

**THE RHETORIC AND THE REALITY:
YOUTH JUSTICE CONFERENCING FOR
ABORIGINAL AND TORRES STRAIT ISLANDER
YOUNG OFFENDERS IN NEW SOUTH WALES**

**Submission to the Review by the
NSW Department of Attorney General and Justice of
the *Young Offenders Act 1997* and
the *Children (Criminal Proceedings) Act 1987***

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This submission does not necessarily reflect the views of Gnibi College of Indigenous Australian Peoples or Southern Cross University.

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2. Acknowledgments

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3. Scope

This submission relates to the *Young Offenders Act 1997* (NSW) only, and specifically to the youth justice conferencing scheme. This submission is a response to two questions put forward by the *Consultation Paper*:

- Question 21:
 - (a) What changes to the YOA, or its implementation, could be made to ensure that Aboriginal and Torres Strait Islander children have equal access to diversionary interventions under the YOA?
 - (b) What changes to the YOA, or its implementation, could be made to better address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system?²
- Question 23:

Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?³

We focus on the implementation of the *Young Offenders Act 1997* ('the Act') and particularly the problems facing Indigenous offenders, their families and communities when an Indigenous juvenile attends a youth justice conference. We make a number of recommendations and put forward several possible solutions to difficult problems in this area. We believe that these can inform the regulation, administration and delivery of youth justice conferencing ('conferencing') in Indigenous communities.

² New South Wales Department of Attorney General and Justice, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987: Consultation Paper* (2011) 31.

³ Ibid 32.

While we have not considered the issues facing Indigenous victims, we note that this is a critical issue that requires specific and directed research to both identify the issues facing Indigenous victims and the solutions to address the complexity of their experiences.

We argue that we first need to ensure the provision of culturally appropriate conferencing before we can draw conclusions about equitable access to conferencing. Although the issue of equitable access – that all Indigenous juvenile offenders who are eligible for conferencing are in fact referred – is important, it is beyond the scope of our submission.

4. Background

This submission will examine what is required for Indigenous young offenders to experience conferencing in a culturally appropriate and safe manner so that they will be able avoid offending behaviour with the assurance of support from their family, extended kin and the local Indigenous community. We note with approval the following comment about conferencing by the NSW Law Reform Commission in its report on young offenders:

[A] well-facilitated conference will end with general satisfaction by the participants and confidence that the young person will move on from his or her offending behaviour and grow in maturity and responsibility, knowing that they have the support of their family and community.⁴

To address some fundamental problems with the existing operation of conferencing, we argue that at least one amendment must be made to the *Young Offenders Act 1997 (NSW)* (the Act), and several policy changes need to be implemented in the operation of the conferencing scheme.

We note one of the principles that guides the operation of the Act is contained in s 7(h):

The principle that the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of youth justice conferences, cautions and warnings.

The focus of our submission is on improving the experience of Indigenous young people in conferencing. The implementation of our recommendations for changes to legislation and policy will result in reduced recidivism rates of Indigenous young offenders who have attended a conference. This will have a consequent impact on the over-representation of Indigenous juveniles in the criminal justice system.

⁴ New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005) [7.21].

4. (a) Recidivism amongst conferenced juvenile offenders

The central measure for the success of conferencing, and other diversionary programs, is recidivism. Evidence about the impact of youth justice conferencing (and other similar restorative justice programs, such as family conferencing and juvenile justice teams) on recidivism is inconclusive. However, Richards, et al, state that:

There is some evidence to suggest that restorative justice conferencing can reduce offending by juveniles, although the evidence is somewhat mixed.⁵

Similarly, in a report that forms part of the review of the NSW juvenile justice system, it is noted that:

The effectiveness of RJ [restorative justice] in terms of reducing recidivism is debatable ... [a] review of 46 international studies found on average that there were small but significant reductions in recidivism for RJ participants compared with normal probation. However, these reductions were smaller among juveniles than adults. In another meta-analysis of 22 studies involving 35 RJ programs, it was found that such programs are more effective at improving victim/offender satisfaction, increasing compliance with restitution, and decreasing recidivism compared to non-restorative approaches.⁶

On the other hand, a recent report noted that:

Although rates of adult recidivism have remained steady since the baseline reporting year of 2004-05, rates of juvenile recidivism have increased during this time and are approaching 60%. That is, worse than every second juvenile who participates in a Youth Justice Conference or receives court-ordered supervision with Juvenile Justice receives another supervised court order or Youth Justice Conference within two years.⁷

Regardless of the effectiveness of conferencing as measured by reoffending, the effectiveness measured by net benefit to taxpayers (at least in America) seems much clearer:

⁵ Kelly Richards, Lisa Rosevear and Robyn Gilbert, 'Promising interventions for reducing Indigenous juvenile offending' (2011) 10 *Indigenous Justice Clearinghouse*, 5.

⁶ *Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice* (2010) Noetic Solutions Pty Limited, 38 (footnotes omitted).

⁷ Ian Nisbet, Anne Graham and Sallie Newell, *Working Together to Reduce Youth Recidivism: Exploring the Potential of a "Wraparound" Interagency Service Model* (2011), prepared for the Indigenous Coordination Centre, Coffs Harbour, 7.

From a cost-benefit perspective, the most recent WSIPP [Washington State Institute for Public Policy] cost-benefit analysis found that RJ produced \$2,223 in net benefits to taxpayers per program participant or \$3.45 for every marginal dollar spent on the program. Thus, despite conflicting evidence with respect to the effectiveness of RJ on reoffending, restorative justice still offers substantial taxpayer benefits as well as higher satisfaction amongst crime victims.⁸

4. (b) Recidivism amongst conferenced *Indigenous* juvenile offenders

Evidence of the effectiveness of conferencing for *Indigenous* juvenile offenders is not so encouraging:

Although the evidence is currently limited, it appears that restorative justice processes may be more effective for non-Indigenous than Indigenous juveniles. Future research into reasons for this, and into which aspects of restorative justice influence reoffending behaviour among Indigenous juveniles, is therefore important.⁹

Vignaendra and Fitzgerald analysed data for NSW juvenile offenders who completed a conference for the first time in 1999. They found that, for juvenile offenders, 30 per cent of Indigenous offenders received a custodial sentence within five years, compared to 10.8 per cent for the entire cohort.¹⁰ In another measure of recidivism, the authors found that, for the same cohort, the average number of proven court appearances within five years for Indigenous offenders was 5.5, compared to 2.5 overall.¹¹

Nisbet, Graham and Newell caution that:

[Although] Weatherburn, Cush and Saunders (2007) ... found that although Indigenous offenders were significantly more likely than non-Indigenous offenders to recidivate, Indigenous status did not exert an independent effect on risk of re-offending. In other words, although many Indigenous offenders recidivated, this was more likely due to the fact that they were also young or not at school, rather than simply that they were from an

⁸ *Review of Effective Practice in Juvenile Justice*, above n 6, 39.

⁹ Richards, Rosevear and Gilbert, above n 5.

¹⁰ Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference' (2006) 103 *Contemporary Issues in Crime and Justice: Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, 9 (table 10).

¹¹ *Ibid* 11 (table 13).

Indigenous background. It is important to note that the research does not point to purely racially-based explanations of Indigenous juvenile recidivism in Australia.

Given the high rates of Indigenous recidivism, however, it is evident that successful efforts to reduce juvenile Indigenous recidivism would substantially reduce juvenile recidivism in general. It is also likely to reduce adult Indigenous over-representation in the prison system. A study by Beranger, Weatherburn and Moffatt (2010) highlighted the impact of adult Indigenous recidivism on Indigenous over-representation in prison. It was estimated that by reducing Indigenous recidivism by 10% there would be a reduction of 30% in the number of Indigenous court appearances each year. The report's authors concluded efforts to reduce Indigenous over-representation in the criminal justice system should be focused on offender rehabilitation and assistance in promoting compliance with court orders.¹²

We also note the argument made by Daly and Proietti-Scifoni (in relation to circle sentencing) that counters the quantitative approach to research on recidivism:

quantitative research on re-offending needs to take a longer term and more holistic perspective. Desistance from crime takes time: it is a process, not an event. The concept of *pathways towards desistance* is a good way to understand Indigenous pathways into and out of crime.¹³

As our submission will argue, Indigenous juveniles who attend culturally appropriate and culturally safe conferences will be less likely to re-offend, which will reduce overall juvenile recidivism rates; this will have a beneficial impact on the over-representation of Indigenous people in the criminal justice system.

4. (c) Improving conferencing: putting principles into practice

We will focus on improving the quality of conferencing service delivery for Indigenous juvenile offenders, which will make it more likely that they will avoid future offending behaviour, address the factors leading to such behaviour, improve support from their family and community, and ensure reintegration into their communities. This will

¹² Nisbet, Graham and Newell, above n 7.

