accordance with the Treaty (especially Article 2) and the principle of self determination, Mäori should be free to develop their own justice systems or seek justice on marae. One submission viewed restorative justice as being in accordance with the Treaty as it was seen to protect the rights and property of Mäori, while another

mentioned that consideration of the Treaty should be a base objective of any restorative programme, and that the Crown's obligations to Mäori must be honoured. Colonisation and the history of Mäori in relation to the Treaty were also mentioned in two submissions as essential considerations when developing policy on restorative justice.

One submission stated:

Much research is needed in order that we are able to assess the cultural relevance of the proposed restorative process. The notion that the restorative process strongly accords with the concept of Tikanga Mäori is unacceptable. (National Collective of Independent Women's Refuges, 107)

Others saw restorative justice itself located in indigenous sovereignty movements.

Pacific Peoples

A total of 14 submissions made reference to Pacific peoples. Many of these commented generally rather than specifically in relation to various cultural traditions and the responsiveness of the criminal justice system. A number of submissions suggested that restorative justice had to be culturally relevant and that traditional practice should be looked at first as a way of achieving justice.

Two submissions were made from a Samoan perspective. One confirmed that the Samoan community was capable of restorative justice in its holistic sense and proposed practical joint ventures.

Our definition of restorative justice from a Samoan perspective encapsulates "relationship" in all its meanings. It encapsulates our culture, our spirituality, our gender arrangements, and the healing of relationships. Healing of relationships involves the support systems for victim and offender. Examples of these systems include extended families, churches, the traditional matai system and our community. We are keen to seek ways where we can work together to seek positive outcomes for victims and offenders, especially within the Samoan context. (Ete & 7 others, 92)

The other submission reinforced the importance of involving extended family, political and religious leaders and matai if restorative justice was to work for Samoan offenders. This also proposed a "Fautua" - a group comprising each race represented in New Zealand to sit at all cases of their respective peoples and advise judges on appropriate sentences.

7.4. Restorative Justice - 1996 [31]

In what ways might restorative justice enhance the cultural responsiveness of the criminal justice system?

What cultural issues are important to consider?

Cultural Relevance

The introduction of family group conferences in the juvenile jurisdiction in New Zealand came partially from pressure from Maori to restore traditional processes of conflict resolution. While the English-derived system of justice recognises the rights and responsibilities of groups who register a corporate identity, and in some instances of families, in the criminal jurisdiction it takes a singular approach based on the responsibility of individual offenders for their crimes. Such offences are perceived as having been committed against both an individual victim and society in general, with these dual interests being represented by the state. The Maori system was derived from views of kinship and obligation involving the whanau of both the offender and the victim and a real and close relationship (Jackson, 1988). Pacific Island traditional responses to crime have similarly involved a collective rather than an individual approach (Anisi, 1993) as have those of the first nation peoples in North America (Zehr, 1995). The adoption of restorative programmes as a

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[31] New Zealand, Ministry of Justice, Restorative Justice, A Discussion Paper, 1996, http://www.justice.govt.nz/pubs/reports/1996/restorative/index.html

response to adult offending in New Zealand might therefore contribute to a more culturally relevant response to offending by providing traditional decision-making models and approaches.

However, there is not necessarily any more agreement among Maori than among Pakeha or other groups that such systems are appropriate or would work in modern times. In a recent study (MRL, 1995), some Maori did not accept there was a need to move from the current criminal justice system. Alternatively, others felt that a restorative approach would address a number of the current system's inadequacies. While some would have preferred a move to marae justice, they questioned the efficacy of this because of the disassociation of young Maori from their whakapapa (cultural identity), and the consequential absence of essential elements for success. There was a number of Maori who rejected the concept of Pakeha-based justice in all its forms, including as part of a restorative approach.

In a recent small study involving Maori, Tauri and Morris (1995) identified clear support for moving towards Maori justice practices. However, it was recognised that this would not be without its difficulties. Some of these would arise when the victim and offender were from different cultures.

Other possible difficulties include the identification of communities for alienated urban Maori, the loss of cultural knowledge in many young Maori and the location of control of any Maori-based system.

7.5. Putting Aboriginal Justice Devolution Into Practice – 1995 [32]

The View from Government

- The experience of governmental involvement in negotiations respecting devolution of justice authority to Aboriginal communities highlights two important constraints to the process.
  - First, there appears to be an unwillingness (or inability) on the part of governments to deal with anything outside a **limited range of organizational types.**
    - The main consequence of the first constraint is that governments give a strong preference to aboriginal organizations that look a lot like their own structure, i.e.,
      - hierarchical, with one point at the top,
      - an institutional separation of the administrative from the political,
      - clear lines of authority which remain the same in different contexts,
      - the use of double entry accounting, and
      - a separation of administration from the other functions in the community.
  - Second, in communicating about issues related to Aboriginal people and justice, governments rely on a limited, technical and highly conventional way of communication, namely through the over-use of written documents.
    - The second constraint, the preferred mode of communication of governments, leads to an over reliance on
      - formal written proposals,
      - audits statements,
      - written evaluations, etc.
  - These two constraints clearly affect the relationship between governments and Aboriginal communities.
    - Communities needs are transformed into written documents.
    - Governmental responses to needs become "initiatives", i.e. "things" which can then be administered.
    - What may once have been "political" becomes "administrative".

- Part of the challenge of those working in non-Aboriginal governments is to be open to and supportive of the unique organizational forms that have and will continue to arise as Aboriginal people in difference circumstances

[32] Charles Horn (Canada) cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience
Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

create new and evolving modes of collective behavior, and to resist the temptation to channel everything through the few models that are currently found to be acceptable.

- The challenge for Aboriginal people is to create, or re-create, collective practices which reflect the culture of the specific group, but are also durable enough to survive in increasingly difficult, and in some cases openly antagonistic, circumstances.

7.6. Resolving Disputes Locally: Alternatives for Rural Alaska - 1992[33]

Use of Tribal Courts by Non-Natives. Non-Natives voluntarily used or cooperated with tribal courts in the resolution of children's and family matters, and civil regulatory cases. This indicates that the tribal courts can serve citizens of all races in the state in their capacity as local dispute resolution organizations.

7.7. The Consequences of Modernity -1990[34]

This is a classic treatise on modernity by one of world's leading sociologists. It discusses how modernity arose, and became a global phenomenon. Particularly significant are the analyses of the kind of processes that it has unleashed, and the risks and promises that modernity holds out for human life. Of special relevance here are three ideas. First, Giddens argues that modernity has been shaped by Western culture with its particular values and structures. Accordingly, traditional societies and cultures, such as Aboriginal systems, experiencing modernity are subject to powerful but subtle pressures to reproduce these values and structures, whether in the field of justice or some other field. Secondly, Giddens discusses processes of modernity such as "distanciation" (i.e. social relations are no longer tied to particular locales), and "disembedding" (i.e. 'lifting out' understanding of social relations from local contexts) which provide the legitimizing basis for the increasing reliance on professional and technical experts. Clearly, to the extent that the local context is deemed to be an essential feature of social relations, and/or there is insufficient trust in professionals, community-based programs in justice (e.g. treatment programs) will be more strongly emphasized. Thirdly, Giddens notes that modernity brings an increased risk of the growth of totalitarian power at the same time as it holds out the promise of multilayered democratic participation.

[33] Alaska Judicial Council, Resolving Disputes Locally: Alternatives for Rural Alaska, August 1992, http://www.ajc.state.ak.us/Reports/rjrepframe.htm
[34] Giddens, Anthony. The Consequences of Modernity. Stanford, CA: Stanford University Press, 1990 cited in Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm