To study restorative justice programs for indigenous offenders in USA, Canada and New Zealand.

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The state of any society can be determined by looking into its prisons, and our prisons are a black mark on our society. - Winston Churchill

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1. Precis and Acknowledgments

In choosing the content of this report I was faced with the rather difficult task of producing a report on a somewhat complex subject matter, and one that whilst understood by few, directly affects every person in Australian society. Those familiar with criminal courts are generally limited to those that have either trained for many years to learn or those reluctant long-term participants that have learned by osmosis. It is for this reason that I have included an introduction to the report that goes some way to giving the reader a basic understanding of the history of crime and punishment, and the issues it presents today. I also felt it necessary to give a brief description of my definition of restorative justice in practice.

Absent from the report are recidivism statistics. Although most figures reflect favorably on the particular restorative justice initiative, I feel these statistics are not useful as they tend to only reveal differences in measurement methodologies or baseline figures. They are also based upon the false assumptions that offenders are caught on their first criminal act and all repeat offenders are caught. Where available however I have included qualitative observations about the effect of the restorative justice initiative on criminal activity. All terminology reflects the local terminology, and accordingly will change from jurisdiction to jurisdiction and from that used in Australia.

This report was made possible through the generosity of so many people both in Australia and overseas. An already lengthy report would be made longer if I were to include every person who made this report possible so unfortunately I cannot do so. There are however a core group of people without whom this fellowship simply would not have been undertaken, and I want to acknowledge these people.

- My wife Natasha, whose unquestioned love, support and encouragement allows me to achieve things that I had never dreamed possible.

- Mr Richard Refshauge SC, Director of Public Prosecutions ACT, who not only generously provided the time off work to complete this study, but his support and encouragement motivated me to undertake the project in the first place.

- The Winston Churchill Memorial Trust, who make available human venture capital to develop our society in ways that would otherwise not be possible.

- My late father Neville Drumgold and little brother Casey, who constantly remind me that everyone matters.

- My many extremely generous hosts each of who gave up their valuable time, efforts and knowledge, and in doing so displayed the spirit of restorative justice.
2. Executive Summary

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Fellowship Objectives:
To study restorative justice programs for indigenous offenders in the USA, Canada and New Zealand.

Fellowship Highlights:
1. Navajo Nation, Crown Point New Mexico USA – to study peacemaking from those that have practised it since creation.

2. University of Minnesota, Minneapolis Minnesota USA – to study the application of restorative justice principles in the main stream community as a sentencing options.

3. Winnipeg Mediation, Winnipeg Manitoba Canada – to study the application of restorative justice in the main stream and aboriginal community as a diversionary initiative.

4. Gladue Aboriginal Court, Toronto Ontario Canada – to study initiatives such as the Gladue aboriginal court and aboriginal diversion aimed at addressing the special needs of aboriginal people in the criminal justice system.

5. Saskatchewan Provincial Court Saskatoon – to look at the application of circle sentencing and diversion, in a location where challenges exist similar to those faced in Australia.


7. Restorative Justice Trust Auckland New Zealand – to study family group conferencing in the Auckland District Court.

Findings:
Peacemaking and other restorative justice initiatives potentially presents an alternative approach to the rehabilitation of offenders fundamentally different to that presently practiced in Australia, and capable of far better results than those currently being achieved.

A restorative justice trust or other such organisation is essential to coordinate restorative justice initiatives to ensure that they compliment each other. This body can be instrumental in developing and implementing restorative justice programs, pooling resources as well as training individual players in the process.
Peacemaking and other restorative justice principles do not always have to take place in a special court or location, nor do they always require specific names and titles. The principles can be applied in a main stream courtroom by main stream members of the judiciary. It only requires a change in how we think about offenders and the causes of offending behavior.

Of all restorative justice options, diversion is the simplest, most cost effective and most successful for an initial option. It is capable of better results as well as clearing clogged court lists of matters the criminal justice system will most likely only aggravate. It serves the duel purpose of reducing interactions with the criminal justice system that have shown to lead to subsequent criminal behavior.

Changing the direction of a life fundamentally requires ceasing one particular type of existence. Essential to this is the availability of provisions necessary to replace this. All restorative programs require dedicated support structures in employment, life skills and education and other areas to allow offenders to build an alternative way of life.

After some initial work, peacemaking circles can be successfully applied in aboriginal and non-aboriginal communities. Many valuable resources exist in the community that go completely unused. The very involvement of the broader community in the criminal justice system is one such untapped resource, and the broad-based implementation of restorative justice in criminal matters can be undertaken in this way to produce excellent results.

All proposals need to be closely assessed against three main criteria;
1) Cost effectiveness. We need to ask whether the money being spent is going to produce outcomes that justify the expense.
2) Sustainability. We need to ask whether the structure of the program, including the required voluntary and paid resource contributions are sustainable.
3) Success. We need to ask whether the process is likely to have a meaningful impact on offending behavior.

3. Introduction

Aristotle defined law as the application of reason without emotion. The Macquarie Dictionary defines reason as sound judgment or good sense.1 One must ask if this definition still applies to the Australian criminal justice system when statistics suggest that at least half of all people that come before a criminal court in Australia will not be discouraged from re-offending by the penalty imposed. This figure is higher for some minority groups and of major concern to the legal community and should be of concern to the general community as old Australian prisons overfill and new Australian prisons rapidly fill to capacity soon after completion. According to the Australian Bureau of Statistics in the 10 years between 1993 – 2003, whilst the Adult population has grown by 15%, the male prisoner population has grown by 50%, and the female prisoner population has more than doubled with a growth of 110%. This is a very sobering statistic, as the male imprisonment growth is more than 3 times the

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population growth, and the female imprisonment growth is more than 6 times the population growth. At least 60% of male prisoners and 50% of female prisoners are known to have had prior term of imprisonment. The 10 years before this saw the prison population per 100,000 citizens of imprisonable age grow from 91.6 to 119.2. This is not a new trend, as in 1920 Australia’s prison population per 100,000 population was 51.6. The growth rate of the prison population on average has exceeded population growth for most of the 20th Century, however this growth rate has been exponential since the 1980s.

This presents government with possibly the biggest challenge it will face in the criminal justice area. As I am writing this report, in the ACT, the jurisdiction in which I prosecute, a considered debate surrounding the construction of the first territory prison is reaching 10 years of age. One of the first reports into the proposed prison was released in December 1996 by the Attorney General entitled Establishment of a Correctional Facility. This report considered two possible models, the biggest of which being a 180-bed facility at a cost of $25 Million. The proposed size of this model was based on 1995-96 ACT custody figures of 110 ACT prisoners and factoring in anticipated growth. The growth prediction was based on the 1994 Mudd report, which suggested that by the estimated completion date in 2000, the number of ACT prisoners would be 129, and by 2025 the number would increase to 200. According to the Australian Institute of Criminology figures the ACT prisoner figures had actually reached 199 by 1998. In fact between 1994 and 1998, the total number of ACT prisoners almost doubled from 101 to 199. In 2004 the debate currently surrounds the selection of one of two sites for the prison, however the reality is that on current trends we will need both sites, and possibly commence looking for a third.

This trend and the difficulties it presents would suggest we as a society are actually getting worse at rehabilitating our criminals. In a scientific setting, our current criminal justice system would be considered as having no effect at all, as a success rate of 50% simply represents the random probability of two possible outcomes being further offences or no further offences. This test applied to minority group figures however would suggest that the application of rehabilitative or punitive measures is actually increasing the likelihood of re-offending.

Broadly there are two reasons the criminal justice system sends people to prison, the first is to rehabilitate those that we feel capable of rehabilitation, and the second is to remove from society those we feel not capable of rehabilitation. The fact that we send those who have fallen foul of the law yet still capable of rehabilitation to live in an

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6 Ibid, Executive Summary.
7 Ibid, Chapter 3 – Predicted inmate population levels for the ACT.
enclosed environment 24 hours per day with those already beyond help may go some way to explaining our failure. It’s difficult to understand how anyone could think that joining those in need of help with those beyond help could result in anything positive. A long-term prisoner from Saskatchewan most aptly described prison as a criminal university.

> *It doesn’t matter what criminal craft you want to branch out into, there is a professor in that discipline to teach you. From burglary to bank robbery, they are all there. It is residential so there is no down-time either. When you are not learning your craft the system is conditioning you to the aggression, anger and hatred for society that you need to be a career criminal. It is the most successful educational facility our society has and draws proportional funding.* J.T Saskatoon.

It is important to acknowledge that our current concept of justice has not always existed, nor should we believe that it will exist forever more. The history of the British Empire and the legal system that it developed is but a flash in history. Every society has however sought the same basic objectives, being a civil, orderly and safe society, and each administration has utilised the best means known at the time to achieve this. In pursuit of a civilized society, a number of universal questions have been asked; how do you deal with that percentage of society’s members that do not conform to the expectation of the majority? What is the best means of keeping this percentage to a minimum? And what is the best way to minimise the harm that flows from their conduct? It is quite clear that law provides at least a consistent environment in which all members of society know what is expected of them. Flowing from this is the Latin phrase *Ubi jus ibi remedium*, where there is law, there is a remedy. A consistent standard requires a known remedy or sanction as a means of enforcement; it is simply the form of this remedy that changes as society develops.

**History of Criminal Law;**

It has been purported that our current centralised prosecution has only existed for the last thousand years or so. Some writers suggest restorative justice to have long-standing historic origins with restorative justice being the norm rather than the exception for most of history. Van Ness suggested that it was grounded in traditions of justice from the Ancient Arab, Greek and Roman civilization for offences that included homicide during which time, crime was viewed more in the nature of a civil action in which an offence by “A” against “B” accrued a debt to “B” rather than the community.9 Zehr suggested that this concept begun its decline around 1066 when the Norman Conquest resulted in the birth of the nation state concept, at which time the Church first established the concept of prosecution as a central authority through the introduction of inquisition, feeling that this was morally justified because crime, in addition to being committed against the victim was also an offence against the moral order of the church and society. At this point, it is suggested, early Christian practices of forgiveness and reconciliation began to loose ground as the church took a central role in early society, and began to take the lead role in enforcing moral order.10

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Umbreit suggests the critical incident is at the time William the Conqueror’s son, Henry I, issued a decree securing royal jurisdiction over certain offences (robbery, arson, murder, theft, and other violent crimes) against the “kings peace.” This is thought to be the point at which a new centralised approach developed where by the debt was no longer to the victim rather to society, which is the concept that exists today.

With respect to those learned writers, this view is not supported by evidence. Although Contra pacem certainly has seen a strengthening since the birth of the British Empire, a cursory look at history suggests that Justiciarius regni, the kingdom’s administration of justice has existed for much of history. Although much of history’s law was unwritten, the oldest written laws known to us originate from Mesopotamia, which means between the rivers referring to the area of land between the Tigris and Euphrates rivers. The oldest complete code originates from Hammurabi, King of Babylon (1795-1750 BCE). The purpose of the code was clearly stated in the prologue of the code, which sets forward its argument in support of central prosecution;

That the strong might not injure the weak, in order to protect the widows and orphans, I have in Babylon...in order to declare justice in the land, to settle all disputes, and heal all injured, set up these my precious words, written upon my memorial stone, before the image of me, as king or righteousness.

In some areas, the Hammurabi Code appears to be somewhat of a state enforced civil remedy rather than a purely criminal code;

If he [the offender] put out the eye of a freed man, or break the bone of a freed man, he shall pay [him] one gold mina.

The code however also provided a list of what can only be described as state enforced deterrent punishment for other offences;

If any one strike the body of a man higher in rank than he, he shall receive sixty blows with an ox-whip in public.

The basic Hammurabi Code was later broadened and further refined, with the Persians introducing much more comprehensive codes, however the basic tenets remained the same. During the time of Darius around 517BCE, Persian punishment for crime was relatively severe even by the standards of the time. The punishment for manslaughter was ninety strokes with a horsewhip. Capital crimes included treason, rape, and...
sodomy, cremating or burying the dead, murder, accidentally sitting on the king’s throne, invading the king’s privacy or approaching one of his concubines. Death was administered by poisoning, stabbing, crucifixion, hanging, stoning, burying one up to his head, smothering in hot ashes, crushing one’s head between huge stones or other methods.18 Within the Persian Empire was a small body of land about 50 miles wide and 100 miles long called Judah. Judah had very complex and strictly followed a body of laws which prescribed that if an engaged or married woman copulated with another man, they would both be stoned to death yet if the woman was a slave the man would be beaten. Judah’s laws also clearly extended to behavior within the family. If a father found his son stubborn, rebellious and disobedient, he could take him to the city elders where the son could be stoned to death. In any dispute before a court a man judged to be wicked could be whipped up to 40 times.19

The oldest comprehensive code know from ancient Greece dates to the Archaic period 621BCE, when the Athenians assigned Dracon the task of codifying law to reduce incidence of Talio or individual, in kind, retribution. What followed was shockingly severe, hence the term Draconian law. This code carried the death penalty for almost all offences, and was so harsh it was said to have been written in blood. The severity of these laws drove ancient Greece to the verge of revolt, until 594-593BCE when Solon was appointed to review the laws. The only law of Dracon that was left untouched was the division between murder and manslaughter, which is a concept that remains today. Solon’s laws, although supplemented and modified remained the foundation of Athenian statute law until the end of the 5th century, and parts of it were embodied in a new codification made at that time.20 Although Solon’s laws were less severe then Dracon’s they still prescribed punishment for offences, however as with Hammurabi’s code, these laws also contained compensation for loss in some areas. Ancient Greece did however have her proponents of what appears to be a restorative justice mindset. As knowledge grew, a group called Sophists developed who sought to expand knowledge. Outstanding amongst the Sophists was Protagoras from Thrace who moved to Athens in 445 BCE. Protagoras lectured that people became good citizens not by obedience to authority but by learning and believing what is just and right. Believing that people were dependent on what they learned and on their own will, he said, “man is the measure of all things.” Unfortunately, Protagoras went further and lectured that there were scientific explanations for most phenomenon, and the belief that “gods” were responsible for everything was false. City officials prosecuted him for atheism and he was exiled, and he and his message were lost at sea on his way.21

The code of law of the Romans called twelve tables came into existence between 450 BCE and 190 BCE.22 Again, these laws were deterrent and punishment based. Jesus Christ himself was executed by the state pursuant to these laws.

Although some degree of restoration through compensation has been an objective for most historic legal systems as it is today, state-enforced deterrence has always ranked

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high on the agenda. As a consequence, the state has always actively provided the
mechanism for enforcement. Whilst the compensatory factor has provided an attempt
to restore the victim of such offences, the clear focus has been penalty induced
deterrence to offending behavior.