¹³ Kathleen Daly and Gitana Proietti-Scifoni, "'The Elders Know ... The White Man Don't Know': Offenders' Views of the Nowra Circle Court' (2011) 7(24) *Indigenous Law Bulletin* 17, 17 (footnote omitted).

reduce recidivism rates for Indigenous juveniles who have attended conferencing and will therefore impact on the over-representation of Indigenous juveniles, preventing the cycle of offending that leads to adult offending; thus impacting on the offending rates of Indigenous adults. What we are arguing for are fundamental policy reforms that will intervene in the cycle of juvenile offending at the point of conferencing.

In one sense, what we are saying is nothing new: it is already well established that cultural appropriateness and community participation are essential for restorative justice generally, and conferencing in particular. For example, the *Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice* stated that five 'good practice measures are available to governments to address Indigenous overrepresentation in the juvenile justice system.' These measures are:

- maximum access to and utilisation of alcohol and substance abuse programs;
- avoidance of incarceration wherever possible;
- emphasis on prevention and early intervention;
- *the provision of culturally relevant programs; and*
- *a high level of participation by the Indigenous community in formulating and implementing responses to Indigenous youth crime.*¹⁴

In relation to the provision of culturally relevant programs, the *Review of Effective Practice in Juvenile Justice* emphasises that:

The provision of culturally relevant programs is of utmost importance in effectively addressing Indigenous youth offending. The inclusion of culturally specific elements in youth justice programs helps to reduce the sense of alienation commonly experienced by young Indigenous offenders and conveys a message of respect and community acceptance which in turn tends to improve the responsiveness of young Indigenous offenders in reforming their offending behaviour. Culturally relevant programs can also benefit young offenders by providing them with a value system and sense of group identity which they are more likely to embrace and which is more likely to influence their behaviour. Effective Indigenous juvenile justice programs, therefore, are those which provide appropriate public funding and technical support to promote the development and delivery of such programs on a local-level.¹⁵

¹⁴ *Review of Effective Practice in Juvenile Justice*, above n 6, 67 (italics added).

¹⁵ *Review of Effective Practice in Juvenile Justice*, above n 6, 68-69.

In relation to participation by the Indigenous community in formulating and delivering Indigenous youth justice programs, the *Review of Effective Practice in Juvenile Justice* states that:

it is also necessary to promote involvement by local Indigenous agencies and persons in developing and delivering Indigenous youth justice programs and prevention initiatives. This is important for empowering Indigenous stakeholders and improving the responsiveness of youth justice programs to the unique situations and needs of local Indigenous communities. Further, participation by Indigenous people in administering and delivering programs is an important aspect for improving participants' sense of community acceptance and increasing the level of responsiveness on the part of participants in reforming their offending behaviour. Thus effective Indigenous juvenile justice systems provide appropriate public funding to support training and staffing of Indigenous juvenile justice workers, such as conference convenors, judges, lawyers, psychologists, doctors, social workers, police and facility wardens. This is consistent with the recommendation put forward in the NIDAC report to develop a national employment strategy to train and establish a specialist workforce of doctors, psychologists and nurses to provide substance misuse, mental health and general health services.¹⁶

Richards, Rosevear and Gilbert set out four principles for prevention of offending by Indigenous juveniles. These four principles mirror four (of the five) measures set out in the *Review of Effective Practice in Juvenile Justice*:

- Community based strategies
- Building on existing strengths
- Addressing juvenile offending in a holistic way
- Addressing juvenile offending through collaborative approaches¹⁷

In the section on community-based strategies, Richards, Rosevear and Gilbert point out that:

The literature highlights the importance of community involvement in the design and delivery of programs. Such involvement can ensure that the program addresses the particular needs of a community, and that the program is culturally appropriate ...

¹⁶ *Review of Effective Practice in Juvenile Justice*, above n 6, 69.

¹⁷ Richards, Rosevear and Gilbert, above n 5, 5-6. The authors refer to restorative justice processes as a tertiary crime prevention measure.

Community involvement should go beyond consultation, and move towards community ownership and control, thus contributing to empowerment and self-determination[.]¹⁸

Richards, Rosevear and Gilbert explain that the principle of building on existing strengths could draw on a number of areas, including ‘kinship systems, cultural identity and spirituality, and community knowledge (eg of Elders).’¹⁹

What we have seen in conferencing, however, is that policy and practice do not address these principles in any comprehensive manner. For example, the *Review of Effective Practice in Juvenile Justice* notes that:

With respect to the provision of culturally relevant programs, jurisdictions in Australia have tended to address this need by modifying existing mainstream programs to include Indigenous cultural components rather than by emphasising the promotion of programs which are organically developed by Indigenous communities.²⁰

We argue that there are several barriers facing Indigenous young offenders, which cause them to experience conferencing as a culturally inappropriate and culturally unsafe place. The cultural appropriateness of conferencing – at least those matters we believe are most relevant to this review – are addressed in the following section, with recommendations concluding each sub-section.

The final section of our submission deals with Indigenous-specific monitoring and evaluation, answering question 23 of the *Consultation Paper* – but only as to how that question relates to Indigenous people – and concluding with recommendations.

Although our recommendations are fully explored and stated in the text of our submission below, we have brought them all together in the next sub-section for ease of reference.

¹⁸ Richards, Rosevear and Gilbert, above n 5.

¹⁹ Ibid 5.

²⁰ *Review of Effective Practice in Juvenile Justice*, above n 6, 58.

5. Culturally appropriate conferencing of young Indigenous offenders

It is essential that we consider what elements constitute culturally appropriate restorative justice for Indigenous people in order to improve the chances of successful outcomes (including that the offender does not re-offend). Culturally appropriate, effective and safe conferencing, we argue, will have an impact on Indigenous juvenile recidivism rates and therefore will impact on the level of Indigenous over-representation in the criminal justice system.

5. (a) Embedding cultural appropriateness in legislation

The *Consultation Paper* for the review of the Act states that:

[E]quity in indigenous access to diversionary options under the YOA has been a concern since the early years of the Act's operation.²¹

This concern could be construed narrowly – in terms of aspiring to equitable Indigenous *numbers* amongst those offered diversionary options (warnings, cautions and conferences). But the idea of equity in Indigenous access to diversion can also be interpreted more broadly, in terms of fair and reasonable *operation* of the diversionary options in relation to young Indigenous offenders.

Conferencing must be equitable for Indigenous offenders, based not only on proportionate referrals (although that is part of it), but also on a fair and reasonable *process*. To be fair and reasonable, the process must be culturally appropriate. This is not an “optional extra”, as implied by the Act and as construed in practice. Cultural appropriateness is at the heart of how conferencing functions for its participants.

We need to ensure that the principle of cultural appropriateness is mandatory in legislation, and thence in policy. The Act currently provides for three principles ‘that are to guide the operation of this Part [Youth Justice Conferences] and persons exercising

²¹ New South Wales Department of Attorney General and Justice, above n 2, 30.

functions under this Part.’²² The first of these principles is ‘that measures for dealing with children who are alleged to have committed offences are to be designed so as:

...

(v) to be culturally appropriate, wherever possible.’²³

We believe that the qualification, ‘wherever possible’, should be deleted, because this makes it too easy to side-step cultural appropriateness. We therefore recommend an amendment to the current Act to remove such qualification, which will then allow for policy and practice to be developed to ensure that Indigenous juveniles have access to culturally appropriate conferences.

We believe there is little point in referring Indigenous offenders to conferences that are *not* culturally appropriate, as they have little or no likelihood of being reintegrated into the community. Indigenous juveniles may as well go straight to court, where they are subjected to a culturally inappropriate procedure anyway, but where they have a solicitor to advocate for them and ensure that their rights are protected within the court system. A culturally *inappropriate* conference is anathema to the philosophy and principles of restorative justice.

Offenders cannot logically be reintegrated into their community if the conference participants do not understand nor represent the community. The cultural dynamics of the community must be reflected in the conference. Such dynamics include, but are not limited to: the level of respect and understanding of culture, customs and norms; the retention and use of language (including Aboriginal English); the nature or existence of Aboriginal customary law; the role of Aboriginal elders in the community; whether Indigenous juveniles continue to respect Aboriginal elders; and whether there are particular elders who are widely respected and would be appropriate for conferences (there may be self-appointed elders who would be of little assistance to a conference – or may even hinder it).

²² *Young Offenders Act 1997 (NSW)*, s 34(1).

²³ *Young Offenders Act 1997 (NSW)*, s 34(1)(a).

Recommendation 1

That section 34(1)(a) of the *Young Offenders Act 1997* be amended by deleting the words 'wherever possible' from placetum (v). Section 34(1)(v) would then read: 'to be culturally appropriate, and'

5. (b) Addressing cultural appropriateness in an Indigenous context

Defining what it means to be culturally appropriate has been considered a complex and pervading area of discontent in an Indigenous context.

Cultural appropriateness in a general context has been referred to as:

Behaviours, attitudes, and policies that come together in a system, agency or among professionals to enable effective practice with members of a cultural or ethnic group.²⁴

To be culturally appropriate in an Indigenous context means that the system (the juvenile justice system), the agency (the Youth Justice Conferencing Directorate, in this instance), and the professionals employed in this scheme adopt effective practices when they relate to Indigenous juveniles.

The recent NSW Ombudsman report on Indigenous disadvantage concludes that there is a critical 'need to do things differently',²⁵ as the name of the report suggests. In the present case, if we want to see changes in Indigenous juvenile recidivism rates, and the rate at which Indigenous juveniles are over-represented in the criminal justice system, things do indeed have to be done differently. This begins with effective engagement with Indigenous communities.

Culturally effective engagement with Indigenous communities means a commitment to work directly with local Indigenous communities – in many cases they have embryonic solutions and latent capacity to address our problems. Obviously support is needed to enhance our current capacity. Effective practice with Indigenous people and communities by the juvenile justice system requires an active and committed goal to enhance 'the capacity of the Aboriginal service sector'.²⁶

²⁴ Leah Bromfield, Nick Richardson and Daryl Higgins, 'Kinship care: A culturally appropriate practice framework for Aboriginal and Torres Strait Islanders' (2006) *National Child Protection Clearinghouse*, Australian Institute of Family Studies. We note that this is in the context of kinship care of children, but we believe that the definition is applicable in the context of restorative justice and the practice of conferencing as it relates to Indigenous juveniles.

²⁵ New South Wales Ombudsman, *Addressing Aboriginal disadvantage – the need to do things differently: A special report to Parliament under s 31 of the Ombudsman Act 1974* (2011).

²⁶ *Ibid* 13.

On a practical level, in relation to conferencing, culturally appropriate service delivery will require working with Aboriginal organisations, including Aboriginal elders councils, to determine the roles that they need to play in reintegrating Indigenous offenders back into their communities. Kelly's experience with her own (Aboriginal) communities (in her parents' country of north coast NSW) suggests that there is currently no noticeable inter-agency approach by the regional youth justice conferencing offices. These regional offices need to seriously reconsider their involvement with local Indigenous communities – who provide about a quarter of their “clientele”²⁷ – in order to improve their services, particularly conferences, to Indigenous young offenders, their families and relevant community members, including Aboriginal elders.

Kelly has argued elsewhere that she prefers the term “culturally effective”, as opposed to culturally appropriate, in relation to Indigenous conflict management. She defines it as:

how well a service addresses Indigenous needs, including accessibility, fairness, impact and sustainability. Therefore, effectiveness requires dispute resolution and conflict management providers to examine all aspects of their services, including cultural practices, physical facilities and the selection and training of both Indigenous and non-Indigenous practitioners.²⁸

There is an interconnection between the terms culturally appropriate and culturally effective, and the terms may be used interchangeably.

To be culturally effective – based on the definition above – all aspects of service delivery must be considered: infrastructure (including physical facilities), institutional cultural practices, and recruitment and training of Indigenous and non-Indigenous convenors. For example, for Indigenous convenors we argue that a culturally specific recruitment and training program be designed and implemented. And as argued below, if a non-Indigenous convenor is to be appointed where a young offender is Indigenous then s/he must attend Indigenous cultural safety training.

²⁷ The NSW Law Reform Commission notes that it had ‘been advised that, since 1998, one quarter of all referrals to youth justice conferences have been for Aboriginal young people’: New South Wales Law Reform Commission, above n 4, [7.49].

²⁸ Loretta Kelly, ‘Elements of a “good practice” Aboriginal mediation model: Part II’ (2008) 19 *Australasian Dispute Resolution Journal* 223, 223-224. Kelly is referring here to the work of the National Alternative Dispute Resolution Advisory Council in the following publication: National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) 4.

Cunneen, in considering diversionary programs such as youth justice conferencing and the role of elders, refers to the importance of the legislative provisions for 'direct involvement of Indigenous people or Indigenous organisations in the administration and decision making of juvenile justice'.²⁹ Cunneen refers to provisions existing in legislation 'requiring conferences to be culturally appropriate', which is the case for youth justice conferences,³⁰ and Cunneen raises the ubiquitous question of:

What does 'culturally appropriate' mean? Who will decide what it is, when it is possible, and what processes will guarantee its implementation? There is no provision for Indigenous organisations and communities to make either these decision or decisions about the best interest of their children.³¹

Just because it is difficult to define what it means to be culturally appropriate does not mean that we should not attempt to identify aspects of cultural appropriateness. Thus we will attempt to do so.

In an Indigenous context, to be culturally appropriate means many things, but the following are some elements:

- The agency or program must work directly with local Indigenous communities;
- The preferred model for culturally appropriate service delivery is that the agency works in a direct and equal partnership with local Indigenous communities³²;
- Elders and/or respected community members must have a central place in restorative justice practice;³³
- Non-Indigenous personnel must engage in an ongoing capacity with the local Aboriginal community. For example: attending cultural events, being a part of

²⁹ Chris Cunneen, 'Bringing Them Home and The Contemporary Criminalisation of Indigenous Young People' (2008) 12(SE) *Australian Indigenous Law Review* 46, 52.

³⁰ See section 34(1)(a)(v) of the *Young Offenders Act 1997* (NSW).

³¹ Cunneen, above n 29.

³² New South Wales Ombudsman, above n 25, 13.

³³ Loretta Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (2002) Cambridge University Press, Cambridge, 220. While these points were made in relation to restorative justice and family violence, the points are relevant to the most prevalent juvenile restorative justice process: conferencing.

- NAIDOC celebrations, involvement in sorry business such as National Sorry Day and local events, as well as (but not limited to) Invasion Day/Survival Day events;
- If non-Indigenous practitioners are involved, they must have in-depth knowledge of the local Aboriginal community's culture, protocols and customs (including customary law). For example, they must have cultural knowledge as to who are the acknowledged local elders (the practitioner must be able to discern between self-appointed Aboriginal elders and acknowledged Aboriginal elders who are 'widely respected for their fairness, reasonableness, honesty and wisdom');³⁴
 - If a practitioner's work covers the geographic area of different Indigenous language groups, then there must be ongoing consultation with elders of those local communities to ensure that the current protocols are being adopted for different language groups; and
 - Needless to say, the practitioner must not make assumptions about how particular Indigenous juveniles, their family or even their elders, practice their culture. In an urban Aboriginal community the cultural protocols may not appear 'Indigenous enough' if the practitioner already has stereotypes about Aboriginality and cultural manifestations.

These elements are by no means comprehensive, and are simply some ideas on what a non-Indigenous service provider, if required to work with Indigenous juveniles, must take into account (although it is our argument below that only Indigenous convenors be appointed for Indigenous young offenders referred to conferencing).

Kelly has discussed previously what constitutes cultural appropriateness in mediating with Indigenous people, and we argue that these elements are applicable in providing culturally appropriate conferencing. The following element of "good practice" applies to the conferencing:

³⁴ Kelly, above n 33, 220.

- That the client (in this case the Indigenous juvenile) has access to an Aboriginal or Torres Strait Islander practitioner.³⁵

This means that local Indigenous people who are known and respected in the community should be able to apply to become a convenor. One of the issues with this (and indeed with many Indigenous-identified positions) is when people self-describe themselves as Indigenous without any history of being so. A recent research project on 'Aboriginality and Identity', commissioned by the NSW Aboriginal Education Consultative Group ('AECG'), noted this as a strong issue arising from their community consultation process:

Concern was expressed by many respondents that an ever increasing number of people who are "late identifiers" or who have recently "discovered or claim" their Aboriginality are being employed by governments to inform and shape Aboriginal specific policies and programs. Most respondents were totally against this situation because they argue that such people have little knowledge, understanding, experience or lived awareness of being Aboriginal and the circumstances that most Aboriginal peoples continue to combat in their daily lives.

Put another way this concern relates to Aboriginal people who can perhaps demonstrate Aboriginal ancestry or heritage but who lack personal experience or cultural knowledge of what it means to be Aboriginal and therefore their role in shaping Aboriginal public policies and programs is seen as misleading, ill informed and problematic.³⁶

To ensure that the appointment of Indigenous conference convenors are not "late identifiers", we believe that applicants for the Indigenous convenor panel must provide a confirmation of Aboriginality from a local Aboriginal land council or other Aboriginal organisation.³⁷ The NSW AECG's report confirms the use of the three-part criteria for Aboriginality:

³⁵ Loretta Kelly, 'Elements of a "good practice" Aboriginal mediation model: Part I' (2008) 19 *Australasian Dispute Resolution Journal* 198, 221.