Restorative Justice;
Since Hammurabi’s day, the population of Mesopotamia and Persia pushed south then
west taking its values and perceptions with it. As these approaches were becoming the
accepted form of civil order in most other parts of the world, first nations and native
people of the American continent, which was geographically isolated from the
European continent formed a fundamentally different approach to dealing with those
members of society that did not conform. This is a much more spiritual and holistic
approach, in which the spiritual and material are viewed as inseparable and
interdependent, that everything is related to everything and healing depends on our
capacity to understand ourselves.\textsuperscript{23} Offending behavior is viewed as a consequence of
a disability of the spirit, and conceptually a spiritual disability is viewed much the
same as a physical disability. Three important distinctions exist between the system of
deterrence that grew from European foundations and the holistic and spiritual
approach of the first nations. Firstly, the offender is viewed not a bad, but as
spiritually or emotionally less than whole with the objective being to make them
whole. It is felt that blame and shame are negative elements, whereas rehabilitation is
a positive step and a combination of the two actually work against each other, and all
efforts should be focused on a forward and positive direction. Secondly, societies
contribution to the position of the offender is formally acknowledged. It is believed
that an individual receives their spirit from those around them such as parents and
peers, and if alcoholism and violence are part of their lives, it is probable that they
will not have a complete spirit to give. Thirdly, the ripples that flow from this
situation are seen as flowing outwards leaving nothing untouched. This makes it the
responsibility of the whole community to deal with, as it is the whole community
including the offender that is viewed as victim of the incident.

Whilst the Native American concept has always been practiced amongst the first
nations and other native communities, it has recently been studied, documented and
practiced amongst increasing western communities under the label Restorative
Justice. There is a Latin legal phrase \textit{Lex prospicit non respicit}, the law looks forward;
it does not look back. The ultimate aim of all restorative justice programs is to
interrupt offending behavior at the cognitive level to aid the prevention of re-
ocurrence in the future. In other words to fundamentally change the incomplete mind
converting it into a complete mind. This is also the aim of the current centralised
punitive system however most proponents of restorative justice would argue that the
method employed by the central punitive approach will rarely succeed. Hypothetically
speaking, if “A” felt they were dispossessed of an item and became angry about this
dispossession, all of the punitive threats in the world would not displace this mind set.
The best the constant presence or threat of punitive sanction could achieve in this
circumstance is either (a) suppression or delay of the action or (b) a conversion of the
reaction into a different manifestation. As the first nations approach suggests, what is

\textsuperscript{23} Croal.P, Darou.W, Development Express, First Nations and Development, Canadian International
Development Agency.
needed is to repair of the mind and heal the person rather than hang a potential consequence for the action over their head.

The offender:
In my experience as a prosecutor there is a view within the Australian community that offenders are oblivious to the consequences of their action as they do not have a conscience, however it appears that our current system works toward protecting offenders from the consequences of their actions. In my experience, it is rare that an offender will gain any insight at all into the consequences suffered by the victim. This is a big shortcoming in our current system because there is significant evidence that the maintenance of criminal behavior not only thrives in such an environment but is dependent upon this insulation from consequence. Research suggest that perpetrators have the same conscience as everybody else, however the same research has suggested that there are broadly five techniques employed by offenders to insulate themselves from the consequences of their actions;\textsuperscript{24}

1) Denial of victim (We weren’t hurting anyone)
2) Denial of injury (They can afford it)
3) Condemnation of the condemners (They’re crooks themselves)
4) Denial of responsibility (I was drunk)
5) Appeal to higher loyalty (I had to stick by my mates)

It is essentially this information that provides direction for my view of restorative justice. I believe that the removal of this insulation presents the first step to the interruption of offending behavior at the cognitive level.

The Victim:
There is significant evidence to suggest that victims of crime are interrupted at the cognitive level in a negative way. Studies have indicated that victims of child abuse have a high propensity to become abusers themselves, which is a trend experienced in many other offence groups. There is a Latin phrase Damnum sine injuria esse potest, meaning there can be damage without injury. Even victims that do not suffer physical injury can still suffer severe damage. Victims of burglaries often suffer insomnia and insecurity in the home environment leading to poor work or study performance, resulting often in quite dramatic consequences such as loss of income. Such damages are seldom taken into account, as they do not become apparent until well after the crime is committed and the matter finalised.

The legal systems responsibility to repair the victim is a concept that is only now beginning to be taken seriously in Australia, however it is still more as an adjunct to the system rather than part of it. Most proponents of restorative justice will argue that it is an incomplete system that deals with an offender in isolation of those affected by the actions, and does not take account of all costs. Further, this is contrary to long-standing objectives of our current legal system, Justitia est constans et perpetua voluntas jus suum cuique tribunes,\textsuperscript{25} justice is the constant and perpetual wish, rendering everyone his right. One cannot underestimate the power of healing the victim. In a restorative dialogue study conducted in the USA between serious violence


\textsuperscript{25} The opening words of the first title of the first book of Justinian’s Institutes de justitia et jure (About justice and law)
victims and offenders, the word most used to describe post-mediation victim sensation was euphoric. There is a growing body of research to suggest that victims of crime will express their displeasure in some form. This could in a positive way such as the formation of victim support bodies, a negative such as becoming an offender or simply by becoming angry and bitter members of society. The feelings that follow victimisation do not however simply disappear.

Restorative justice process;
There appears to be an academic obsession with defining restorative justice and one that clearly outweighs any obsession with meaningful performance measurement of such programs or critical self-analysis. Most of these definitions are rather loaded and quite often simply reflect the authors own position in life. Zehr for example defines restorative justice in one book as based on an old, common sense understanding of wrongdoing. Albert Einstein accurately defined “common sense” as the set of prejudices one has formed by adulthood. Umbreit goes some way to defining it as restorative dialogue however I am of the view that dialogue requires some backup action before it becomes truly restorative. My definition of restorative justice is quite simple, restorative justice is not a noun, it is a verb. It is a process approach to crime that focuses on healing both offenders to prevent future offending, as well as the victims to minimise the harm. In other words it should be defined by what it does, not what it is. Although restorative justice is a process rather than an incident, it can however be triggered by an incident of which there are four broad categories;

Mediation:
Mediation shares its characteristics with other diversionary initiatives, however the significant difference lies in the juncture at which mediation takes place as opposed to diversion. Mediation occurs before the real criminal proceedings are initiated. Mediation does not involve a 3rd party imposing a solution upon two other parties, rather it is the facilitator that simply assists the two parties to reach an acceptable agreement amongst themselves. This system is known as alternative dispute resolution and practiced as a legally imposed prerequisite in civil matters, however due primarily to the centralisation of our system it is not employed in criminal matters in Australia at present. This is notwithstanding the British Colombia lower mainland has recorded more than a 90% success rate in the criminal setting.

Diversion:
Diversion occurs at a stage after the justice system has become involved, and is probably the only measure that has been practiced systematically in Australia, known more commonly as the Wagga model of police diversion. A prerequisite to diversion has been an admission of guilt. In the ACT however after some initial enthusiasm, the AFP appear to have lost interest in this measure. Diversion figures for the first 5 years of the program are as follows;

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- 1999/00 – 58.\(^{30}\)

Participative sentencing:
Participative sentencing programs are known by many names in many cultures, the most common of which include healing circles in British Colombia, and circle sentencing in other areas. Its aims are;

1) Expose the offender to the consequences of their actions (to heal the offender)
2) Expose the victim to some background information regarding the offender (to heal the victim)
3) To use positive peer influence to instill a sense of worth on the offender (to empower).
4) To adopt measures aimed at rectification/education of the causes of offending behavior.
5) To empower both the offender and the victim by giving them some control over the process.

Most circle sentences occur at the sentencing stage of proceeding, and usually only follow full and unconditional acceptance of the crime. Figures have found that it is largely unsuccessful where there remain unresolved factual issues. The goal is not to remove resentment or anger at the offence, as this is much too ambitious. The aim is to educate in a transparent manner, and place on the table all things that are currently left hidden. This is often a highly volatile and emotional process and experience has found that issues are aired for the first time with open wounds exposed, however true to the analogy this is a essential to the healing process.

The discussion within the circle focuses on the following issues;
- Extent of similar crimes in community.
- Underlying issues not otherwise exposed.
- The impact of the crime on both the offender and the victim.
- How the offender can make amends to the victim.
- Think tank sentencing options, with a particular focus on rehabilitation.

Placing the crime in the center of the circle,
Diaphramatically, our current system appears like this;

Our system commences with the introduction of the crime into the criminal justice system through the laying of an information. This is immediately followed by denial of the offence until proved or admitted. Once admitted however, the system then calls upon the defendant to justify the offence in the form of mitigating arguments. At no point does the system focus on the defendant’s acceptance of responsibility. Interaction with our legal system is largely governed by tactical denial and skilful justification.

Diaphragmatically, restorative justice would view the system like this:

![Diagram of Tribunal of Fact/Law, Victim (+ support), Defendant (+ support), Crime]

Post-incarceration reintegration and support:
It is important to acknowledge that restorative justice should not be limited to instances where custody is not imposed. There are a large number of crimes and offenders in our current system to which custody is still the only option. For a period prior to release the prisoner requires preparation for the outside world. Also, immediately after release former-prisoners are in a vulnerable position with regard to offending behavior. Quite often offenders leave prison in a very angry state, and it is important to accept that the rehabilitation process should not cease, rather it should be increased post release which creates a vacuum that can be filled by restorative justice.

Post-incarceration reintegration is more in the line of cognitive education modules to give insight into offending behavior as opposed to simply showing former inmates the big stick of re-incarceration.

4. The Churchill Trust Study;
There have been many studies of restorative justice programs overseas, and the form of these programs have been documented and occasionally practised in Australia. From my observation however, their substance, objectives and ideology has not always been understood, which has shown in a less than effective application. The studies that have been undertaking have been largely academic in nature, and although they have produced library’s full of books, they have had little or no impact on the participants in the criminal justice system as I see it. Different areas of the world have operated various models for varying periods of time. Although the basic structure of the models are much the same, several model possess interesting derivations that enable them to be practised in the broader community.

The aim of this study is twofold, firstly to capture and convey the substance, objectives and ideology of the various restorative justice programs and look at how
these traditional forms of restorative justice have been eroded throughout the North American continent with varying degrees of European intervention. Secondly, to look at unique and useful model attributes distinguishing particular programs.

Each highlight on the trip was chosen for a particular reason, either because my research suggested that the visit would give me a better understanding of the ideology of restorative justice and how it has changed over time, or because I had identified a unique and useful derivation on the application of that particular program.

**5. Peacemaking in the Navajo Nation – New Mexico USA;**

I was in New Mexico 11 – 14 April 2004. Whilst in New Mexico I spent four valuable days with Dr Jim Zion. Dr Zion is a lawyer with a Doctorate in Judicial studies and has practiced law in the Navajo courts for over 20 years. He is widely published in the area and is responsible for developing much of the legislation that supports peacemaking in the Navajo court system and is very respected by both the Navajo people and the broader restorative justice community. My time with Dr Zion was spread evenly between discussions in his office and field trips to the Navajo Nation. I also spent time with Robert Yazzi, retired Chief Justice of the Navajo Court and Judge Angela Keahnae-Sanford of the Navajo court both of whom are very well respected members of the Navajo Nation. I cannot thank these people enough for their unrestricted time and confidence, which enabled me to visit and meet with the peacemakers, the most respected and protected amongst the Navajo nation. This was an extremely rare honor, and one that is seldom experienced by anyone at all let alone a lawyer from Australia. This enabled me to not only learn of the peacemaking process but to learn of the underlying Navajo culture which is an essential pre-requisite to understanding peacemaking. Prior to my trip I read much about the Navajo people however my time on the Navajo taught me that we are extremely limited in what we can learn from books.

**The Navajo Nation:**
The Navajo Nation is a sparse area of land 25’000 square miles in size with a population of 220’000 people. The Navajo nation is bordered by four mountains namely Mount Taylor to the south, San Francisco Peaks to the west, La Plata Mountains to the north, and Blanca Peak to the east all of which have significant cultural value that I will get to later. The Navajo nation is an independent and sovereign nation headed by the Dine’ (pronounced Dinay) Counsel of Elders, and a presiding President. The Nation has its own Navajo laws, enforced by Navajo police and prosecuted in Navajo courts. When state police detect a crime, they often have to interpret a complex area of the nation known as the checkerboard to determine if the state or Navajo nation has jurisdiction.

The Navajo court has a criminal division that deals with its criminal matters in the same manner as the state of New Mexico or Arizona. In 1982 however, faced with rising crime and increasing western influences the judges of the courts of the Navajo nation consciously revived and institutionalised the traditional Navajo justice system hozhooji naat’aatii, know as Peacemaking in English.

Structurally, when a matter comes to court in the Navajo nation it can be dealt with in the conventional manner much the same as criminal prosecutions all over the world. In domestic abuse cases the matter can be diverted to a domestic abuse commissioner
who at present is my host Dr Zion who will conduct a mediation process, which results in an agreement being signed. At the request of the court, the prosecutor or the offender the matter can be diverted at any stage of proceedings to peacemaking. It is this peacemaking that I travelled to the Navajo nation to study.

**Peacemaking:**
Firstly I should point out that peacemaking is not without its difficulties in the Navajo, as there are difficulties fitting it into an existing legislative framework, which is a concept that I am familiar with in setting up circle sentencing in Australia. The peacemaker’s argument is difficult to argue with however. They say that just like fire, the law must be our servant not our master. *If the law stands between us and a more desired outcome, we need to do what is necessary to remove the obstacle.*

In order to understand Navajo peacemaking it is essential to gain at least a superficial understanding of a very complex and spiritual culture, which from an academic perspective covers psychological, physiological and sociological aspects as well as legal aspects. In Navajo mythology, we live on top of three other worlds and we live on the fourth world. In the world immediately below ours, just prior to our creation there was a conflict due to excesses in life, which resulted in the separation of men and woman and a number of monsters being born. These monsters it is believed followed the Navajo into the present world. At this time a major female Navajo deity *Asdzaa na’dleehe’* (changing woman or mother earth) was born and was impregnated by the father sun and gave birth to twins named “Monster Slayer” and “Born for Water”. *Monster Slayer* and *Born for Water* went on a journey to the sky to look for their father to obtain weapons to slay the monsters, and returned with weapons to do so. Monsters referred to in Navajo culture are not the same as in western culture, rather they have a deeper more spiritual meaning referred to in Navajo as *Nayee*, loosely translating to any obstacle to a happy and successful life such as plague, depression, marital strife, violence, greed, insecurity etc. The first monster they encountered was *Yeetsa* and they successfully killed him, leaving his head behind which is a rock known locally as *Cabezon* (Spanish for large head) with his beheaded body being Mount Taylor. In killing Yeetsa, Monster Slayer had to watch for some time, as initially he could not see him only the damage he was leaving behind. By studying that trail of destruction, Monster Slayer was eventually able to identify the monster. Once he identified the monster, he then had to work out his weaknesses then constructed a plan to kill him including the tools that would be required, and how best to approach the task. Some monsters not killed by monster slayer include poverty, self pity, old age, depression, rebellion and insecurity. In peacemaking, the task is to identify the particular monster from the trail of destruction, study how it works and operates then determine how to kill it within the individual. In line with their beliefs and true to their culture, alcohol is illegal on all Navajo nation property as it was identified as a vicious monster, and although it could not be killed, the Navajo determined that it could easily be caged.

In the Navajo nation for the most part, families consisting of Mother, Fathers, Sisters, Brothers etc live in separate houses close to each other called “Outfits”. Each outfit has a “Hogun,” which is an eight sided house used for all traditional Navajo ceremonies. Each group of outfits are in relatively close proximity, and the size of it

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31 Peacemaker, Alfred Dennison of the Navajo Nation.
can usually be determined by the size of the water tower located near by. The Navajo nation is grouped into 110 Chapters. These are similar to municipal councils that make their own by-laws. The nation does however have a sort of capital called Crown Point, which was where I spent my time in the Navajo nation as this is where the court is located.

As mentioned, thanks to Judge Angela Keaahnae-Sanford I had an opportunity to meet with the Peacemakers at Crown Point, and talk for quite some time. I sat and talked to the peacemakers about Navajo issues and I came out with at least a superficial understanding of the culture and resulting process. The peacemakers seem to have the ability to say a lot in just a few words with the use of metaphor. This, they explained is a time honored Navajo tradition, and an attribute they look for in potential peacemakers.

Head peacemaker, Alfred E Dennison explained the concept of peacemaking. He said that there are two ways things can be done, the traditional way and the law way. He described an offender as being like a horse, and said if it is acting up you need to be guarded in the way you deal with it. If you raise your hand and threaten it will run and regardless of how hard you yell and threaten it will not stop running. If you attempt to attach shame or blame to the actions of the offender, you are in essence raising your hand and spooking them. Low self-image is felt to be the monster responsible for drug use and offences of violence. Shame creates low self-image and insecurity that is usually accommodated with violence or the desire to anaesthetise self. It is believed that the monster of insecurity will manifest itself in the form of violence to allow the individual to feel less vulnerable, or to mask their true feelings with an offence is the best defence mentality. They believe that a negative emotion such as shame cannot advance an individual as needed it can only keep them down. To kill the monster of low self-image or insecurity, you need to drown it in feelings of security and high self-esteme.

Peacemaker Dennison said in order to be a peacemaker, firstly it is important that you are not a running horse yourself. Secondly, you need to understand what will calm the horse and stop it from acting up. He said horses run easily once they begin to become upset, and there is much in this world that can upset a horse. A peacemaker’s role is to calm the horse, and bring it back to graze. Peacemaking and culture are inseparable, and peacemaking is a difficult thing to define and write in a law way, because law deals with the surface, peacemaking deals with much deeper issues. He explained the Navajo sacred basket, and explained that learning is like a journey that begins at the end of the line and deepens as you get into the basket. The law way he explained is at the beginning and designed so that even the unwise can understand it. Peacemaking relies upon a much deeper understanding that is reliant upon wisdom, and your ability to understand people with a clarity that is beyond most people. The difficulty is, standing on the outside of the basket you need to focus to see beyond the outer rim, and most will resist it because it presents knowledge that most do not understand and few feel comfortable with. You cannot demand that others see beyond the outer rim he said, you need to take them by the hand and lead them along the strands of the basket towards a deeper understanding. When you see offending behavior for what it is, you can begin to move further down the journey of learning.
In a practical sense, focusing on the monster removes the negative based blame and shame from the offender that feed the monster of insecurity and low self-image that feed many crimes. Recognition of the desire to slay the monster is portrayed as a positive emotion. This is how you balance positive and negative in society.

Peacemaker Dorothy Becenti explained that all existence is like fire and water. For example fire has good in it, it can keep you warm and cook your food, however it can also burn you and destroy your house. This is the same for water, which is essential to sustain life however also has the power to end it. The objective is to learn how to control the elements that reveal the negative side, whilst not killing those that create the positive side.

The monster possessed by an offender is viewed the same as the monster possessed by an individual who is sick. The Navajo seek to reach the conditions sa’ah naaghai bik’eh hozho being the conditions for health and well-being in harmony within, and a clear connection to the physical/spiritual world. The process of peacemaking is to assist the offender to identify their monster, then to work with them to study and analyse the monster just as monster slayer did then to discover how to kill it or at least cage it. To bring the horse back home to graze so to speak. The Navajo have concepts that simply cannot be translated accurately into English, however the peacemakers attempted to loosely translate them for me. Firstly, hoxho is a state of disharmony in which a person is in a state of conflict with their surrounding environment, in other words the horse is away from where it should be. The aim of peacemaking is to achieve a state of anahoti, which loosely translates things are as they should be. This is the aim of peacemaking, to achieve anahoit. To make things as they should be.

In order to achieve anahoit, the offender and the victim discuss the offence being careful not to attach blame. The victim outlines the incident and the effect it has had on them, then the offender does the same. The peacemakers then provide a lecture. This is not a lecture in the English sense, rather it is a statement of wisdom in which the peacemakers assist in the identification of the monsters that are to blame. Once the real monsters are identified, the task is then to study them to help the offender slay them which is in the form of another lecture. In imparting this wisdom, peacemakers often cite the story of the Coyote and the Horne Toad, which are usually told for both education and entertainment. Hajne Bahane is the creation scripture such as Born for Water and Mountain Slayer, however there are large parts that generally cannot be discussed. There is a body of knowledge that is normally told to children at winter around the fire in the Hogun. In Navajo, Coyote is an evil entity, and the stories mostly are told about the trouble the Coyote gets into due to greed or ignorance etc. The Horne Toad called Cheii (Grandfather) usually feeds off the stupidity of the Coyote and shows his wisdom this way.

The process of peacemaking is foreign to us in the west. In the west we have a saying, a troubled individual should act with their head and not their heart. Peacemakers preach the reverse, that you should be guided by what is in your heart because they feel that the head can sometimes mislead you. The Navajo, as with other first nations practice a ceremony which lasts from dusk to dawn in which they ingest the Peyote cactus to place them in a state in which they say they can communicate with god directly, to get in touch with the content of their heart. This is based on the premise
that your heart is fundamentally good or that your heart in naturally in *anahoit*, however your head can lead you into a state of *hoxho*.

The objective of the peacemakers is a mutually agreed outcome, which culminates in a peacemaking agreement being signed by the parties. Once this peacemaking agreement is signed the matter is referred back to the criminal court, which sanctions it in accordance with the legal statute. Breaches of this agreement can result in the matter being referred back to peacemaking or back to court for conventional treatment. The respect afforded the peacemakers however means that these agreements are rarely breached.

Both peacemakers and judges agreed that offenders whom participate in the peacemaking process rarely have subsequent contact with the criminal justice system, and even those that do tend to have much less severe offence types then before. As previously mentioned I am avoiding quoting recidivism figures, however in the Navajo the figures would be the lowest I have ever seen anywhere in the world.

6. Don Johnston – Prosecutor Hennepin County Minneapolis, District Attorney, Juvenile Prosecutions Division;

I was in Minneapolis Minnesota from 15 – 18 April 2004. Whilst in Minneapolis I spent time with Don Johnston, a prosecutor with Hennepin County Juvenile Prosecutions Division of the District Attorneys Office.

In many county’s across Minneapolis they practice a unique community based circle sentencing program resulting in dramatic changes to both offenders and victims. The basic model is as follows;
This model represents two significant innovations that other programs do not. Firstly, prior to the circle there is a detailed victim and offender preparation conference that is conducted compulsorily. This is viewed as a vital element in the process, and one that is an essential pre-requisite to a circle. This preparation stage has six main functions;

a) The keeper (facilitator) is selected, and the process is explained to all parties.
b) Essential members of the community group are selected, which could include people from alcoholic anonymous or mental health or other people with special knowledge and interest from the main stream community. The community people are all members of District based Restorative Justice Circle Group who receive special training in conducting and participating in circles, and will be discussed next.
c) The keepers make sure that the victim and offender supports promote a balanced circle.
d) Guidelines and house rules for the circle are established.
e) The victim and offender are fully briefed on the step by step process of the circle, what the circle can do, and what its limitations are.
f) The layout of the circle is then finalised.32

There is at least one day between the participant preparation and the circle itself. The preparation stage not only prepares the participants for the circle, but the time between the preparation meeting and the actual circle provides valuable reflection time after first working through the six stages resulting in participants much more prepared to participate having reality tested the process. This process enables all members to come to the circle very prepared, and ensures that each have thought about what they wish to achieve from the circle, and more importantly what the circle can and can’t provide them.

Secondly, the circle peers are made up from general members of the community, specifically the Restorative Justice Circle Groups, which may include parents, local business people, members of support agencies such as alcoholic anonymous, single parent associations’ etc. This broadens the experiences and views in the room, as well as possibly providing much needed support beyond the circle. Circle members are selected on a number of criteria, including individual experience, race, demographic, age etc and each are screened for security purposes.

Restorative Justice Community Circle Group;
The circle members for the above model are selected from community volunteers who have formed district based Restorative Justice Community Circle Groups. These groups meet regularly for special training in facilitating (“Keeping the circle” as it is called locally) and general participation in circles. The community justice circle groups form circles with the offender and victim to ventilate both views of an incident, then after consultation arrive at a recommended sentencing option which is referred back to the prosecution in the form of a signed agreement for further consideration and if appropriate adoption. These agreements can come in many shapes and forms, ranging from local community reparation work through to training and education modules, and may also include recommendations for jail. More importantly however, they can include offender assistance in the form of training and support in life skills or employment which quite often changes the direction of an offender.

Sending a matter to a community circle group can result in the removal of the time constraints in discussing sentencing options that often exist in the main stream court system. In the main stream court system, the mixture of penalty, rehabilitation and development measures can often contradict each other. This system allows for lengthy discussion about the participants past, and more importantly where they hope to be in the short, medium and long-term future as well as a thorough airing of the victims position. Once this is established, a community-based plan can be formulated to achieve personal development. Once this plan is finalised a more complete and effective sentencing structure can be formulated. Once the agreement is returned to the prosecution it has power to make any necessary adjustments to accommodate for broader community expectations or general deterrence.

These community circle groups were established around 10 years ago, and have increased in both number and expertise since that time. They started with little funding and from their introduction have gained momentum, similar to neighborhood watch programs in the ACT. As they grew the legal community has gained sufficient confidence to make them an integral part of the criminal justice system, which is where they remain today. Many of the community circle groups have become
incorporated, and some receive limited funding from the state government to develop expertise, which they in turn disseminate amongst other community circle groups.

On 17 April 2004 I attended a one-day training course for circle facilitators run by the local restorative justice community circle group co-ordinator. This involved lectures from experts in restorative justice principles as well as circle workshops. The structure has formed whereby circles are usually conducted with the use of experienced members, with newer members taking a less active roll until they gain the necessary experienced. This type of training is conducted regularly for circle group members, and often run by judges, prosecutors, academics and other experts in the area. The training on this day was run by retired Judge Barry Stuart, a former circle-sentencing judge from the Yukon in Canada, and Kay Pranis formally from the Minnesota Department of Corrections, and now author of various peacemaking texts. I also participated in a mock circle on a level 3-sex offender facilitated by a very experienced circle keeper, and received instruction on the conduct of the circle.

I was very curious about what may motivates an individual to volunteer for such a circle group, and I discovered a number of motivations. Firstly, most felt that it made their neighborhood a safer place, as offenders were being successfully rehabilitated rather than sent to jail only to return worse. One theme common amongst group members was that they felt much more informed and less threatened by offending behavior in their community, which they felt increased their feeling of security in their own homes. This is often a product of increased education and a better understanding of offenders and their motivations, and has resulted in a culture shift amongst the broader community to one of reduced fear. A second motivation was that participants felt that it educated them about society in general, and they felt it gave them skills that they could use to make their own lives better. They felt that their understanding of people in general has increased and this made them much more successful in other areas of their lives. All circle volunteers told me that they take joy in watching former offenders become productive members of society, which happens on many occasions and they feel at least partly responsible for this.

7. University of Minnesota – USA;

Whilst in Minneapolis I also met with Annie Roberts from the University of Minnesota which publishes widely in the area of restorative justice, particularly for the government under various programs. The single most useful book on restorative justice is called the “The Handbook of Victim Offender Mediation” which contains basic structures, pitfalls and surveys of programs around the world. This book is a valuable guide to setting up restorative justice programs and essential reading for all restorative justice practitioners.

The main work conducted by the university is at the request of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) which was established by the US President and Congress through the Juvenile Justice and Delinquency Prevention Act 1974. Located within the Office of Justice Programs of the US Department of Justice, the OJJDP’s goal is to provide national leadership in addressing the issues of juvenile

delinquency and improving juvenile justice. An attachment to this project is the broader Balanced and Restorative Justice Project (BARJ), which began in 1993 through a grant to the Florida Atlantic University. In 1994 the Florida Atlantic University developed a partnership arrangement with the Center for Restorative Justice and Mediation through a subcontract with the University of Minnesota. The goals of the project are to provide training and technical assistance and develop a variety of written materials to inform policy and practice pertinent to the balanced approach mission and restorative justice.

In December 1998, the collaboration published the Guide for Implementing the Balanced and Restorative Justice Model to give guidance to all restorative justice projects. The report expressed that there is no single blueprint for this model. For change to be meaningful, implementation of the BARJ approach should be guided by the needs of each jurisdiction and its community members. This report however supported what it called the balanced approach to restorative justice, balancing three vital elements of all such projects, namely the accountability of the offender, the offenders’ competency and skills development and community safety. The protection of the victim is of paramount importance, and considered under the guise of the community safety element.

**Offender accountability:**
An essential pre-requisite to offender participation in any restorative justice initiatives, is the acceptance of accountability. This requires the offender to take full responsibility for their behaviour, and requires 5 issues to be accepted:

1) Understanding how the behaviour affected other human beings (not just the courts or officials). This is quite often reinforced by listening to the victims account during the course of victim-offender mediation.

2) Acknowledging that the behaviour resulted from a choice that could have been made differently. It may be accepted that the offenders behaviour is less surprising due to external factors such as upbringing etc, however it is essential that the offender acknowledge that the behaviour was the result of choices that could have and should have been made differently.

3) Acknowledging to all affected that the behaviour was harmful to others.

4) Taking action to repair harm where possible. Taking action ties in with point two, and is a direct and unavoidable consequence of making the wrong choices.

5) Making changes necessary to avoid such behaviour in the future.

The report prescribed certain strategies to address and promote offender accountability, which underlay all programs.

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35 Ibid.
36 Ibid Pg 7.
1) The focus of all programs from start to finish is repair to the victim.

2) A formal and structured program is required for making amends to the community.

3) A process for greater understanding of how the incident affected others.

4) The offender taking responsibility for their actions must be meaningfully demonstrated and not token or hidden.

5) Encouragement of meaningful apology and remorse.

6) Involvement of both the victim and community in determining accountability measures.