³⁶ *Aboriginality and Identity: Perspectives, Practices and Policies* (2011) produced by Bob Morgan Consultancy for the New South Wales Aboriginal Education Consultative Group Incorporated, 12-13.

³⁷ Such a corporation must be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The accepted content for a confirmation of Aboriginality states that the person meets the definition of Aboriginality as defined in section 4 of the *Aboriginal Land Rights Act 1983* NSW, as follows: "Aboriginal person" means a person who: (a) is a member of the Aboriginal race of Australia, and (b) identifies as an Aboriginal person, and (c) is accepted by the Aboriginal community as an Aboriginal person.

It is important to note that as far as this administrative public policy definition is concerned (it is argued that the definition is not a legal definition) anyone identifying as an Aboriginal or Torres Strait Islander person is expected to meet all three components of the definition, that is that the person must be able to demonstrate descent, identifies as an Aboriginal or Torres Strait Islander person, and the person must be accepted as an Aboriginal or Torres Strait Islander people in the community which they live.³⁸

This does not mean that 'late identifiers' are necessarily excluded from consideration for appointment as conference convenors where young offenders are Indigenous. What we are arguing is that, for a conference to be culturally appropriate, a local Aboriginal person must convene it. Once a 'late identifier' becomes part of the local Aboriginal community, and can provide a confirmation of Aboriginality as per the three-part criteria, then that person can be appointed as a convenor where the juvenile is Indigenous.

We appreciate that Aboriginality and identity can be a controversial and highly political issue. We have already made our opinions known publicly via articles published in 2010 and 2011 in the *National Indigenous Times*. We hold strong views on Aboriginality, particularly where a person is appointed to a position working with, or speaking for, the Aboriginal community.

We will not explore this debate here further, other than to make three critical points:

1. A 'late identifier', as defined by the AECG's report, has the fundamental human right to identify as Indigenous. We would never interfere with an individual's right to identify however they wish. However, when it comes to Indigenous-specific programs and positions working with Indigenous people, then the person must meet the three-part definition of Aboriginality. If a potential or current convenor has an issue with this, we suggest that they read the AECG's report on Aboriginality and identity. 'Late identifiers' who take issue with this need to put aside their personal feelings and look at what is in the best interest of Indigenous juvenile offenders (see below).

³⁸ *Aboriginality and Identity*, above n 36, 8.

2. Given that it is widely known that a person feels more comfortable with another person from the same race, it follows that in any situation where an Indigenous person is to work directly with another person, then that person should be Indigenous. It is in the best interest of the Indigenous juvenile offender that the conference convenor is also Indigenous. As we argue below, the only way to ensure that a person from a particular race is culturally safe in their interactions with another person, is to guarantee that the other person is from the same race. This, of course, does not prevent the appointment of (non-Indigenous) co-convenors where, for example, the victim is non-Indigenous.

3. The research report on 'Aboriginality and Identity' for the NSW AECG notes that:

Concern was expressed by many respondents that an ever increasing number of people who are "late identifiers" or who have recently "discovered or claim" their Aboriginality are being employed by governments to inform and shape Aboriginal specific policies and programs.³⁹

Given the widespread community concern identified in the above report (which is something that many grass-roots Aboriginal people are strongly and passionately aware of), any future applicants for Indigenous-identified Youth Justice Conferencing Manager/Administrator positions should also be required to provide confirmation of Aboriginality confirming that the applicant meets the three-part definition of Aboriginality.

Kelly has argued elsewhere that cultural appropriateness in restorative justice relates to various facets, including whether:

1. restorative values reflect indigenous cultural values;
2. restorative justice processes are culturally relevant;
3. the practice or the implementation of the restorative justice scheme is culturally sensitive;
4. restorative justice schemes empower Indigenous communities; and

³⁹ *Aboriginality and Identity*, above n 36, 12.

5. restorative justice schemes meet the desired outcomes for Indigenous communities.⁴⁰

Note that Kelly's Elders' Council holds the view that:

For youth justice conferencing to be culturally appropriate then local Elders must attend. This is non-negotiable. A conference cannot be held unless a local Elder, respected by and agreed to by the child and his/her family, attends the conference.⁴¹

We have considered what cultural appropriateness means for many Indigenous people, specifically in relation to restorative justice. We have also outlined cultural effectiveness and how the concept is generally used interchangeably with cultural appropriateness. We now need to consider cultural safety, as it is a crucial element of a culturally appropriate restorative justice program.

Cultural safety is a phrase originally coined by Maori nurses which means that there is no assault on a person's identity.⁴² Williams goes on to say that cultural safety is:

more or less - an environment, which is safe for people; where there is no assault, challenge or denial of their identity, of who they are and what, they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening.⁴³

Williams argues that, from his experience, cultural safety is a challenge for many non-Indigenous people.⁴⁴ At one point – in a faculty planning meeting – Williams made the observation that he:

felt that no-one could move forward really, personally or professionally, until it had been worked out what cultural safety meant, why it was so important, and what it meant for

⁴⁰ Loretta Kelly, 'Cultural Appropriateness' in Loretta Kelly, Sam Garkawe and Rhonda Booby, *Restorative Justice LAW000259 Study Guide* (2011) School of Law and Justice, Southern Cross University, Lismore, 9.5.

⁴¹ Oral submission to Loretta Kelly in relation to youth justice conferencing (24 November 2011) Garlambirla Guuyu-girrwa Aboriginal Elders Corporation, General Meeting, Coffs Harbour.

⁴² Robyn Williams, 'Cultural Safety – What does it mean for our work practice?' (2004) Northern Territory University, 1 <<http://www.ruralhealth.utas.edu.au/indigenous-health/RevisedCulturalSafetyPaper-pha.pdf>> at 16 December 2011.

⁴³ Ibid.

⁴⁴ Ibid. Whilst Williams is considering this practice in relation to the health sector, the arguments still apply here.

individual and organisational work practice.⁴⁵

We agree with this critical observation, and argue that a part of the training of conference convenors must cover cultural appropriateness, effectiveness and safety. We believe that Indigenous young offenders are at risk of being further damaged emotionally by participating in conferences that are culturally unsafe. Any Indigenous juvenile participating in a culturally unsafe conference is unlikely to be able to address his/her offending patterns and will likely go on to re-offend.

Recommendation 2

That policy of the Youth Justice Conferencing Directorate be informed by principles of cultural appropriateness and cultural safety for “good practice” conferencing of Indigenous young offenders. Furthermore, a non-Indigenous conference convenor should not be appointed to convene a conference involving an Indigenous young offender until the convenor has undertaken specific training in ‘Indigenous cultural safety practice’.

Recommendation 3

That an Indigenous specific recruitment and training program for Indigenous convenors be designed and implemented. While we have identified the existence of an Indigenous specific recruitment package,⁴⁶ we cannot locate (in any departmental annual reports nor on the website) that there has ever been an Indigenous-specific convenor recruitment program/campaign.

Furthermore, we recommend that to be considered for appointment as an Indigenous conference convenor, the applicant must provide a confirmation of Aboriginality from a local Aboriginal land council or other Aboriginal organisation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); such confirmation being that the applicant satisfies the 3-part definition of Aboriginality.

⁴⁵ Williams, above n 42, 3.

⁴⁶ New South Wales Department of Juvenile Justice – Youth Justice Conferencing Directorate, *Youth Justice Conferencing Policy and Procedures Manual* (June 2005) [1-2].

Recommendation 4

That, as Indigenous-identified positions of Youth Justice Conferencing Managers/Administrators become available, a requirement for the position be that the applicant provides a confirmation of Aboriginality from a local Aboriginal land council or other Aboriginal organisation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), such confirmation being that the applicant satisfies the 3-part definition of Aboriginality.

5. (c) Improving the role of Aboriginal elders and other respected community members

A culturally appropriate restorative justice program is where the involvement of “respected elders” is essential. Kelly has previously argued that:

Elders are not self-appointed, but are those who are widely respected for their fairness, reasonableness, honesty and wisdom ... according to Gumbaynggirr customary law, the Elders were the decision-makers.⁴⁷

Despite a loss of many traditional laws, Kelly believes that this value is extant amongst many Aboriginal people. But what sort of characteristics do we want in those who are involved in a restorative justice process? In 2002 Kelly facilitated a conference (a meeting, not a youth justice conference) involving over 70 Aboriginal people to discuss the use of restorative justice to address Aboriginal family violence. While the offence that was being considered at the conference was family violence, comments about the role that Aboriginal elders should have in a restorative justice process are relevant here. These were the types of statements made about the contemporary status and role of Aboriginal elders:

- Law-makers, law-keepers, counsellors, arbitrators, instructors.
- Directors and teachers of the processes.
- For guidance, wisdom and positive role modelling.
- To teach respect and responsibility.
- For guidance, community empowerment and an equitable outcome.
- ‘Use their wisdom.’
- ‘Helping them understand themselves as Aboriginal people.’
- ‘To be mentors.’
- ‘Role models, mentors, therapists.’
- ‘Getting together and talking.’
- ‘Talking to the perpetrator on handling anger.’
- ‘To work together as one – young and old.’
- ‘To be part of the solution and resolution.’
- ‘Talking and support for all the community.’
- ‘The Family Elders should be asked.’⁴⁸

⁴⁷ Kelly, above n 33, 220.