Criteria for victim sensitivity in mediation with offenders

Whilst all jurisdictions appear to acknowledge and respect the particular vulnerability of the victim, US restorative justice experts have conducted specific studies for the US Department of Justice’s Office for Victims of Crime. This study has identified a number of underlying principles for victim offender mediation:

1) All humans possess untapped inner resources that may be utilised under the right circumstances.

2) An appropriate structure is essential to neutralise status and power, and provide an environment conducive to meaningful dialogue, even in an emotionally intense context.

3) The use of specific techniques by the mediator serves a larger goal of creating a safe and respectful environment.

4) Personalisation of issues is a powerful tool. Removal of insulation is supporting to insight and empathy.

5) The mediator’s presence plays an important role in facilitating genuine dialogue in which the parties actively engage.

6) Presenting choices rather than decisions to the parties where possible maximises opportunities of empowerment.

7) It is important that mediators do not get in the way of meaningful dialogue, even when emotive. This is an essential part of the process.

8) Individual differences and conflicts can elicit creativity and a sense of possibilities otherwise unknown.

9) The discovery of underlying information, needs and interests can encourage more successful results.

10) Well-drafted and detailed agreements produce better outcomes.

Guidelines for dealing with victims in mediation with offenders.

1) Victim Safety
   • Of paramount importance is to ensure that the victim is not further harmed in either an emotional or physical manner.

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• First contact should be by way of written letter and brochure outlining the process, and advice that the mediator will contact them in near future to discuss the matter. It is important that the proposition of involvement is first put to the victim without pressure of a decision, and only informed discussion takes place.
• The mediation should be conducted at a location the victim feels safe.
• Victims may find it reassuring to have input into the arrangement of the room and seating of parties, and have the freedom to introduce themselves as they choose, ie first name only / alias
• If the victim feels unsafe, the mediator needs to act immediately to provide options or to terminate the mediation.

2) Victim Choice
• The victim did not choose to be a victim of crime. It is crucial then that victims experience the power of choice in deciding to participate in the mediation process. Procedures to facilitate this should be formalised and documented.
• The mediator should give accurate information about mediation, describing the process itself and the range of responses for the victims who have participated in mediation along with research finding on client satisfaction.
• The victim should have the choice of support person.
• The mediation session should be scheduled at a time that is convenient to the victim.
• The mediation site should be ultimately determined by the victim, with an emphasis on a location they feel safe.
• The layout of the room should be determined in consultation with the victim, and support a feeling of safety.
• Victims should have the opportunity to choose whether they speak first or last, and determine whether their address is in the form of a narrative or questions.
• Some victims find it healing to hear an offender’s spontaneous words of regret or remorse not elicited by the victim’s story.
• A form of non-verbal communication between the victim and mediator should be established in the event that the victim becomes unsure/unsafe during the course of the mediation. The mediation should be immediately stopped, and discussion should be conducted with the victim regarding possible termination of the session.
• The victims should have the right to choose their restitution, and have input into the sentence.

3) Pre-Mediation session with victim, conducted in person by mediator
• Initial contact should be made in writing to ensure that the process is not simply sprung on the victim.
• This contact should be followed by face-to-face contact.
• The mediator must NOT attempt to persuade the victim in any way, as participation must be wholly voluntary.
• It is critical that the mediator listens carefully to the victims concerns and occasional paraphrase and confirm accuracy.
• Any consent to participate must be fully informed, regarding the mediator, the process, the judicial system, the victim’s rights and the offender’s rights.
• The offender’s consent must be obtained, prior to disclosure of any sensitive information. This is vitally important as it underlies issues of trust, and this information may find its way into the session itself and become an issue.
• Discuss the risks/benefits to assist the victim in making their decision.

4) Careful and extensive, “in person” victim preparation by mediator
• Victim expectations must be reality tested.
• Restitution / sentence must be outlined with the victim, as must limitations of the process.

5) Careful screening of cases
• Each mediation program must have its own details set of criteria for case selection, including the type of crime, attributes of offender/victim.

6) Meeting first with offender
• Mediators will generally need to meet with the offender first, and undergo the same processes with regards to disclosure as those applying to the victim.

7) Offender choice to participate
• The offender’s choice to participate must be fully informed without false expectation, and made free of any persuasion.

8) Offender support
• Care should be taken, to select appropriate support people to ensure that they are aware of their role in the process, and that they will not exceed their role.

9) Pre-mediation session with offender conducted in person by mediator
• This will help make people comfortable with the process and exposure to each other prior to subjecting them to the pressure of the process and the achieving an outcome.

10) Careful and extensive in-person offender preparation by mediator
• The expectations with regards to all aspects of the process should be reality tested by running through them in detail and determining the viability of those outcomes.
• Both offender and victim should be encouraged to think about both restitution and sentence outcomes during the intervening period.

11) Use victim sensitive language
• Care should be taken to use appropriate language.
• Words such as “forgiveness” or “reconciliation” should be avoided because such words pressure the behaviour of the victim. Words such as “healing”, “restoration” and “being made whole” should be used instead as the outcomes are more reachable.

12) Use of humanistic/transformative model of mediation
• The mediator must bring a non-judgmental, and positive attitude to the process.
• The atmosphere should be positive and relaxed.
• As the session proceeds it is important that plenty of time be allowed not just for personal narrative but for interaction as well.
• Silence must be honoured.
• Time pressures or a focus on reaching agreement can detract from the benefits of thorough dialogue, question and answer.
• The mediator will need to discuss the guidelines or the process with all participants and seek feedback.
• Various options for follow-up after the process should be discussed.

13) Follow up after mediation session
• At the conclusion of the session an agreement must be documented in detail, with accountability, time frames etc being detailed.
• It is vitally important that detail is not left out as this may lead to post process failure.
• The victim must be notified when the agreement has been fulfilled.
• Ongoing contact is essential to service the agreement.
• Final evaluation must be conducted with both the victim and offender.

14) Training for mediators in victim sensitivity
• The initial training of mediator as well as continuing education should contain information on the experiences of victims of crime, referral sources, appropriate communication skills for mediators, victims’ rights and guidelines for victim sensitive mediation. It is helpful for trainees to hear from victim advocates and victims themselves.

Minnesota Department of Corrections;
One of my primary hosts in Minnesota was Kay Pranis, author of *Peacemaking Circles from Crime to Community* and a wealth of information on peacemaking circles and circle sentencing in Minnesota. Kay formally worked for the Minnesota Department of Corrections and still has strong contacts with the department, and facilitated a visit to the Department of Corrections to look at their existing programs. Kay is a circle trainer for community groups and a general educator in the area.

Thanks primarily to Kay’s contribution the department still conducts post-conviction victim counselling. This program addresses a dilemma in which victims were forgotten after conviction. Under the guise of this program victims have access to counselling and victim healing programs well after the conviction of their offender.

This program recognises the significant and long lasting impact that offending behavior has on victims and seeks to address this to re-establish the feeling of security or more accurately absence of fear. It provides ongoing support for victims and the dissemination of information on issues such as day release and parole for the offenders in their matter. They also provide information about the progress being made by the offender and may facilitate contact or apology if desired.

Following Kay’s identification of causes of violence in US Jails she designed and conducted restorative justice groups to assist prison wardens to cope with the pressures of their job. Kay’s research revealed that prison wardens in US jails were becoming increasingly hardened in their attitude causing harsher treatment of inmates. This had a snowball affect that resulted in harder and more violent in-mates, which
only made the wardens harder. Kay’s program targets US Jail wardens and assists them to deal with in-mates in a way that facilitates the softening of in-mates and has resulted in a culture shift in US jails.

I also met with Jason Garlynd from the Oakhill Correctional Institution in Oregon Wisconsin, who has developed a program aimed at empowering offenders. Jason commenced work as a horticulturalist at the prison, however he has achieved much more than this. In 1999 during Restorative Justice month, the then warden of Oakhill came up with an idea to encourage the prisoners to construct a symbolic memorial to the victims of their crimes. This was welcomed by the prisoners, and in its construction a plethora of talents amongst the prisoners were discovered ranging from garden design to stone masonry.

![Official Opening of the Garden](image)

The garden is a circular shape 35 feet across paved in rust coloured crushed granite. In the centre of the garden is a large obelisk boulder, unearthed during the construction of the prison and since sandblasted. An inmate with experience in stone masonry engraved the stone with four words “WILL”, “HOPE”, “GROWTH” and “CARE”. The garden is entered from the west and you progress clockwise to the north. This quarter of the circle is symbolised by the chiselled word WILL. It represents the aspect of latent potential, the season of winter, the resting seed. The germ of reconciliation is set by decision based on heartfelt conviction. The yellow flowers positioned at this point are used to symbolise the light of this intrinsic humanitarian anchoring that humans posses.
Moving clockwise from the north to the east the word HOPE faces you. The word symbolises the dawning of the creative impulse, the season of spring, the germination of the seed, the sprouting of the idea of change. The colour for the transformation of intent into positive change is purple to symbolise the passion of emotional conviction. The third quarter of the circle cycle, from east to south, bears the framed word GROWTH. The inscription represents the outpouring of life, the season of summer, the flush of light energy. The colour of yellow represents this vivacious undiluted power of the teeming creation. Progressing further you move toward the west and observe the word CARE etched into the stone. Care is used to represent the aspect of harvest, the fall season, the setting of the seed in which the kernel of the next choice and action is contained. One of the tenets of restorative justice is to create a lasting change in the awareness of the offender as to the consequences of their actions. Part of the process of this transformation is re-establishing a sense of personal wholeness and self worth which is critical to sustaining positive connections to their family, their local community, and the broader society when they are released. Utilising this space has enabled inmates to reflect on both the negative impact of actions that cause misery and loss, and the positive impact of actions that create satisfaction and gain.

Change often happens in gradual steps. When, and how to move forward in a positive way is a personal decision. Subtle changes in attitude can result in dramatic changes in behaviour. Experiencing the setting and atmosphere of the Victim’s Memorial Circle individuals may gain some portion of the mercy and grace needed to repair the wounds, and break the cycle of victimisation. Staff hope to provide individuals who enter the Circle an opportunity for contemplation and reflection on their place in the sphere of life.38

Nancy Reistenberg – Prevention Specialist Minnesota Department of Education;
Nancy’s position interacts strongly with the criminal justice system and acknowledges the link between poor school performance or bullying at school and subsequent criminal behaviour. This is an extremely valuable position that uses restorative justice initiations such as diversionary conferences to deal with offending in schools before it becomes systemic.

Nancy has conducted work in developing training modules to teach the teachers how to effectively deal with disruptive or violent behaviour in the state schools. This is a holistic approach to behavior that can effectively address a rolling snowball before it builds momentum and is recognised as a valuable part of a whole of life approach to offence management.

9. Winnipeg Manitoba – Mediation and Community Diversion;
The beginning of the modern application of restorative justice in Canada is typically given as 1974 when the Mennonite Central Committee of Kitchener-Waterloo introduced victim-offender mediation in the early stages of court processing.39 A major impetus for the advancement of restorative justice came from the Canadian

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38 This text is taken from - Description of Physical Parameters and Symbolic Emphasis of The Victim’s Memorial Circle at Oakhill Correctional Institution.
Parliamentary Standing Committee on Justice and Solicitor General in 1988 in the report *Taking Responsibility*. Since its early introduction, the use of restorative justice in Canada has spread the length and breadth of the country.

I was in Winnipeg 18 – 22 April 2004 for two main reasons. Firstly I attended a two-day course run by the Winnipeg Mediation Services Training Program. This course is designed to assist participants in adult diversion mediation to bridge communication barriers that tend to get in the way of applying some of these types of initiatives in the broader community. Secondly, I was there to look at a complex community based diversionary process that has been in operation for over 25 years. In Winnipeg, the model looks as follows;

As a diversionary measure in the Winnipeg model, a pre-charge referral unit has been set up at the crown prosecutor’s office to identify those matters that would benefit from diversion from the court process. The process basically involves the police charging an offender then sending the matter to the crown prosecutor’s office. If this office deems it appropriate it will refer the matter to the pre-charge community referral unit which will in turn consider the suitability for diversion. Conversely, should the crown not consider the matter suitable for diversion and send it to court, the court can refer the matter back to the pre-charge referral unit. I need to acknowledge that I see a downside to this process in that there appears to be no obvious application of the rules of procedural fairness. There is no transparent application decision making process nor are reasons given for the decision of whether or not to divert a matter to allow a potential participant to respond. The decision is largely unilateral and there is no appeal process.

Once identified however the pre-charge referral unit diverts the matter to one of three bodies namely the Youth Justice Committee for young offenders, Winnipeg Mediation Services for adult offenders, or Onashowewin Aboriginal Organisation for certain aboriginal offenders. These bodies conduct either restorative justice circle and/or mediation based measures aimed at reaching a mutual agreement on a proposed reparation/ punishment to be signed and returned to the referral unit, which will permanently stay the charge if it feels appropriate. The job of overseeing the

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obligations under this agreement is handled by the same body that formulates it. Should agreement not be reached or an agreement be breached, the matter is referred back to the court system to be dealt with in the usual manner. Whilst in Winnipeg I met with all three referral bodies as well as the referral unit.

**Youth Justice Committee:**
I met with Wendy Singleton, Janine Hogue and Denise Marks, three project officers with the youth justice committee. This process is similar to that which operated in Minneapolis in that groups of interested volunteer community members are formed into geographically defined neighborhood youth justice committees. These committees meet with the young offender and conduct circle based restoration programs, much the same as those discussed in the Minneapolis model. These conferences may have participation by individuals with special skills, such as drug and alcohol specialties or mental health, or conversely could simply be members of the main stream community interested in rehabilitating offenders through community involvement. These youth community committees are governed by a type of federation of committees that handles much of the co-ordination and training and employs Wendy, Janine and Denise. The girls provide resources that include a very comprehensive list of community resources as well as orientation and instruction packages. They also conduct research and produce reports on constructive dialogue with adolescence and appear to be a very central part of this process. Some of the programs offered as sentencing options include;

- **Exploring Anger** – to assist in understanding the underling issues of anger.
- **Healthy Decision Making** – to promote reflection on decision that have changed an offenders life and how those decision could have been made differently.
- **Live On The Streets** – aimed at re-integrating a young offender with their family by showing the young person the risks of life on the street.
- **Illegal Graffiti Program.**
- **Shifting Gears** – designed for youth that have accepted responsibility for auto offences to help identify all risk association with such behaviour.

**Adult Mediation Committee:**
Whilst in Winnipeg I also met with Veronica Joseph, Dorothy Barg Neufeld, Michael Handler and Chris Freeman, case workers from the Winnipeg Mediation Services. This committee operates in largely the same manner as the youth justice committee however the restorative process is more in the line of mediation between the offender and the victim and is conducted by a more centralised group of trained yet volunteer mediators. As with the youth justice committee the mediation service receives the file and contacts the victim and offender to offer them the chance for mediation. Those that agree are called in for a pre-mediation conference to outline the process and generally prepare them for what is to follow. The mediation process itself is similar to a peacemaking circle however there is only one mediator who calls upon resources as required. This process also has a community resource database and has a very structured training and development program at its disposal. At the conclusion of the mediation as with the youth justice committee, a mutually agreed and signed development agreement is returned to the court for consideration.

**Onashowewin Aboriginal Organisation Inc:**
I met with Rachel Charette, executive director of the Onashowin aboriginal organisation and Mike Alexander mediation worker with the organisation, a new
organisation added to the list of referral resources in June 2003. This is an aboriginal body funded by a combination of the national and provincial government’s and attempts to integrate tradition aboriginal peacemaking initiatives into the diversionary process. Rather than being limited to one particular aboriginal clan this organisation spans a number of aboriginal clans, however at the direction of the offender attempts to pair offenders with those elders they are most likely to have a personal connection with. Once this is done a circle is convened with the elders, the offender and the victim and again following the circle process a signed development agreement is returned to the court for consideration. The purpose of this organisation is to provide expertise in dealing with issues unique to the aboriginal community, which has a similar history to the aboriginal community in Australia and is suffering similar resulting disadvantage. This diversion is much in line with main stream circle sentencing conducted in other areas of the world.

10. Toronto Ontario – Gladue Aboriginal Court;
I was in Toronto Ontario between 22 April 2004 – 3 May 2004 for three main reasons. Firstly, to observe the operation of the Gladue aboriginal court, a court established to exclusively deal with the special needs of aboriginal offenders. Secondly, I was there to observe a unique aboriginal diversionary process run by the Aboriginal Legal Service of Toronto. Finally, to learn of a unique situation that exists on Tyendinaga Mowhawk territory a community about 2 hours east of Toronto.

My primary host in Toronto was Justice Joseph Bovard, a judge of the Gladue aboriginal court at the Toronto Ontario Provincial Court. I also had discussions with Justice Patrick Sheppard the judge responsible for forming the court and Justice Brent Knazan who assisted in this process. Prior to outlining the operation of the Gladue court, it is useful to understand the history of the Gladue case.

On 23 April 1999 the Supreme Court of Canada delivered the decision or R v Gladue. This case involved a crown appeal against sentence of a previously unrecorded young aboriginal woman who on the evening of her 19th birthday discovered her partner was having an affair with her older sister. Following an argument in which the victim called her fat and ugly and she had consumed enough alcohol to elevate her blood alcohol level to 0.165, she ran towards her partner with a large knife and stabbed him in the chest, killing him. At sentence, the trial judge took account of the defendants hyperthyroid condition, which caused her to overreact to emotional situations and suspended a term of imprisonment.

The Supreme Court delivered the first interpretation of section 718.2(e) Criminal Code (Canada) which states;

A court that imposes a sentence shall also take into consideration the following;
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the aboriginal offenders.

The Supreme Court of Canada ruled that section 718.2(e) mandatorily required sentencing judges to consider all available sanctions other than imprisonment paying

\[41\ [1999] 1 SC 688\]
particular attention to the circumstances of aboriginal offenders, and dismissed the
crown appeal against sentence. The Gladue aboriginal court was formed shortly after
in Toronto to ensure the obligations imposed upon the court by section 718.2(e) are
met.

Also prior to discussing the function of the Gladue court, it is useful to point out that
there are dramatic differences in bail issues between Australia and Canada. In
Australia save for certain circumstances, there is a presumption in favor of bail unless
the prosecution can prove that certain statutory grounds make the risk too high to
grant bail. If the prosecution is not capable of proving that one of these specific risks
exist bail must be granted. Further, statutory provisions exist that require a defendant
to appear in bail court within 48 hours of arrest.

When someone is arrested in Toronto they first appear in court before a justice of the
peace rather than a provincial court judge. Should bail be opposed and applied for
which is frequent, the matter is transferred to another court for a “Show Cause”
hearing or what we could call a bail hearing also heard by a Justice of the Peace, often
several days after the first appearance. Although technically Canada has a
presumption in favor of bail, my observation was that bail was refused much more
readily than in Australia as many defendants did not have lawyers or the ability to
produce surety or other proposed bail requirements. Aboriginal people in Canada are
extremely over-represented in custody figures and they have no comparison to the
Australian aboriginal legal services providing criminal defence lawyers to aboriginal
defendants. As a result, aboriginal defendants in Canada are rarely represented so
prior to the Gladue court, it was quite rare that aboriginal offenders would receive
bail. This lead to an interesting dilemma whereby offenders that had been remanded
in custody for a given period, would often plead guilty to offences they may not have
committed as this was easier than defending the charge. Defendants knew they would
simply be sentenced to time served and immediately released which produced a much
better immediate result.

Since the introduction of the Gladue court, aboriginal offenders are diverted to this
court on their first mention. This court will handle the first mention, bail application
and sentence where a plea of guilty is entered. The only time the matter will be sent
back to the main stream criminal court system is on a plea of not guilty, under which
circumstance the matter will go to the criminal trial list. I had an opportunity to spend
significant time in both the Gladue court and the main stream mentions court, and
observed a number of dramatic differences between these two courts.

**Speed of court.**
The main stream court system operates at a pace that I am familiar with from my
experience in Australian courts, instructions are mostly taken on the run and matters
are called on in quick succession. This places a focus on speed rather than quality and
a great deal falls between the cracks. The reduced pace of the Gladue court enables
more accurate instructions to be taken and allows for a much more thorough
discussion to take place regarding bail options or sentencing structure. Most
importantly crown concerns about bail and how these concerns could be addressed in
a manner other than remanding in custody can be dealt with. Due to the reduced
pressure judges are more agreeable to an application for a matter to be stood down to
allow necessary things to be done.
Resources available to court:
The court has a thick directory of community resources compiled by aboriginal court workers. The speed of the court is such that it is possible for a matter to be stood down to allow court workers time to contact those resources to attempt to address specific bail concerns that the crown may have.

Another valuable resource is an aboriginal organisation called the “Spirit of the People” which permanently sits in the court and can formulate bail and sentencing plans, and can step in to oversee bail or sentencing obligations and breach the defendant if required. The Spirit regularly provide unsworn information to the court on the history of the offender as well as past compliance with bail and sentencing requirements. This organisation can also assist the defendant with issues such as housing and employment and appear to have the complete confidence of the Gladue judges.

Diversion of matters from the criminal justice system.
A community based diversion system has been in operation in Toronto for about 14 years the details of which will be addressed in the next section. The structure of the Gladue court enables the various players in this system to be collected in one place rather than having to scan a number of courts making them available when required.

Practical operation of the Gladue court.
In practical terms, the police will arrest the defendant for an offence and they will appear in the Gladue court for their first mention. Before the issue of pleading to the charge arises a bail plan will be discussed. The crown will outline their concerns for bail at which point a member of the Spirit of the People organisation will address the court on the services it has available to address these concerns. Should it be required, the matter will be stood down to allow this organisation to contact the preferred support services to determine the availability of the services, or possible similar services should the first choice not be available. Informal discussions will take place between the crown and Spirit of the People and a detailed plan will be formulated. The matter will then be mentioned again by which time a proposed plan will be finalised and put before the court for consideration. This system operates in such a fashion that a large number of matters can be dealt with at a time.

11. Toronto Aboriginal Legal Service – Diversionary Conferencing;
I spent quite a bit of time with Jonathan Rudin, project officer with the Toronto Aboriginal Legal Service, an organisation designed to offer assistance to reduce the interaction between aboriginal people and the criminal justice system. The Toronto aboriginal legal service is not the same as the aboriginal legal services in Australia, in that it does not provide legal representation in criminal matters. Its primary role is to formulate plans to reduce offending behavior of aboriginal people and to appear in Coronial proceedings in the event of aboriginal deaths in custody. One such plan to reduce re-offending is the aboriginal diversionary program. This is a unique program as it was initiated by the aboriginal community itself. As with Australia, most restorative justice programs in Canada are initiated by the judiciary whereas this program was initiated by the Toronto Aboriginal Legal Service.
The basis of the aboriginal diversionary program is a protocol entered between the Aboriginal Legal Services of Toronto (ALST) and the Crown Attorney’s Office 15 years ago. Crown Attorney Rick Bennett told me the initial attraction was simply to clear matters out of the court system that should have been dealt with in another ways resulting in cost savings through a reduced number of matters coming before the court. The success of the program is such that increasingly complex matters are now being diverted. Charge types are separated into those that could be dealt with by diversion and those not suitable. As confidence in the system grows, charges such as robbery and assault occasioning actual bodily harm are being included resulting in gradual erosion of the pool of excluded charges.

This protocol in summary states;

a) The ALST will identify those cases that the court worker believes can successfully be diverted.
b) The court worker will then contact the ALST office to determine if the offender has had a previous diversion, and if so the outcome of that diversion.
c) If suitable, the court worker will contact the assistant crown attorney responsible for the case and make an application for its diversion, which takes the form of a written application followed by verbal discussion.
d) If the assistant crown attorney agrees the matter will be discussed with the offender then the victim and ALST to acquire consent for diversion.
e) If the matter is to proceed to diversion the court charges are dismissed at the request of the crown, and responsibility for the matter is completely taken over by ALST.

If diversion is to be conducted, a diversion brief is compiled that includes the following;

a) Defendant information sheet.
b) Consent to participate in community council diversion.
c) Criminal charge sheet.
d) Show cause sheet (bail summary)
e) Statement of facts.

The matter is then referred to the community council division of the ALST for conferencing. The conference is convened and attended by the following people;

a) At least two community council elders drawn from a pool of volunteer senior members of the aboriginal community in Toronto.
b) The offender.
c) The victim (if desired)
d) The ALST case worker.

The conference involves the offender talking about their life and the circumstances that lead to this offence and past offences. If a victim is in attendance they will outline the affect the offence has had on their lives and those around them. The offender then outlines what they would like to do with their life and with the assistance of the caseworker, resources are identified to make this possible. The community council members then discuss what they think appropriate in all circumstances and deliver a decision. This decision usually involves a plan to assist the offender to achieve their goals however frequently contains a restoration requirement.
There is quite deliberately no statutory basis for enforcement of the decision of the community council, however an unsatisfactory outcome will result in the offender’s name appearing on a refusal list should they appear in court again. Accordingly, successful completion figures are extremely high even for individuals with long-term interactions with the criminal justice system.

I had extensive discussions with the judiciary, prosecution, defence and ALST regarding the success of this diversionary process and all are adamant that it is extremely successful. Justice Patrick Shepherd, one of the most experience judges in the Toronto provincial court told me that following the introduction of the diversionary process and the Gladue court there has been a noticeable reduction in court lists. This was a view shared by Justice Joseph Bovard and Justice Brent Knazan. Jonathan Rudin stated that since the introduction of diversion, he has noticed that the number of people that offend once or twice then cease to offend have increased and the number of repeat participants in the criminal justice system have decreased. A statistical study on participants conducted by Craig Proulx showed that this decrease in offending behavior of 33.7% was experienced by the toughest demographic to rehabilitate. This included 33.4% who had completed one or more periods of imprisonment prior to diversion, 35.3% came from the 18-25 year age group and a further 22.3% came from the 25-30 year age group. 73.8% were unemployed and 58.8% were drug users at the time of the offence. Of the participants in the program 64.6% fully completed their obligations under the diversion and a further 12.5% partially completed the program. Proulx’s study clearly shows the difficulty with pure reliance on numbers, as participant story’s clearly demonstrate that any interaction with the process whether deemed successful or not will have a positive affect on the offender, which often only manifests itself in later interactions with the criminal justice process. The deduction that can be drawn from this is that this diversion process is not perfect, but it is much less perfect than its alternatives.

Notwithstanding the large amounts of funding for academic studies that result in many books being written, from my observations this diversion program holds more practical potential than any criminal intervention program that I have seen anywhere in the world. It is simple to undertake, informal enough that it does not discourage participants yet those that partake often cease to display subsequent criminal behavior. Although it is applied in the Toronto aboriginal community, it can equally be applied in the non-aboriginal community and once set up can significantly reduce court lists and other demands on the criminal justice system, particularly with young offenders.

12. Tyendinaga Mohawk Territory Police Force

About 2 hours drive east of Toronto lies the Tyendinaga Mohawk territory, an area of land 26 miles in length with a population 2021. Tyendinaga is a community with a complex mix of local and provincial governance. It is primarily governed by the Mohawk Chief and council of elders all of who are elected to debate and enact laws specific to the territory. Occupants of the territory do not pay state tax and in line with Mohawk culture, all land is owned by the Mohawk people. The territory however also falls under provincial Ontario criminal law. Although the area falls under the

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43 Crack Cocain is the drug of choice for most Canadian drug users, as opposed to Heroin in Australia which studies suggest have extremely different effects on offending behaviour.
jurisdiction of the Ontario Provincial Police (OPP) there is also a local Tyendinaga Mohawk police force. My host whilst in Tyendinaga was a retired 15 year veteran of the Royal Canadian Mounted Police and current Tyendinaga Police Chief Larry Hay, a man who heads a police force with unique challenges that they meet in a fashion that would make most police forces envious. I should also point out that Larry also cooks a mean burger and is a terrific drinking buddy.

During the 1990s there was a 6-week standoff between Mohawk Warriors and Quebec Provincial Police at a place called Oka near Montreal. Although the immediate crisis has passed, tensions still exist between Canadian Provincial Police and Mohawk residence. The right to self-determination within the Mohawk territory is passionately valued and the culture within the territory is such that it is the responsibility of every Mohawk to defend this right. Accordingly, the Tyendinaga Police have two roles, firstly to enforce law and order in the Mohawk territory and secondly to ensure that another Oka incident does not occur. This is an extremely difficult task however one that the Tyendinaga Police manage very well. On occasion the OPP will enter the territory and pull over a car and within minutes a number of local cars will have arrived and a spokesman will have begun questioning the OPP Officer as to why they are policing in the territory. When the Tyendinaga Police arrive, they firstly have to calm the group and satisfy them that they have things under control so they can leave. They then need to talk with the OPP officers and satisfy them that they have things under control so they can leave. Finally, they need to deal with the situation giving rise to the incident in the first place.

Peacemaking is an integral part of police enforcement on the Mohawk as Larry explained, not because it is novel or because it is a good idea, but because it has been part of the culture since the beginning of time. His philosophy is that the law is handy for when peacemaking is not possible. Peacemaking is driven by the police and is practised extensively. Crime figures within the Mohawk territory are very low and re-offending, specifically for the same or similar offences are quite low compared to mainstream Ontario. Based on government figures the Mohawk should be policed by 12 police however the current police force has 6 officers including Larry. The reason for this as Larry stated is because their objective on every occasion is to find out why the offence occurred and fix that problem rather then punish the end result leaving the problem un-addressed. As with the Navajo, the Mohawk have a daieity figure that features prominently in their approach to peace. Hiawatha is a culturally significant figure who was so angry that he had a head of snakes ready to attack. Their ancestors calmed Hiawatha and encouraged him to sit down then gently brushed the snakes until they calmed and lay as idle as a head of hair. This is their objective with every offender and one that works very well within the territory.