⁴⁸ Kelly, above n 33, 221.

The last of these is a particularly important point. There are elders in each family or clan; a particular elder may not be appropriate if the perpetrator is from a different family or clan group.

There is evidence of the effectiveness of elders in dealing with offending behaviour in a recent evaluation of circle sentencing in NSW. A qualitative research project undertaken in 2008, drawing on interviews with elders and court staff, 'suggests that Circles do reduce re-offending'.⁴⁹ One of the most positive aspects of the circle identified by the research project was the involvement of the Elders. It is the presence of the Elders that enables open and honest communication with the offenders. The following are comments by Indigenous offenders who participated in circle sentencing:

they [the Elders] actually talk to you about why you committed the crime, why you did what you did, and where your head was at.

...

they [the Elders] know what all us young blokes have been through.

...

[the circle is]done by people that know you [the Elders]. They know your past, they know what you're like, they know what you used to be, you know, what you used to do and that ... They [the Court] officials just judge you in there.⁵⁰

Daly and Proietti-Scifoni report that, 'The Elders drew from shared experiences, and they supported and encouraged the participants toward the path of change.'⁵¹

In Kelly's discussion with the Coffs Harbour Elders Council regarding section 7(e) of the Act⁵², it was put to her by the Council that:

⁴⁹ Daly and Proietti-Scifoni, above n 13, 17, citing Cultural and Indigenous Research Centre (CIRCA), *Evaluation of Circle Sentencing Program – Report* (2008). This finding contradicts the quantitative study by Fitzgerald in 2008, which 'suggests that circle sentencing has no effect on the frequency, timing or seriousness of offending'. However, Fitzgerald does acknowledge that: 'It should not be concluded that circle sentencing has no value simply because it does not appear to have any short-term impact on reoffending': Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (2008) 115 *Contemporary Issues in Crime and Justice: Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, 7.

⁵⁰ Daly and Proietti-Scifoni, above n 13, 18.

⁵¹ *Ibid.*

⁵² Section 7(e) is one of the principles that guide the operation of the Act: 'The principle that, if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.'

Local Aboriginal elders must attend the conferences as we know and understand the family, their relationship to country, their culture and their socio-economic environment.⁵³

However, we have anecdotal evidence that few conferences of Indigenous offenders are benefiting from the attendance of elders or other respected community members. The Garlambirla Guuyu-girrwa Aboriginal Elders Corporation (the Aboriginal elders council in Coffs Harbour) submitted to Kelly that:

They [the government] want blackfellas knowledge but won't pay us. If other experts are paid to attend conferences then elders should be paid as a principle of equity. Based on our lifelong learning of our culture, our wisdom, and knowledge, we have been appointed as elders by our communities. We are not self-appointed. We should have the same standing in a conference as any other expert.⁵⁴

The Law Reform Commission of NSW ('the Commission') has previously noted that:

In many instances, the presence of a respected community member forms a vital part of conferencing, especially where a parent of the young person is unavailable. It reinforces the "positive shaming" aspect of the process. The inability of a community member to attend due to cost potentially weakens the impact of conferencing upon the offender. However, the obverse of this issue is the concern expressed to the Commission that payment by the state to the community member weakens that very community ownership on which the process relies.⁵⁵

The 'concern' about payment of a community member by the state is not logical in light of the fact that conference convenors are also supposed to be community members – in line with restorative justice principles – yet are paid by the state. The fact that conference convenors are not required to possess educational qualifications⁵⁶ is intended, in part, to encourage more 'grassroots' community members to apply for a convenor position.

⁵³ Oral submission to Loretta Kelly in relation to youth justice conferencing (24 November 2011) Garlambirla Guuyu-girrwa Aboriginal Elders Corporation, General Meeting, Coffs Harbour.

⁵⁴ Ibid.

⁵⁵ New South Wales Law Reform Commission, above n 4, [7.67] (footnote omitted).

⁵⁶ See: Juvenile Justice, *Youth Justice Conference Convenor Information Package*, NSW Government, 8 <http://www.djj.nsw.gov.au/careers_yjc.htm> at 7 December 2011.

The Commission's statement, 'payment by the state to community members weakens the very community ownership' of conferencing, does not take into account the literature on community development nor community understanding of the conference convenors as a "community members". Indeed to encourage a community perception and practice that convenors are community members, they are not employed as public servants but rather as independent contractors⁵⁷ (unlike conference administrators, who are public servants). This differentiation between the employment status of conference convenors and conference administrators is not well understood in the community. At a grass-roots community level, people are unaware that conference convenors are *not* public servants.

Conference convenors are promoted by the Department as being part of the local community of the young offender (and the victim). The Department's 2008-09 Annual Report states that:

Youth Justice Conference Convenors are statutory office holders appointed by the Director General, or delegate. They are recruited from the community and are provided with four days of training to be eligible for initial and continuing appointment.⁵⁸

The Department's recruitment webpage states that:

Youth justice conference convenors live and work in their local communities and are engaged by contract to prepare and facilitate youth justice conferences as needed. They are not employees under the Public Sector Management Act, 2002 (NSW)⁵⁹

Sokol and McKeagg point to the community-rooted nature of conference convenors as being an important aspect of the NSW scheme:

One unique aspect of the NSW scheme is the identity of conference convenors. People who live and work in the local communities are contracted to organise and facilitate youth justice conferences.⁶⁰

⁵⁷ See section 60 and Schedule 1 of the *Young Offenders Act 1997* (NSW).

⁵⁸ New South Wales Department of Human Services – Juvenile Justice, *Annual Report 2008-2009* (2009), 35.

⁵⁹ Juvenile Justice, *Careers: Community positions - Youth justice conferencing convenors*, Department of Attorney General and Justice <http://www.djj.nsw.gov.au/careers_yjc.htm> at 9 December 2011. The 2010-11 Annual Report states that conference convenors 'are recruited from the community and are provided with four days of training to be eligible for initial and continuing appointment': New South Wales Department of Attorney General and Justice – Juvenile Justice, *Annual Report 2010-2011* (2011) 155.

⁶⁰ Tami Sokol and Alissa McKeagg, 'Youth Justice Conferencing: Achieving Restorative Justice?' (2010)

We find it difficult to see how payment of one community member (the convenor) does *not* weaken the community ownership, yet payment of another community member (an elder/community advisor) *does* weaken community ownership.

We must therefore conclude that there are other, unwritten, reasons for the rejection of payment of elders/community advisors. We can only speculate about what those reasons might be.

The Law Reform Commission of NSW also stated that:

Furthermore, the YJCD [Youth Justice Conferencing Directorate of the Department of Juvenile Justice] considers that the views of Kelly and Oxley do not generally represent those of any of the five Aboriginal YJCD conference administrators. These administrators are strongly of the view, based on their experiences over the last six years, that to pay Aboriginal “elders” to attend youth justice conferences in the way Kelly and Oxley suggest would be counterproductive and perhaps create a “conferencing industry” for certain Aboriginal people. Their strong view, which is YJCD practice, is to ensure that out-of-pocket expenses are paid to any people who attend and participate in a youth justice conference but would be unable to do so without some financial help. YJCD also offers to provide financial support to community members who assume responsibilities for helping young offenders undertake their outcome plan tasks in appropriate cases.⁶¹

With respect, we disagree with the view of the Indigenous conference administrators. A ‘conferencing industry’ will only be created if conference administrators allow it to be created. The administrators, together with the convenors they appoint, are responsible for determining who attends the conference.⁶² They hold the purse strings and, given their intimate knowledge of the community, should be able to determine which community members are genuinely devoted to the interests of the offender and the community, rather than simply ‘going through the motions’ of the conference in order to be paid. Furthermore, the convenor should be well aware of familial and factional structures in the Indigenous community in determining the appropriate community member/elder to invite to the conference.

Human Rights Law Resource Centre Bulletin: Special Edition, 14.

⁶¹ New South Wales Law Reform Commission, above n 4, [7.68].

⁶² See *Young Offenders Act 1997* (NSW), s 45(2)(a).