The Tyendinaga police practice is to lay charges if they think there is no better way to fix the problem. If they do lay charges and at a later date another option arises they will drop the charges pursue this option. Principally, it is accepted that punitive punishment does not rehabilitate or deter such behaviour.

13. Saskatchewan Legal Aid Commission – Saskatoon.
I was in Saskatoon Saskatchewan 3 – 17 May 2004 to study restorative justice in this criminal jurisdiction. An inescapable conclusion I drew in Canada was the further west I moved, the less culturally connected the aboriginal population, and more
difficult the relations between the aboriginal and main stream population. Ross Green reminds us;

*The prairie provinces have the most marginalized aboriginal population and the highest use of imprisonment for life-style related offences such as administration of justice and public order. This partly explains the disproportionate levels of imprisonment.*

One can hypothesize that this is directly related to the degree of early control the colonial forces had over Canada, which tended to increase as you move west across Canada. Historically in the east of Canada, colonial forces were often engaged in land battles with both French and United States forces, which seriously hindered early assimilation of the aboriginal population due to the powers that be being otherwise distracted. This has resulted in an aboriginal population more culturally connected and with a greater degree of self-determination today. There was no such struggle for western Canada, which was historically a colonial stronghold from quite early on. This allowed the powers that be to focus on the issue of the aboriginal population. Whereas the Navajo are a people largely insulated from western influences, this is not the situation in Canada. Further the situation in Toronto is considerably different to that in Winnipeg, which is in turn different to that experienced in Saskatoon where I met with Jane Lancaster QC, Chief Executive Officer of the Saskatchewan Legal Aid Commission.

Saskatchewan is a province of about 1 million people 12% of who are aboriginal. The two major cities are Saskatoon and Regina each having populations of around 200,000, with the remainder of the population residing in more remote communities. The aboriginal population live both on scattered reserves throughout Saskatchewan as well as amongst the main stream population of Saskatoon. The reserves are significantly different to the Navajo or Mohawk territories in that they do not have the right to self-determination and there is no local governance or police force. The aboriginal population is governed the same as the rest of the Province, the only difference being that many reside on geographically defined reserves. Rather than reserves they would be better defined as isolated aboriginal neighborhoods. The Saskatchewan legal aid commission handle about 10,500 matters per year, and over 70% of its clients are aboriginal. Notwithstanding this figure it is anticipated due to some aboriginal defendants refusing legal aid, the number of aboriginal people appearing in court is anticipated at around 95%. This accords with my own observations in which I sat in bail court for two days counting defendants, calculating that aboriginal people outnumbered non-aboriginal by 17-1. The bail situation in Saskatoon is however a little more progressed than in Toronto in that Provincial Court Judges hear all bail matters. The first appearance is usually within 48 hours of arrest and if bail is opposed and applied for, the matter is listed for a show cause hearing the following day. Further, a duty lawyer is always present for show cause hearings if required. My observation also was that bail was much more readily granted in Saskatoon than in Toronto. Notwithstanding this, aboriginal people are grossly over-represented amongst those in custody.

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It is for this reason that in addition to the diversion programs run similar to those in Ontario and Manitoba, just over 8 years ago circle sentencing was implemented as a sentencing option in Saskatchewan. Circle sentencing involves a judge, the victim, the offender and a number of aboriginal elders from the offender’s community. It follows a nomination and can follow either a plea of guilty or a finding of guilt in a criminal trial. After 8 years, in some areas of Saskatoon circle sentencing is going fairly strong whereas in other areas it is virtually non-existent, and to explain why I first need to outline the history of aboriginal people in this area.

Saskatchewan is predominantly Cree people who speak 3 main dialects namely swampy, plain and woodlands, save for a couple of Dine’ tribes in the extreme north of the Province. Saskatoon is situated near a line where the forests to the north meet the prairies to the south. This has resulted in a difference in the interaction between the Cree and European settlers in this area and the resulting cultural connections. The forest area to the north has been inhabited by Europeans for over 400 years due primarily to French fur traders who travelled trading routes to the north. Many of these fur traders married Cree woman giving rise to a non-status Indian people known as Metis’ whom largely reside to the north off reserve. Conversely the reserves on the prairies to the south were less influenced by western culture until more recently. As a result most of the aboriginal reserves to the north are catholic by religion and tend to be less culturally connected. Whilst circle sentencing or peacemaking was implemented by the judiciary in both the north and south Saskatchewan at the same time, after some initial enthusiasm it appears interest in circle sentencing has largely ceased in the north. Most connected suggest that this is because community volunteers who initially gave the large amount of time required to participate in circle sentencing have lost this initial enthusiasm. Circle sentencing in the south however is still practised a little more, and enthusiasm for the program is a little stronger however numbers are decreasing here also.

14. Restorative Circles Initiative – Saskatoon Provincial Court
In June 2003 Provincial Court Judge Bria Huculak and John Dubets of King George Community and School Association successfully sought funding to commence the Restorative Circles Initiatives (RCI) program to resources the circle-sentencing program in Saskatoon Provincial Court. This program has an office, which employs a Program Manager Tim McLeod and Office Administrator Gene Mak to conduct much of the necessary support work for the circles sentencing program. The program also has a volunteer program which appears fairly well resourced from local University’s particularly from the Social Science, Law and Psychology departments. I discussed the RCI program with Juvenile Judge Sheila Whalan and Judge Bria Huculak who told me that this is an essential part of the circle program, which suffered for the first seven years of operation due to lack of resources. Judge Whalan said in her experience offenders now come to the program much better prepared, and the essential follow up is now provided.

The Saskatoon model conducts circles for young offenders only. The circle can be used to serve a number of purposes such as the development of bail plans, rehabilitation plans or to deal with fitness to plea issues. The circles are most commonly used as to tailor sentencing plans in which the offenders are referred by the Youth Justice Court Judge or possibly recommended by the court youth worker following a plea of guilty. The file is referred to the program manager who then
contacts both the young offender as well as the victim to ascertain the level of support each of these people have. If the parties support the circle the youth is asked if there are any particular people such as elders or other peers they wish to assist. If the youth provides the names of such people these people are invited to attend the circle. The majority of the time the circle is attended by a court organised elder who I spoke to and have documented in the next section.

The circle process itself entails all those with an interest in the matter being gathered in Court 6, a specially designed circle court room at the Saskatoon Provincial Court. Present are the prosecutor, defence, judge as well as the RCI program manager who usually co-facilitates the circle in conjunction with the judge. Each participant tells their story starting with offender then the victim followed by the support people. The circle has four rounds commencing with the introduction. Round two is the story telling round in which each member explains the story of what bought them to this point, as well as what impact the offence has had on them. Round three involves recommendations as to how the particular issue should be dealt with, with each party having input including the available resources. The final round is the closure round, where each party offers their parting comments that may or may not include an apology.

The 2003 year end report for the program describes the outcome as *tailor made sentence[s]* *that are the absolute best that can be provided with regard to the circumstances surrounding each offence and the available resources within the community.* It is debatable whether or not this program falls completely within any definition of restorative justice, or whether it is just a well resourced sentencing process. In my view it is for this reason that we should not distract ourselves with defining restorative justice, as regardless of the title this program has produced far better results that the main stream court system. The program is connecting with young offenders in a way the main stream court system does not and the proof is in the sustainable results. Out of the 31 cases dealt with in the half-year report, only 4 had not had previous contact with the criminal justice system. All have experienced a reduced contact with the criminal justice system since their circle sentencing.

The program raises a question of resources however as the program is exclusively reserved for young offenders with the objective being to prevent the young offenders becoming institutionalised or systemised. The system has never been practiced on adult offenders and from my observations there is a strong likelihood that the program would become overloaded if it were to be expanded.

15. Discussion with Cree Elder, about Saskatoon Circle Court.

It is important to have a broad range of views and to this end I had a discussion with a very traditional Cree elder associated with the Saskatoon Circle Court, and although I was not asked to suppress his name I have decided to do so due to his continued involvement in the court. We discussed his upbringing, the circle court and his involvement in the circle court.

The elder told me he grew up in a small Cree village and healing circles were not something practised rather a way of life. Healing could be used if someone was upset

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if they received bad news or if they did something wrong and there was no distinction in the processes. The purpose of sitting in a circle he said was simply that it was good for communication. Traditional circles have four rounds;
1) Introduction – why they think they are at the circle
2) Story telling- how they feel about the issue.
3) Recommendation – suggestion of what to do about the issue.
4) Closure – summary, expression of remorse, expression of love.

The elder said that he has never thought of the circle as a thing, it was always just the way they communicated about everything. Circles were an integral part of life, they took place in routine life such as during mealtime or could be convened for special purpose such as misbehaviour. The objective was communication, to look beyond the action at the reason for the action so everyone knew what needed fixing as well as to work out how to fix the situation. One circle achieved nothing he said the benefit was from the system of communication, not a single communication event.

**Saskatoon Provincial Court Circles Sentencing.**
The elder was invited to be involved in the circle sentencing process in court 6 of the Saskatoon Provincial Court as an elder and to provide a traditional prayer before the circle. It is this involvement and his views on the court that were the primary subject of our discussion.

We talked about the Cree warrior hunting Buffalo and how they would learn to move like the Buffalo, then how to make noise like the Buffalo. The warrior would then get a Buffalo hide and place it over their back and stand in the middle of the forest where the Buffalo lived. As they made the noises and movements they would slowly move closer to the Buffalo. The hunter did not know why the Buffalo were making specific noises, nor did they know why they made specific movements and they never learned why because they did not have to. They were not interested in the reasons, they emulated the movements and sounds so they looked like the Buffalo, and only to the Buffalo. The other hunters knew they were not Buffalo as did the birds and the deer, it was only the Buffalo that thought they were Buffalo.

The elder said that this is the way it is with many circle sentencing in Canada. People with no cultural bonds to Eagle feathers suddenly use Eagle feathers. They move like traditional peacemaking circles and sound like traditional peacemaking circles, however the only purpose is to give the appearance of a traditional peacemaking circles to the offenders. This he said makes the court feel better, but often does not do much good to the offender. He said that this is demonstrated by the fact that he is there and is asked to say the prayer and give some encouragement to the offender, however he is never asked to lead a process that has formed an integral part of his makeup and upbringing. He is never asked to form a bond with the offender so he can effectively communicate with them, nor to follow up after the circle. His involvement begins and ends in the circle.

He did however say that whilst it is important to know where your father walked, it is important that you don’t try to walk in his footsteps. Circles on his reserve did not have to deal with crack cocaine or serious alcohol problem or urbanisation. It is important that the circles practiced are evolved to deal with the special difficulties faced by young people living in Saskatoon today.
I asked the elder what changes he would like to see in the current process, and he said;

**Build Connection**
Most young offenders do not truly communicate with many people, this is why they are in trouble. They do not express verbally what they are thinking rather they express their emotions through actions. Accordingly, they never really communicate with legal people. The only people they will communicate with is someone they have built a connection with and formed trust, so building a connection is an essential prerequisite to any communication. This can be done by an individual support however not in the few minutes before a circle. To have any effect whatsoever, a support needs time with the young offender to build a connection. The support role needs to be a process not an incident and needs time and contact. Further, this is a relationship that needs start before the circle and continue beyond the circle to provide this communication. Peacemaking is not an incident he said, it is a process.

**Offender Decision**
In normal court, a judge will tell the offender what they have done wrong. They will usually then tell them what they need to do to fix themselves and what steps they need to take to do this. In a circle this is usually the same however there are more people in the judges role. The offender rarely truly commits to the plan as it is not their plan, it is someone else’s plan that is being sold to them or worse forced upon them.

The offender needs to be asked what they want to do where they want to go and how they are going to get there. They then need to be sent away to write a plan to get where they want to go. After this process they will then be in a position to contribute to the discussion. Any contribution made by the young offender to the circle will need to be thought out, not made up on the spot as it presently is. Most of the time an offender’s contribution to a circle will simply be their perception of what the other participants want to hear rather than what they are really thinking. They need time and an environment to work out what they are thinking for themselves before they can offer this to the circle

**Tough Love**
Circle participants must stop telling offenders what they are going to do for them, and what they need, and how much they understand why they committed the offence. The offender needs to be told clearly that they are responsible for the actions that placed them in their current dilemma. This needs to be done carefully with love, and without attaching blame or shame. More importantly however the offender needs to be told that it is only through their own actions that they can move on from this. They cannot change the past however they have complete control over the future, in whatever shape it presents itself to them. The only improvement will come from them.

**16. Beardy’s Okemasis – Willow Cree Nation, North Saskatchewan**
For many defendants living on aboriginal reserves to the inner north of Saskatoon, their court appearance was at a central location such as Rosthern. This is quite often some distance from where they live and non-appearances were quite regular primarily due to transportation difficulties. It is for this reason that courts have been established on several reserves. One such reserve is Beardy’s Okemasis. On Wednesday 5 May 2004 with the assistance of Don Mullord Legal Director Saskatoon Rural Legal Aid I
attended a sitting of the Saskatchewan Provincial Court at Beardy’s Okemasis, a few hours drive north of Saskatoon.

The court was presided over by Judge Tim White and whilst no circle sentences or diversions were conducted, I found an integrated form of restorative justice practiced as part of the general court proceedings. For example one 19-year-old male charged with 4 counts of burglary and having already plead guilty appeared before the court for sentence. Initially Judge White declined to proceed to sentence until the victims of the burglary’s had an opportunity to communicate the effect these offences had on them, and recommended the matter be adjourned. It became apparent that the defendant had lost some members of his family and was having trouble dealing with this. Eventually it came out that the defendant had already suffered significant feelings of guilt and had left the reserve and moved to Saskatoon, at which point it was agreed that such a process would be non-productive as it would damage his self-esteem more. In dealing with the defendant it was noticeable that Judge White was careful not to further damage the defendants already damaged self-esteem. He spoke of the positive things in the defendant’s life such as sport and how he could focus on these facets of life to deal with the difficulty he had faced. It was made clear to the defendant that whilst there were external factors at least making some sense of his behavior, it was only he that could change his situation.

After court I had lunch with Judge White who stated that this approach was enormously successful, particularly with aboriginal clients many of who have such low self-esteem that placing guilt upon them would have no affect. The only change he has ever experienced had come from empowerment of an offender. He further stated that the objective of communicating the effects of the offence was to remove the ability of an offender to hide behind any misconception that there was no real victim or injury caused by the offence. In other words he said it is not to shame but to educate the offender that theripples that flow from their actions flow for some time. Further, while many feel sympathy for an offender’s position, it is only the offender who can change their position in life.