Another way of approaching the argument is to admit that conferencing is indeed an industry; likewise juvenile justice and the wider justice system is an industry. Tens of thousands are employed in the criminal justice industry across Australia: police officers, judges and magistrates, court officials, youth and social workers, justice department employees, and so on. Does this mean that all of these paid workers are doing their jobs purely for the money, and not also because of altruistic reasons? Of course not – the perceived dichotomy of ‘the professional’ and ‘the community member’ is a false one. This is particularly evident in regional and remote areas, where the professionals in attendance at a conference are, inevitably, also members of (at least the geographic) community to which the offender belongs. Yet we would not expect the specialist youth officer to attend a conference for no payment even if she lived next door to the offender and was the coach of his football team.

The fact is that restorative justice processes are (if they are successful) incredibly difficult matters. As an official of the United Kingdom Home Office has said, ‘[m]ediation between people who have been divided by crime is one of the most skilled and sensitive tasks to which anyone could be assigned’.⁶³ Those who are invited to attend conferences for their experience and skill should be remunerated as professionals.

It may be that community members/elders who wish to attend conferences, as paid participants, first need to complete a short training course (as conference convenors do⁶⁴). We believe that that would also be a good process for determining appropriate community members/elders for conference participation.

Nevertheless, we urge the Department of Attorney General and Justice *not* to rely only on our view or that of the Elders Council (or, for that matter, the view put forward by the YJCD on behalf of their Indigenous conference managers). Instead, one should examine what is occurring in practice. Anecdotal evidence we have collected suggests that

⁶³ Tony E Marshall, *Restorative Justice: An Overview* (1999) Home Office, United Kingdom, 27 in Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice: Final Report* (2009) 305. The *Inquiry* devotes at least three sub-sections to the conduct of restorative justice processes (sub-sections 11.4-11.6, pp 305-313).

⁶⁴ ‘Successful applicants are required to undertake a four day training program’: Juvenile Justice, *Careers: Community positions - Youth justice conferencing convenors*, Department of Attorney General and Justice <http://www.djj.nsw.gov.au/careers_yjc.htm> at 9 December 2011.

Indigenous elders and other community members are simply not attending conferences of Indigenous juvenile offenders: they say that they are not willing to continue going to conferences without payment. Conferences are usually complex, emotionally-charged, time-consuming, onerous and – for the elder or community member – do not simply ‘end’ when the conference finishes.

We believe that robust research is required to substantiate this matter, including collecting data on how many conferences are actually attended by community members/elders, and how many are paid not only for out-of-pocket expenses in attending the conferencing, but also for assuming ‘responsibilities for helping young offenders undertake their outcome plan tasks in appropriate cases’.⁶⁵

Recommendation 5

That the Youth Justice Conferencing Directorate conduct training (on a regular basis) for respected community members (including elders), and other persons listed in section 47(2)(a)-(e) of the *Young Offenders Act 1997*, who wish to be considered for invitation to youth justice conferences.

Recommendation 6

That respected community members (including elders), and other persons listed in section 47(2)(a)-(e) of the *Young Offenders Act 1997*, should be appropriately remunerated for their attendance at youth justice conferences, provided that they have first attended training provided by the Youth Justice Conferencing Directorate (see recommendation 5). Such remuneration should be in addition to any substantiated out-of-pocket expenses.

⁶⁵ New South Wales Law Reform Commission, above n 4, [7.68].

5. (d) Dealing with young offenders in their community of concern

Section 7(e) of the *Young Offenders Act 1997* (NSW) provides for the principle that:

if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.

In a similar manner to section 34(1)(a)(v), a legislative qualification ('if it is appropriate in the circumstances') provides a convenient way for conferencing to sidestep a fundamental principle of restorative justice; in this case, dealing with offenders in their communities.

In NSW Juvenile Justice's 2009-2010 annual report, it is noted that:

Youth justice conferences are a community-based approach to dealing with young people who have committed a crime. Conferences are a formal legal process based on the principles of restorative justice. They bring young offenders, their families and supporters face-to-face with victims and their support people. Together, they agree on a suitable outcome that can include an apology, reasonable reparation to victims, and steps to reconnect the young person with their community in order to help them desist from further offending.⁶⁶

This unequivocally states that conferencing is a restorative justice process and that a result of a conference is to 'reconnect the young person with their community'⁶⁷ to prevent them from reoffending.

It is also the unequivocal view of Kelly's Elders' Council that:

If Indigenous children are to be re-integrated into our community then local Indigenous community members must be present. What is required is for the conference to be facilitated by a local Aboriginal person, who will be able to get the child's family and extended kin to be involved and a local Aboriginal Elder must be present.⁶⁸

⁶⁶ New South Wales Department of Human Services – Juvenile Justice, *Annual Report 2009-2010* (2010) 186.

⁶⁷ *Ibid.*

⁶⁸ General meeting of Garlambirla Guuyu-girrwa Aboriginal Elders Corporation (24 November 2011), Coffs Harbour.

Conferencing is a restorative justice process in which reintegration of offenders into their communities is a crucial component. The notion of reintegrative shaming, which we discuss below, is an important foundation to reintegration generally. Reintegrative shaming also forms part of the “culturally appropriate principle”, which guarantees that Indigenous young offenders will be ‘dealt with in their communities’ through the involvement of their community of concern.

We need to briefly remind ourselves about what restorative justice is, what reintegrative shaming is, and what a community of concern has to do with ensuring culturally appropriate conferencing for Indigenous juveniles.

Restorative justice ‘is a set of values that guides decisions on policy, programs and practice’.⁶⁹ These values are based on the notions that:

- all parties involved in crime should be included in the response to crime – offenders, victims, the community and agents of the criminal justice system;
- offenders become accountable through understanding the harm caused by their offences, accepting the responsibility for that harm and taking actions to repair the harm they have caused; and
- crime is defined as harm to individuals and community, rather than to the state.

The NSW Law Reform Commission notes that:

Restorative justice has as its goal the re-situating of the offending behaviour within a community framework, by providing reparation for harm caused and the active involvement of the offender.⁷⁰

We begin to see the critical role of the community in any restorative justice program (in this case, youth justice conferencing). Much has been written about the role of the community in restorative justice and these writers argue that the success in ‘any restorative process relies heavily on community involvement.’⁷¹ Pranis argues that:

⁶⁹ Kay Pranis, ‘Building Community Support for Restorative Justice Principles and Strategies’ (1995) International Institute for Restorative Practices – Real Justice <<http://www.realjustice.org/articles.html?articleId=471>> at 9 December 2011.

⁷⁰ New South Wales Law Reform Commission, above n 4, [7.6].

⁷¹ Margaret Thorsborne, ‘Building Community Support for Restorative Justice: The Local Context’ (Paper presented at the *Restorative Justice Conference: Restoring the Balance Between Victims, Offenders and the Community*, Brisbane, 22-23 July 1999) 3.

Greater community involvement in a restorative justice process is a powerful way to break this destructive cycle and increase the connections among community members.⁷²

Thorsborne states that the community 'however defined, is a major stakeholder in the act, how it is resolved, and what unfolds as a result of the process.'⁷³ Thorsborne makes the important point that:

community involvement also carries with it responsibilities and accountabilities, but which, if honoured, will assist in the reduction of crime and other wrongdoing and create safer places to live and work.⁷⁴

Kelly has argued previously that the need for community accountability is:

where the importance of respected Elders comes in to play. They are the ones who have the wisdom to carry the responsibilities and to be accountable.⁷⁵

Kelly has also argued that there are parallels between restorative justice and customary Indigenous processes for dealing with offending behaviour. It has been suggested that restorative justice has its roots in ancient culture; Wilkinson holds the view that it dates back thousands of years.⁷⁶ The New Zealand family group conferencing program is based on Maori traditions.⁷⁷ In particular, the notion of reintegrative shaming can be translated to an Australian traditional Indigenous communal context.

We argue that Braithwaite's theory of reintegrative shaming is comparable to the customary reintegrative processes for offenders under Indigenous customary law. The

⁷² Pranis, above n 69.

⁷³ Thorsborne, above n 71.

⁷⁴ Ibid.

⁷⁵ Kelly, above n 33, 220.

⁷⁶ Reginald Wilkinson, 'Back to Basics: Modern Restorative Justice Principles Have Their Roots in Ancient Cultures' (December 1997) *Corrections Today* 6, 6.

⁷⁷ See Juan Tauri, 'Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State?' (1999) 32(2) *Australian and New Zealand Journal of Criminology* 153, 158. We are not suggesting that family group conferences are, in practice, meeting the needs of Maori juvenile offenders. Many are critical of NZ conferences with respect to Maori offenders. For example, Tauri argues that: 'Given these problems associated with cultural inappropriateness and the disempowerment of Maori "cultural experts", we must conclude that the conferencing process has failed thus far to provide Maori with the opportunity to be much more than the passive subjects of an imposed criminal justice system': at 160.

following is Kelly's earlier overview of Braithwaite's theory of reintegrative shaming and its relevance to traditional Indigenous processes for addressing offending behaviour:

Braithwaite (1989) argues for a process he calls 'reintegrative shaming' – a type of social control based upon community condemnation of wrong-doing, with opportunities for reintegration of the offender back into the community. Braithwaite states that 'a communitarian society combines a dense network of individual interdependencies with strong cultural commitments to mutuality of obligation' and that the 'aggregation of individual interdependency is the basis for societal communitarianism' (p. 85). He maintains that '[i]nterdependencies must be attachments which invoke personal obligation to others within a community of concern' (p. 85).

The 'attachments' in Aboriginal communities where personal obligations are invoked relate to the authority of Elders.⁷⁸

The "community of concern" is illustrated in a real life scenario that faced a couple experiencing family violence, where both the perpetrator and victim were Indigenous. Kelly relays their thoughts:

In the case study, Samantha said: 'I have a lot of respect for my Elders. My man has a lot of respect for the Elders too. He does a lot for the Elders and they're good to him.' Jim described his respect for, and fear of, the local Elders... Samantha and Jim's community of concern would be the extended family and the relevant family or clan Elders.⁷⁹

Kelly continued with her analysis of Braithwaite's theory of reintegrative shaming and the shaming in a traditional Indigenous community context:

Braithwaite argues that it is the cohesiveness of a society and the 'social embeddedness' of sanctions that give communitarian shaming its force (Braithwaite, 1989: 54–57).

This notion of social embeddedness is particularly relevant in tradition- oriented Aboriginal settings. The society is relatively cohesive and sanctions are often embedded in the social structure. In pre-invasion Aboriginal society reintegrative shaming occurred for a number of offences – only the most serious offences would be dealt with by extrication – permanent exclusion or execution. Shaming was, and still is for some offences in some traditional communities (for example, religious offences), a highly formalised, ritualised cultural practice.

⁷⁸ Kelly, above n 33, 215-216.

⁷⁹ Kelly, above n 33, 216.

In traditional Aboriginal society, enormous inter-dependency will mean that any 'dysfunctional' (for want of a better word) person must be either reintegrated or extricated.⁸⁰

In Kelly's analysis of reintegrative shaming in Indigenous communities, she believed that reintegrative shaming was not a cultural practice in urban Indigenous communities and therefore argued:

However, in non-traditional/urban Aboriginal communities, reintegrative shaming is not a cultural practice. Due to the decimation and dispersal of Aboriginal communities following invasion, the rituals of traditional life have been quashed by oppressive white man's 'rituals'.⁸¹

After several years of research on the topic and further consideration, Kelly is now of the view that, if the conditions for '[s]uccessful reintegration ceremonies' are in place, then urban Indigenous offenders can be reintegrated into their communities.

Braithwaite and Mugford describe the conditions for successful reintegration ceremonies:

1. The event, but not the perpetrator, is removed from the realm of its everyday character and is defined as irresponsible, wrong, a *enme*.
2. Event and perpetrator must be uncoupled rather than defined as instances of a profane uniformity. The self of the perpetrator is sustained as sacred rather than profane.

This is accomplished by comprehending:

- (a) how essentially good people have a pluralistic self that accounts for their occasional lapse into profane acts; and
- (b) that the profane act of a perpetrator occurs in a social context for which many actors may bear some shared responsibility. Collective as well as individual shame must be brought into the open and confronted.

⁸⁰ Ibid.

⁸¹ Ibid.

3. Co-ordinators must identify themselves with all private parties—perpetrators, their families, victims, witnesses—as well as being identified with the public interest in upholding the law.
4. Denunciation must be both by and in the name of victims and in the name of supra-personal values enshrined in the law
5. Non-authoritative actors (victims, offenders, offenders' families) must be empowered with process control. The power of actors normally authorized to issue denunciations on behalf of the public interest (e.g., judges) must be decentred.
6. The perpetrator must be so defined by all the participants (particularly by the perpetrator himself) that he is located as a supporter of both the supra-personal values enshrined in the law and the private interests of victims.
7. Distance between each participant and the other participants must be closed; empathy among all participants must be enhanced; opportunities must be provided for perpetrators and victims to show (unexpected) generosity toward each other.
8. The separation of the denounced person must be terminated by rituals of inclusion that place him, even physically, inside rather than outside.
9. The separation of the victim, any fear or shame of victims, must be terminated by rituals of reintegration.
10. Means must be supplied to intervene against power imbalances that inhibit either shaming or reintegration, or both.
11. Ceremony design must be flexible and culturally plural, so that participants exercise their process control constrained by only very broad procedural requirements.
12. Reintegration agreements must be followed through to ensure that they are enacted.
13. When a single reintegration ceremony fails, ceremony after ceremony must be scheduled, never giving up, until success is achieved.
14. The ceremony must be justified by a politically resonant discourse.⁸²

We believe that a conference for an Indigenous juvenile must ensure that these conditions are met so that the juvenile is reintegrated back into his/her community. Indeed the NSW Law Reform Commission noted that:

In many instances, the presence of a respected community member forms a vital part of conferencing, especially where a parent of the young person is unavailable. It reinforces the “positive shaming” aspect of the process. The inability of a community member to

⁸² John Braithwaite and Stephen Mugford, ‘Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders’ (1994) 34(2) *British Journal of Criminology* 139, 143.

attend due to cost potentially weakens the impact of conferencing upon the offender.⁸³

However, as noted above, the Commission opposes payment by the State to community members attending conferences (except for certain associated costs) – presumably even if their attendance would ensure that some or all of these 14 conditions are met for positive/reintegrative shaming. The risk is that, without the presence of respected Aboriginal community members (and given the disempowerment already facing Indigenous juveniles), it is more likely that Braithwaite and Mugford’s 10th condition⁸⁴ for successful reintegration ceremonies will not be met.”

Accepted practice when conferencing Indigenous juvenile offenders?

It is our view that Indigenous young offenders attending conferences without respected community members will be disempowered due to the number and power of non-Indigenous participants far outweighing that of the Indigenous participants. This has occurred in far too many situations reported to Kelly by members of her community who have attended conferences themselves (or who have heard through the “Goori Grapevine” – an oral web of information transfer). Community members have reported to Kelly that many conferences take place where Indigenous young offenders and their mothers attend, but all the other participants are non-Indigenous – including the convenors.

Furthermore, Indigenous young offenders invariably attend conferences with police present: regardless of how “friendly” police officers are towards Indigenous juveniles, a negative dynamic is likely to exist between Indigenous juveniles and police given historical and contemporary Aboriginal/police relations. This systemic imbalance needs to be countered by the presence and participation of respected Aboriginal community members.

The institutional discrimination facing Indigenous juveniles in the criminal justice system is not new, but just because a scheme is a diversion from the mainstream

⁸³ New South Wales Law Reform Commission, above n 4, [7.67].

⁸⁴ ‘Means must be supplied to intervene against power imbalances that inhibit either shaming or reintegration, or both’: Braithwaite and Mugford, above n 82.

criminal justice system does not mean that (at least for Indigenous people) the strong sense of disempowerment and systemic bias ends. An Indigenous juvenile offender attending a conference is fully aware that conferencing is part of the government bureaucracy, with the added dynamic of the attendance of police as agents of the criminal justice system.

One cannot continue to ignore the sense of disempowerment of an Indigenous juvenile attending a (culturally inappropriate) conference. With a condition for successful reintegration being the “means” to “intervene” against power imbalances, surely the presence of Aboriginal community members is essential for successful reintegration into the community for Indigenous juveniles.

Kelly has also been advised of several conferences, attended by Indigenous girl offenders and their mothers, where all the other participants (including the convenor) are non-Indigenous males. It seems that this is an acceptable practice of both racial and gender disempowerment. Kelly was advised of one particular matter in which an Aboriginal girl and her mother attended a conference facilitated by a non-Indigenous male convenor, where both the police officer and victim were also non-Indigenous men. So even though “on paper” the Indigenous juvenile had the support of her mother, both the girl and her mother reported back to a female Aboriginal elder about how intimidated they felt.

When Kelly spoke to this Aboriginal female elder to ask why she did not attend to support them, the elder advised Kelly that she had to work on the day that the conference was being held. The elder apparently attempted to get the conference rescheduled to another day but the victim was not available on the day the elder was available. If the elder, in this instance, could have been paid to attend the conference she could have had the day off work and attended the conference. We submit that in this situation the presence of this Aboriginal female elder would not only have prevented such disempowerment, but would have provided the support to ensure positive/reintegrative shaming.

Predictably, this Aboriginal girl continued her offending behaviour and is currently serving a community service order for a similar offence to that for which she was

conferenced. The elder told Kelly that she believes that the girl will end up in gaol if there is no 'local Aboriginal community intervention'.