17. Montreal Lake Aboriginal Community, Northern Saskatchewan.

Between 11-13 May 2004 I headed further north to the town of Prince Albert, a town of 38’000 people in addition to a further 7’000 people in surrounding areas. Prince Albert is serviced by 6 Provincial Court Judges, 10 legal aid lawyers and 10 prosecutors. To get a comparison of demands on the criminal justice system in this area, this is almost the same number of criminal justice system participants as the ACT however we have over 10 times the population. It is from Prince Albert that I accompanied Legal Aid Lawyer Jeff Lubyc further north to the small and isolated aboriginal reserve of Montreal Lake for a scheduled sitting of the Saskatchewan Provincial Court.

The court was presided over by an aboriginal Judge Jerry Morin. The prosecutor, police chief and most other court officers were aboriginal also. Notwithstanding the claim that they do not practice restorative justice in this court, as with Beardy’s Okemasis I witnessed the restorative principles practiced as a fundamental part of the general court proceedings. Although formal sentencing circles were hardly ever practiced, sentences were often adjourned to facilitate meetings between offenders and victims and a large number of matters were sent to mediation between the victim...
and offender. On average there was probably more real restorative justice practiced in this court than any other court I have seen on my travels.

I spoke to George Arcand, Regional Manager Adult Probation from Montreal Lake. George is a Cree man who has been working in this court for over 30 years, and we had a discussion about the way they did business, specifically the extensive use of mediation and conferencing aimed at settling disputes between offenders and victims. George explained that the difficulty with disputes or crime in Montreal Lake due to its small size and isolation, combined with the fact that court only sits Monday and Wednesday of every second week, is that unresolved disputes do not just go away. If an offender commits a crime and peace is not achieved between the offender and the victim the issue will invariably blow up between court sittings. Relatives of the victim will respond to the incident, which in turn will result in further retaliation eventually polarizing the community. George said it is like a storm in a fish bowl. The court by necessity has a strong focus on settling the bad blood between the offender and victim then dealing with the matter in accordance with the law after this. The curious end result is that quite often, after reconciliation the victim of the offence will support the offender and provide a source of support for any rehabilitation program.

This lead me to the conclusion, the smaller the community and the less insulation offenders and victims have from each other the more need there is for peacemaking between the parties. When you deconstruct the definition of community this creates an interesting situation in the case of domestic violence matters for example, as families can be defined as micro communities. Un-resolved disputes within the domestic situation results in ripples that feel more like waves to all those concerned. As with Montreal Lake, crime in micro-communities such as families, work places or even neighborhoods need to be resolved as a priority, or the majority of real damage will occur after the actual offence. This damage will usually increase with the stress induced by the introduction into the criminal justice system.

18. Saskatoon Tribal Council Urban First Nations Services Inc.
The primary mediation service provider in Saskatoon is the John Howard Society, however another diversionary service providers is the STC Urban First Nations Service, which conduct community based diversion programs for young offenders. I met with Ron Wilson, Justice Co-ordinator for STC who explained solutions the organisation has developed to accommodate reduced community interest in diversion.

STC obtain diversion referrals from two main areas namely the crown prosecutors offices pre charge diversion unit or youth court directly post charge. The process involves an adjournment of the charges for two months with a report forwarded after completion of the diversion outlining the outcome, with the matter usually being dismissed on successful completion.

In the last fiscal year, the program processed 230 charges against 100 young offenders. 60% of these charges are system related breach of bail conditions, fails to appear or breaches of recognizance. After some initial enthusiasm the program encountered reduced enthusiasm from the community elders who at the time were pivotal to the process. This forced the program to develop a new model that could operate with reduced community involvement.
The new model looks as follows;

![Diagram of the new model]

The system involves two circles 3 months apart. The first circle is in line with mediation with focus on the victims’ views of the offence. The aim is to produce a recommended outcome, which usually involves a plan for the rehabilitation or development of the offender. This is reduced to writing and forms a contract entered between STC and the offender. At this point a community-based mentor is appointed and the mentor and offender discuss the obligations arising from this contract and make plans to complete the obligation. After 3 months a second circle is convened attended by the offender, mentor and facilitator to discuss progress made and address any lack of progress. This may involve suspension of the plan with the matter being referred back to the prosecution/court, or further resources being utilised to facilitate a better outcome.

This model is less labour intensive and requires significantly less input by the community elders. This means that those who remain involved can often mentor several offenders making the process more viable. It is likely that a further reduction in community interest will force another amended model to be introduced, possibly involving utilisation of non-aboriginal mentors from the main stream community which appear to be a further option.


One more traditional focus on peacemaking in Saskatoon is that of Releasing Circles, or elder assisted parole hearings. These are parole hearings conducted with the assistance of community elders in a circle setting. I met with Roland Duquette, a Cree elder who grew up on the Misteanasis Reserve to the north of Saskatoon. Roland now works for the national parole board and convenes such circles.

The circles are run as very traditional healing or peacemaking circles however they are observed by the parole board who then have an opportunity to ask the prisoner questions at the end. As with traditional circles there are four rounds;
1) Introduction.
2) Story Telling.
3) Recommendation.
4) Closure.

Roland told me the Cree medicine wheel has four elements being the mental, physical, spiritual and emotional and the objective of the circle is to address each of these elements. The circles are taken very seriously and the elder often acts as mentor should the prisoner be released and assists with housing, employment as well as generally adjusting to life on the outside. They provide a contact and mentor when things get tough and a verbal supporter when things go good such as finding a job etc. They are a valuable part of release and make re-offending much less likely.

I was in Regina Saskatchewan between 17-23 May 2004 to look at the application of restorative justice in the more southern regions of Saskatchewan, which has its own history of difficulties in aboriginal related crime. I met with Murray Brown Executive Director of Public Prosecutions Regina. Murray said since the introduction of restorative justice in Regina two types have been practised each with their own challenges.

Diversion
Diversion similar to that in Winnipeg and Saskatoon is practiced fairly extensively. The matter is first referred to a diversion service provider such as Regina Alternative Measures Program (RAMP), the John Howard Society or one of several tribal councils. When diversion is pursued the charges are adjourned in court and referred to diversionary mediation. At the completion of the mediation process a report is provided to the court and the matter is either dismissed or sentenced in light of the mediation outcome. The charges sent to mediation are very broad and can include quite serious offences. Murray informed me that the service providers are always full. He said the prosecution could send twice as many matters to diversion as they currently do. The process accepts matters that may be dealt with more appropriately by diversion and is a very important part of the criminal justice system and enjoys full support.

Circle Sentencing
After some initial enthusiasm, circle sentencing has just about ceased in this area. Circle sentencing has largely lost the confidence of the prosecution as the solid structure that was initially envisaged did not materialise. Murray told me there were three judges that were constantly pushing the program by organising elders and other participants to attend. Judge Lynton-Smith, Judge Arnett and Judge Fafard were the three judges and when they relocated or ceased pushing hard the program would cease to operate. Murray said without the constant pushing of the judiciary the system was not sustained and as key figures have moved the process has mostly folded. Murray was quite clear that the program was not an aboriginal initiative rather it was a group of judges constantly pushing for support that ceased shortly after commencement.

The piece meal system that has remained involves a nebulous definition of aboriginal elder who usually ends up being any grey haired aboriginal person. Sentencing largely involves friends and associates of an offender attempting to sentence them, as there is no legitimate pool of elders that appear interested in the process. The prosecution policy is that without a demonstrated structure they cannot support sentencing in this way, as they are usually inadequate and rarely supported by reasoning. Murray said there is rarely impartial involvement. I asked Murray if he felt that this was a shame and he said that even at its highest, the system was only able to handle less than 1% of all aboriginal offenders yet it drew a disproportionate amount of resources. He felt that the system was ineffective in dealing with the problem of aboriginal custody rates holistically. In other words a large and relatively expensive structure was developed that only dealt with a very small part of the problem. He said that this money would be better-spent on welfare, alternative measures or other programs spread more equitably.
21. Justice Saskatchewan – Regina

The structure under which diversion or alternative measures as it is called locally occur is somewhat more complex in Canada than it would be in Australia. Canadian criminal law is a federal code so changes to the system are not as easy as the state based criminal law system in Australia. In September 1996 however the Canadian federal government introduced s717(1) Criminal Code which provided for alternative measures if authorised and controlled by the Provincial Attorney General Department. The task of introducing and overseeing the various alternative measures is held by Justice Saskatchewan in Regina where I met with Ruth Madill the Program Manager and Barbara Timporowski the Policy Analyst for Saskatchewan Justice. The first step to introduction was to develop the policy under which alternative measures were to be conducted, and to this end an early interim policy was refined and republished in January 2002. The current alternative measures program manual outlined the following:

- Section 3 outlines who can refer and who can receive referral for diversion. It also outlines the different treatment of adult and juvenile matters and the process to be followed.
- Section 4 is the most comprehensive section of the manual and outlines the roles of every participant including the accused, police, crown, victim, the case worker and more importantly the alternative measures agencies providing the diversionary services.
- The rest of the manual is virtually dedicated to these service providers. It outlines what an organisation requires to become and remain an alternative measures service provider including registration requirements, record keeping, ongoing evaluations, training requirements, insurance and liability, setting up of agencies and agents as well as the necessary forms to be used for everything from application to evaluation.

For consistency Saskatchewan Justice has standarised the alternative measures process policy and outlines everything from minimum victim and offender criteria to special protections and contact requirements that apply to all organisations including aboriginal organisations, juvenile organisations and adult diversions. Each service provider enters a contract with the government with these provisions included as terms of that contract. This is outlined in an individual policy document issued by Saskatchewan Justice. The government has also issued an overview of all programs so that each individual player knows where they fit into the broader scheme.

Part of the task of Saskatchewan Justice is to collect and publish an annual policy, planning and evaluation report, which I acquired for the year-end 2003. This report revealed that throughout Saskatchewan there are 38 alternative measures service providers which collectively conduct around 5000 diversions per year. As previously mentioned I am going to stay away from recidivism figures however they are extremely positive. The report shows that around 80% of cases successfully reached

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an agreement, and 90% of those agreements were successfully completed. More importantly, the program has resulted in almost $100'000 per year compensation being paid to victims and nearly all diversions resulted in an apology. Victim satisfaction was understandably very high and these results would be dramatically different had these matters not been diverted. As with the diversion program run by the Aboriginal Legal Service of Toronto this program produces far better results than those achievable through the main stream criminal justice system yet it remains relatively easy to set up and run. The national Canadian Government compiled a national report on alternative measures across all provinces in Canada that revealed victim and offender satisfaction is around 95%.\textsuperscript{50} It is of interest that this is 5% higher than in a study conducted by Umbreit in the early 1990s which may indicated that Canada is getting better at alternative measures.\textsuperscript{51} Compliance and restitution numbers across Canada were equally high and recidivism was equally very low. The alternative measures program is considered by judges, prosecutors, defence lawyers, victims and the government as one of the most valuable elements of the Canadian criminal justice system. The program is most suitably summed up in the conclusions of the national Canadian report which wrote;

\textit{The traditional criminal justice system, which has been often criticized as too formal, punitive and adversarial, is clearly changing. The large increase in the number of restorative justice programs operating in Canada is undoubtedly having an impact on criminal justice theory and practice. We are currently in a period of substantial change; but, as the results of this meta-analysis indicate, we are moving in a positive direction. The addition of restorative justice programs has enhanced victim satisfaction in a process that was, by its very nature, rather unsatisfactory.}\textsuperscript{52}

\textbf{22. Regina Alternative Measures Program (RAMP)}

I visited RAMP, one such diversion service provider where I met with Natalie Owl the Community Justice Facilitator in Regina. RAMP receives funding primarily from Justice Saskatchewan under a contract for service arrangement and have several mediators working for them. In line with provincial policy they receive referrals from three main areas namely the Police pre-charge unit, the Crown post-charge unit as well as community based organisations such as schools and colleges.

Once the referral is received a field officer will follow the intake protocol with both the offender and the victim to assess suitability. The offender intake takes between 20 minutes to an hour and the additional RAMP criteria includes the offenders attitude towards the offence as well as their history. I should point out that RAMP consider a recalcitrant attitude as non-fatal to the process as their policy is such that acceptance of responsibility is part of the process rather than a pre-requisite. The victim intake occupies considerably more time and is always commenced with a letter. Should the victim not return contact a second letter is sent. If there is still no contact after two letters a third is sent advising that diversion will be undertaken on a given date unless


\textsuperscript{52} The Effectiveness of Restorative Justice Practices: A Meta-Analysis – Research and Statistics Division Methodological Series. Department of Justice Canada 2001 per Conclusion page 23.
they object prior to that date. If the victim does respond an interview is conducted in which the field officer explains the process including their involvement and the possible outcomes and urges them to think of the most desired outcome. The necessary measures are undertaken to ensure the victim feels safe and secure about the process, and continual dialogue is conducted up to the diversion date. It remains entirely up to the victim whether or not they attend.

Present at the diversion are the trained facilitator, the accused and support, the officer and if desired the victim and its aim is to discuss the incident openly without blame and analyse what led to the incident as well as what has happened since. During the course of this discussion a proposal is developed. The parties are urged to go and think about the proposal whilst the field officer types it up. Once this is done, the final proposal is discussed to ensure that all parties are happy with it, and if so it is signed.

RAMP have developed a number of excellent restorative justice programs;
1) Mediation – for adult offender/victim mediation.
2) Community Justice Forums – more traditional community circles for youth offenders with the process outlined above.
3) John School – for special risk males and females, run similar to above however more intensive and providing special resources particular to high-risk offenders.
4) Stop Lift – a special program aimed at shop-lifters.
5) HEAT (Help Eliminate Auto Theft) – a special program aimed at auto theft offenders, again similar in process however making available special resources particular to this crime.

23. The Gathering Place Regina Saskatchewan
Development proposals cannot operate without support services. In order to put an end to a particular way of life, it is essential to replace that way of life with an alternative or offenders will eventually revert back to their old ways as this is all they know. One such support service is The Gathering Place – Services for First Nations in Regina. This is a housed in a former school building and has many independent services located in the one place. The services provided are many and varied and include;

1) First Nations Employment Center (FNEC)
FNEC is more than a conventional employment agency. In addition to being a posting point for positions vacant, it provides assistant to enable its clientele to be successful at obtaining these jobs. This can include training programs in office management etc, resume writing programs as well as interview skills. It may also include volunteer work to build necessary experience. The program also has a fairly comprehensive program to keep clientele motivated. It provides fax, e-mail and photocopy services free of charge and provides a general secretary to assist.

2) Silver Sage Housing Corporation.
Silver Sage is an organisation that has actually purchased housing from money raised and over the years has collected a large number of condominiums and other forms of emergency accommodation. It provides short and medium term low cost housing to allow clientele to get back on their feet. The housing is both means and circumstance tested.
3) Treaty Four Education Center
Treaty Four is actually a small school that operates on a self-paced basis. It has a number of teachers and provides lessons on all basic subjects up to year 12 level. Its students are generally students that have not done well in the main stream education system. At the conclusion of the tuition offered at Treaty Four, students undertake the ordinary Saskatchewan Provincial Education Department year 12 exams and around 30-40 students graduate per year. It is of note that none of these students would have graduated from the main stream education system.

4) Atoskata (Cree for back to work)
Atoskata is one of those wonderful ideas that make you ask why someone has not thought of it before. It is an organisation that has successfully tendered for government contracts in areas such as cleaning and rubbish removal. When a defendant undertakes the alternative measures program they quite often agree to pay compensation to the victim. One option for this compensation is for the offender to work for Atoskata at a given hourly rate with that money being paid direct to the victim.

The aim of Atoskata is much broader however, as its aim is not just compensation but reparation in all forms. Atoskata can also repair criminal damage free of cost for victims, educated offenders on victim harm issues and simply assist them to come to terms with what has happened. Participants can also learn to make traditional Indian crafts such as dream catchers and medicine wheels that are often given to victims as additional tokens of remorse or reparation and the program is enormously successful.

5) First Nation Family Support Centre.
This is a self-funded program that can assist with short term day-care of children whilst defendants fulfill community service obligations or simply attend school or Atoskata. The service also provides mediation, youth intervention and family counseling programs on parenting skills and again is much more holistic than my brief description suggests.

6) Regina Treaty/Status Indian Inc.
RT is the organisation that centrally manages The Gathering Place. It also actively engages in fundraising and join-endavour programs and is constantly developing new services. It also oversees quality control of the services currently provided.

7) Red Feather Spirit Lodge
Red Feather offers support and services to youth at risk. It teaches life skills to people having difficulty integrating with the broader community as well as general cognitive skills. Its programs are designed to do everything from educate on life and future management through to learning to relate without violence and it is very successful.

8) Neighborhood Recreation Project (NRP)
NRP is a wonderful program that organises activities of all descriptions for all sorts of people. It has sporting teams of all types from Hockey to Basketball participating in local competitions. It also has talent development programs that enable budding musicians to record demo tapes or even learn new instruments. Its available activities include drama, film-making, art and many others. It promotes team spirit and a desire to learn and develop.
9) Randall Kinship Centre
The Randall Kinship Centre is not actually located at the gathering place however deserves a mention. It philosophy is quite simple, a program that is either unknown or unused is as useless as no program at all. I met with Brenda Dubois from Randall and she explained that her role is to ensure that people in need of services provided by places such as the Gathering Place know of and use them. Randall also backs-up this interaction with support programs of their own such as social building skills and community re-integration programs. These programs could included working with disruptive students one-on-one to teach them to interact with the broader community in a productive manner, re-integrating former inmates into the community or simply giving support to people with psychological difficulties.

Around the world I have seen many programs that sound great however are simply not possible due to conflicting obligations such as family or resources or even motivation. Organisations at The Gathering Place provide services that make these options possible and provide encouragement to participate and develop and the turnaround in offending behavior is nothing short of miraculous. It has quite literally turned problem children into scholars as well as generally productive members of society. It is a tremendous example of what can be made available and what these options can achieve. I said at the beginning of the paper that restorative justice is not a noun but a verb and should be defined as such. In my view, if I were to put together organisations such as RAMP and The Gathering Place, I feel we would be very close to that definition.

24. Restorative Justice Trust – Auckland New Zealand
I was in Auckland New Zealand 25 – 30 May 2004 where I met with Jim Boyack and Helen Bowan of the Auckland Restorative Justice Trust. In 1989 the New Zealand government enacted progressive legislation commencing with the *Children Young Persons and Their Families Act 1989*(NZ) requiring young offenders attend family group conference (FGC).53 In 1999 as part of a pilot expansion of Restorative Justice in New Zealand, the Restorative Justice Trust was incorporated to study, educate and promote best practice restorative processes in New Zealand.54 This restorative justice trust has since been joined by a number of community based conferencing service providers who tender on a fee for services basis with the New Zealand Ministry of Justice. Following further positive results, in 2001 a restorative justice pilot was initiated in Auckland, Waitakere, Hamilton and Dunedin District Courts.55 In form, these pilots proceed by way of adjournment of the charge in the District Court and referral to the restorative justice trust. Following completion of the restorative justice process the matter is returned to the court with a report of the outcome. Sentence is then completed. This pilot was given legislative support with the introductions of the *Sentencing Act 2002* (NZ).

*Section 7: Purposes of sentencing or otherwise dealing with offenders*

The purposes for which a court may sentence or otherwise deal with an offender include to (sections 7(1)(a) to (d), (h)):

54 Bowen.H, Jim Boyack, *Restorative Justice Pilot 14/2/00*.
• hold the offender accountable for harm done to the victim and the community by the offending, and/or
• promote in the offender a sense of responsibility for, and an acknowledgment of, that harm, and/or
• provide for the interests of the victim of the offence, and/or
• provide reparation for harm done by the offending.

Section 8: Principles of sentencing
In sentencing or otherwise dealing with an offender, the court must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10) (section 8(j)).

Section 9: Aggravating and mitigating factors
Mitigating factors that the court must take into account in sentencing or otherwise dealing with an offender include any remorse shown by the offender, or anything as described in section 10 (section 9(2)(f)).

Section 10: Court must take into account offer, agreement, response or measure to make amends
In sentencing or otherwise dealing with an offender, the court must take into account (section 10(1)):
• any offer of amends (whether financial or the performance of any work or service) made by or on behalf of the offender to the victim
• any agreement between the offender and victim as to how the offender may remedy the wrong, loss or damage caused by the offender or ensure that the offending will not continue or recur
• the response of the offender or the offender’s family/whānau to the offending
• any measures taken or proposed by the offender or the offender’s family/whānau to make compensation or apologise to the victim or the victim’s family/whānau, or to otherwise make good the harm that has occurred
• any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

In deciding whether and to what extent any offer, agreement, response, measure or action should be taken into account, the court must take into account whether or not it was genuine and capable of fulfilment, and whether or not it has been accepted by the victim as expiating or mitigating the wrong (section 10(2)).
If a court determines that, despite anything of the kind referred to in section 10(1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender (section 10(3)).

Section 25: Power of adjournment for inquiries as to suitable punishment
A court may adjourn proceedings after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with. The purposes of adjournment include to enable a restorative justice process to occur, or to enable a restorative justice agreement to be fulfilled (sections 25(1)(b) and (c)).

Section 26: Pre-sentence reports
A pre-sentence report may include information regarding any offer, agreement, response, or measure of a kind referred to in section 10(1) or the outcome of any other restorative justice processes that have occurred in relation to the case (section 26(2)(c)).

Section 27: Offender may request court to hear person on personal, family, whānau, community, and cultural background of offender
If an offender appears before a court for sentencing, the offender may request the court to hear from anyone called by the offender to speak on any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whānau, community and the victim or victims of the offence (section 27(1)(c)).

Section 32: Sentence of reparation
When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure or action as described in section 10 (section 32(6)).

Section 62: Guidance to probation officer in determining placement of offender for community work
When deciding on a placement of an offender for community work, the probation officer must take into account the outcome of any restorative justice processes that have occurred in the case (section 62(e)).

**Sections 110 and 111: Order to come up for sentence if called upon**
The court may, instead of imposing a sentence, order the offender to appear for sentence if called on to do so within a specified period (section 110(1)). The court may also make an order for the restitution of any property or the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered loss of or damage to property, emotional harm, or consequential loss or damage (section 110(3)).

Such an offender may be called up for sentence if he or she:
- fails to comply with any order referred to in section 110(3), or
- fails to comply with any agreement or to take any measure or action of a kind referred to in section 10 that was brought to the attention of the court at the time the court made the order under section 110 (sections 111(1)(b) and (c)).

An application to have the offender brought before the court to be dealt with for that offence may be made by:
- a member of the Police,
- a Crown Prosecutor,
- the Solicitor-General, or
- any person designated by the Chief Executive of the Department for Courts or the Chief Executive of the Department of Corrections.

It is of note that the legislation refers to restorative justice initiatives as “restorative process” however this is a broad catch all definition. 15 years after the introduction of the legislation, New Zealand has an approach to prosecuting young offenders quite different to the rest of the world. In New Zealand, of all young offenders, 80% are diverted by police, a further 12% are diverted post charge under the family group conferencing program and it is only the remaining 8% that actually proceed to court. The success of this program has resulted in more and more adult matters being dealt with by way of restorative justice conferencing even for serious offences.

**Conference Process**
New Zealand has quite a structured and very well thought out conference process. Every aspect of the New Zealand conference is quite intentional and serves a purpose from the setting of the room to the timing of the breaks. The model has been adopted by the NZ Department of Courts and published in 2002. 56

**Choosing a venue:**
The first step to a successful conference is the venue selection. There are a number of considerations paramount in selecting a venue. Chief amongst the considerations is any apprehensions the victim may have. It is vitally important that the victim feels at ease or else the process runs the risk of magnifying the damage already caused through the offender’s actions. More often than not however the reality is that the venue selection will need to be by negotiated consensus, and it is important that this process is not rushed.

**Set up of the room:**
Quite often productive discussion on any proposed room set up cannot take place prior to the date. Participants are usually otherwise occupied with other issues like confronting the other party and will not be in a position to offer meaningful discussion on the issue. In keeping with the theme of the circle, chairs are usually arranged in a circle pattern. This serves a number of main benefits in that it represents a departure

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from the more formal courtroom setting, and also removes any barriers that can symbolically shelter an individual and inhibit contribution. It is necessary to keep in mind however that some victims may not want this, and it may magnify any fear so balance and compromise is required, particularly with the victim.

**Ground Rules.**
After convening the parties, it is important that facilitators address a number of ground rules. The facilitator must remind parties of the following rules:

- The conference is not the place to dispute or argue about the facts. The facts must have been established and finalised prior to the commencement of the process.
- Participation is at all times voluntary, which is a position that remains until finalisation of the process.
- Two vital elements of the process are respect and truthfulness. Respect must be shown to every member of the circle from the offender to the facilitator. Disrespect is counter productive to the process and will seriously inhibit its outcome.
- Threats of violence either expressed or implied will result in immediate termination of the circle.
- Privacy is essential to the process and extends to all members of the circle. It is a privilege for each member to be privy to what is being shared during the course of the circle, and respecting the privacy of the individual is central to that privilege.

1) **Formal Welcome**
The facilitator will welcome all participants individually and acknowledge their involvement. Next the facilitator outlines the process and how it interacts with the court process. As mentioned, in New Zealand the process is co-lateral to the court, and the sentence will have been adjourned to allow this process to be completed. The offender then appears again for sentence armed with the outcome of the restorative justice process to offer to the court, and to be considered.

2) **Karakia (Prayer)**
This is optional.

3) **Introductions**
Each member individually introduces themselves and thanks the other members for the opportunity to participate, and outlines their role in the process.

4) **Facts**
The agreed version of facts is read to the circle. The police, the prosecutor or the facilitator may do this. Next the members are asked to agree that these are the facts.

5) **Offenders story**
Experience in New Zealand suggests that the victims are more able and willing to participate if the offenders give their story first. This spares the victim the discomfort and risk of speaking first. The offender is then invited by the facilitator to tell the conference about the offence as they see it through their own eyes. I should point out
that this differs to the approach in the US, which suggests that the victim should go first

This is where the skills of the facilitator are paramount. The facilitator will need to periodically paraphrase what the parties say and most importantly confirm with them that this paraphrasing is accurate. Further it is important for the facilitator to refrain from filling gaps and adding things that the person did not say.

6) Victims story
Next the victim is invited to inform the circle of the offence through their eyes. This may involve some illustration of their lives before the offence, their observations/feelings during the commission of the offence, and importantly how their life has changed since the offence.

7) The offenders and victims support people talk.
Each of the offenders and victim’s support are now invited to inform the circle of how they feel the incident has affected the offender/victim, and how it has affected them as an associate of the party.

The discussion becomes freer at this point and it is important that the facilitator does not stifle the discussion, as this is the actual process in action. A general rule in the New Zealand process is that less intervention is best.

8) Summary of the proceedings so far.
It is important not to terminate the discussion prematurely. When the discussion has been exhausted however the facilitator should begin the summary phase, seeking agreement from all parties on the accuracy of the summary.

9) Invite the parties to break up and individually consider appropriate outcomes.
Once the summary has been completed and universal agreement has been reached the parties are invited to break up into offender/victim groups to caucus on a number of issues. Primarily two main issues are discussed being what appropriate suggestions can be offered to compensate / make recompense to the victim and what is an appropriate punishment to be imposed on the offender. The offender group should also come up with a plan for rehabilitation including programs/actions and follow up.

10) Break / Caucusing.
Each caucus should set up in privacy from the other group, however the facilitator and co-facilitator may assist in giving direction to the discussions. This will allow free discussion and prevent groups from wandering off on a tangent.

11) Discussion of outcomes / agreements / plans.
The circle is re-convened and the various proposals are put to the floor and discussed. The focus at this stage is clearly the future and although there will be a strong desire to reach an agreement, attention needs to be given to the detail of each of the proposals. Be prepared to use particular attributes from each of the proposals being offered.

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The agreement should be reality tested to ensure that they are achievable for the offender whilst meeting the victim’s interests. If the participants want the agreement to be reflected in the offender’s sentence then they also need to consider whether it will have credibility with the court.

12) Recording and signing agreement / plan.
The agreement should be specific, time limited and state who will follow up and ensure that proposals are carried out. There should also be a report-back procedure should something go wrong prior to the matter's return to court.

13) Conclusion.
Summarise what has proceeded and the agreed outcome, providing each party with a written copy.

25. Conclusion
There are as many forms of restorative justice as there are theories of their origin. Whilst most have been adapted to suit modern day circumstances, it is unlikely that they have originated from anywhere other than first nations communities on the North American continent. Whilst the study of the original approaches such as peacemaking are useful to gaining an understanding of the methodology, one needs to remember that these original methods did not have to cope with the challenges that the criminal justice system faces today, such as drug use, separation, and other forms of disadvantage. Accordingly, any application of these approaches requires adaptation to modern day conditions.

Circle sentencing has shown some early promise, however due to its time consuming nature and the associated expense combined with the limited number of offenders that can benefit from such programs, most circle sentencing programs around the world have not been sustained for more than a decade. Further, those that have been sustained have done so only with the benefit of a few persistent and dedicated supporters.

The most practical, successful and sustainable programs are those involving outsourced diversion, particularly those supported by extensive social services. These programs do take some work to set up and train service providers and develop expertise, however for those countries around the world that have done this, the programs have resulted in benefits that have far exceeded the expectations. This has been evidenced by the ongoing expansion of such programs by the governments that have introduced them.


**Bibliography**


Bowen.H, Jim Boyack, Restorative Justice Pilot 14/2/00 New Zealand Department of Courts.


Mennonite Central Committee; Kitchener, Ontario: Canada VictimOffender Ministries Program, Attorney General of Canada.