As argued below, with the 'additional \$1.8 million recurrent funding for youth justice conferencing in the 2010/11 State Budget ... to improve the performance of youth justice Conferencing'⁸⁵, resourcing is no longer a barrier to incorporating reintegration ceremonies into conferences to ensure culturally appropriate service delivery for Indigenous communities.

The issue in contemporary restorative justice practice is ensuring that shaming is re-integrative and not punitive. We argue that current failings in the implementation of the restorative justice scheme for juvenile offenders in NSW risks Indigenous offenders becoming even further alienated from their communities instead of being reintegrated. Moreover, we believe that culturally unsafe practices are occurring due to juveniles not 'being dealt with by their communities' to ensure reintegration, which means that Indigenous juveniles have not been appropriately diverted from the criminal justice system.

If Indigenous offenders are being conferenced where the 'community of concern' is not present, then those juveniles are more likely to reoffend, and continue a pattern of offending. The failure to involve the community of concern in Indigenous conferences means that the conference will have no impact on the reduction of Indigenous recidivism rates, and therefore no impact on the over-representation of Indigenous people in the criminal justice system.

It is no surprise that there are suggestions that Indigenous traditional processes be adopted that reflect Indigenous customary law. The 2002 *Report on the Review of the Young Offenders Act 1997* noted that:

Some respondents have suggested that Indigenous traditions of justice should be encouraged in an attempt to redress the imbalance of power between the State, its agents and those Indigenous Australians involved with the criminal justice system.

⁸⁵ New South Wales Department of Human Services – Juvenile Justice, *Annual Report 2009-2010* (2010) 188.

COALS has suggested that consideration be given to trialing a conferencing framework that incorporates customary law.⁸⁶

The 2002 *Review* makes a specific recommendation relating to the development of a process for Indigenous juvenile offenders that reflects Aboriginal customary law:

Recommendation 16

The NSW Attorney General's Department in consultation with the Department of Aboriginal Affairs, the Aboriginal Justice Advisory Council, the Department of Juvenile Justice, and other relevant agencies, investigate conferencing frameworks that incorporate customary law.⁸⁷

We note that this recommendation is weak in its framing as it places no responsibility for one particular agency to be responsible for such investigations on how to go about designing a model, and there is no commitment to implementing a model. With no single agency holding responsibility, agencies can always "pass the buck". In our research for this submission, we could not identify any such program being investigated in NSW, let alone any real commitment by any agency to engaging Indigenous communities to implement a pilot for Indigenous juvenile offenders based on Aboriginal customary law.

The critical role of the local Indigenous community has been identified as one of the principles for the prevention of offending by Indigenous juveniles. Conferencing needs to ensure the direct involvement of Indigenous communities in the design and delivery of conferencing. Community and family based strategies are the strongest approaches to reducing and preventing offending by juveniles.

The crucial role that the local Indigenous community has in the delivery and implementation of programs is not a new concept. Advocates for Indigenous rights have been arguing for the direct and legitimate (not tokenistic) role of local community organisations to address Indigenous juvenile offending. For example, Australians for Native Title and Reconciliation (ANTaR) NSW:

⁸⁶ New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002) 52.

⁸⁷ *Ibid.*

calls on the NSW Government to support alternative interventions designed for young Indigenous offenders which link with existing local Aboriginal community controlled services.⁸⁸

The role of the community is identified in policy but often does not eventuate in practice. For example, the Youth Justice Conferencing Policy and Procedure Manual provides that procedures on cultural issues should:

- allow wider participation in conferencing by Aboriginal people, communities and families;
- ...
- allow respected community leaders to advise on cultural issues and outcome plans⁸⁹.

Our anecdotal evidence suggests that this policy is not being implemented at a grass-roots level. In preparing background research for this submission we spoke to four Indigenous elders councils, all of which reported that they had not heard from the local youth justice conferencing manager. Some said (words to the effect of): 'it has been years since they came and yarned with us elders'; others stated (words to the effect) that: 'they only spoke to use when they first started over 10 years ago now'.⁹⁰

Recommendation 7

That a conferencing framework incorporating customary law for Indigenous juvenile offenders be piloted within five years. This pilot should not be a bureaucratic "up-down" process; Indigenous communities should be informed about the pilot and have an opportunity to be involved in the pilot. An equitable process should be adopted whereby Indigenous communities throughout NSW have the opportunity to apply to trial the program in their community. The organisation administering the funding of this pilot should ensure an open and equitable community selection process whereby all Aboriginal communities in NSW, where feasible, have an opportunity to apply to operate the pilot.

⁸⁸ 'NSW Government should support alternative interventions designed for young Indigenous offenders' (7 July 2009) *Australians for Native Title and Reconciliation* <http://www.antar.org.au/nsw_government_should_support_alternative_interventions_designed_for_young_indigenous_offenders> (accessed 1 November 2011).

⁸⁹ New South Wales Department of Juvenile Justice, above n 46, [4-2].

⁹⁰ Elders who agreed with these sentiments were not willing to be named.

Recommendation 8

That the Indigenous customary law conferencing pilot be evaluated in accordance with Indigenous culturally appropriate and culturally safe methods of evaluation that apply to Indigenous-specific data gathering tools.

Recommendation 9

That the qualification in section 7(e) of the *Young Offenders Act 1997* be deleted. That is:

(e) The principle that, ~~if it is appropriate in the circumstances,~~ children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.

Section 7(e) should read, instead, as:

The principle that children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.

5. (e) Matching the race and gender of the offender with the convenor

If Indigenous juveniles are to be reintegrated into our community, then Aboriginal or Torres Strait Islander convenors must facilitate the conference.⁹¹

The NSW Law Reform Commission's 2005 report on young offenders notes information it received from the Youth Justice Conferencing Director that:

Around 8-10% of the 500 active conference convenors are Aboriginal or Torres Strait Islander people, enabling cultural matching of Indigenous offenders and convenors in appropriate cases.⁹²

This is qualified by the Director's earlier statement about the cultural matching of Indigenous offenders with Indigenous convenors:

it is not always possible for an administrator to appoint an Aboriginal convenor in all appropriate cases. In some cases, Aboriginal families have specifically requested a non-Aboriginal convenor who is accepted and respected by their community.⁹³

We need to question what it means to match the Aboriginality of offender and convenors 'in appropriate cases'?

The NSW Law Commission's 2005 report on young offenders refers to an article written by Kelly:

In an article written in 1999, it was argued that cultural appropriateness was hindered by there not being enough Indigenous conference convenors to match with Indigenous offenders. Where Indigenous offenders are conferenced by non-Indigenous conference convenors, the argument continued, not only is this culturally inappropriate, but it results in further alienation of the offender rather than reintegration into the community. It was also suggested that, where offender and victim are from Indigenous and non-Indigenous backgrounds, there could be co-convenors from each of those

⁹¹ Oral submission to Loretta Kelly in relation to youth justice conferencing (24 November 2011) Garlambirla Guuyu-girrwa Aboriginal Elders Corporation, General Meeting, Coffs Harbour.

⁹² New South Wales Law Reform Commission, above n 4, [7.47].

⁹³ Jenny Bargaen, 'Diverting ATSI Young Offenders From Court and Custody in New South Wales – Practices, Perspectives and Possibilities Under the Young Offenders Act 1997' (Paper presented at the *Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology*, Sydney, 8-9 October 2001) 10.

cultural backgrounds [footnotes excluded].⁹⁴

The Commission seemed to accept that the Youth Justice Conferencing Directorate has resolved these issues:

The YJCD has addressed these concerns by recruiting convenors from specific cultural groups and training convenors to address specific cultural needs, in addition to aiming for a high level of community participation. Five of the 17 full-time youth justice conference administrator positions (seven metropolitan and 10 rural) are held by Indigenous people.⁹⁵

The *Youth Justice Conferencing Policy and Procedures Manual* states:

A specific recruitment and information package has been developed by Youth Justice Conferencing Aboriginal Managers for targeted recruitment of Aboriginal and Torres Strait Islander (A&TSI) Convenors. This package has been endorsed by the Director, Youth Justice Conferencing and is to be used for recruitment of A&TSI convenors.⁹⁶

In 2010-11, Juvenile Justice NSW launched the *Aboriginal and Torres Strait Islander Recruitment and Retention Strategy 2011–2015*:

The strategy articulates the objectives and actions required by the agency to achieve successes in the recruitment, development and retention of Aboriginal and Torres Strait Islander staff.⁹⁷

As conference convenors are not 'staff', but independent contractors, they are unfortunately not addressed by this strategy.

We could only locate fleeting references to the recruitment and training of Indigenous people as convenors in the last decade of annual reports of Juvenile Justice. For example the 2007-08 Annual Report states:

Recruitment of convenors occurred during 2007-08 for Newcastle, Wollongong, Campbelltown, Blacktown East, Blacktown West, Surry Hills and Petersham. The department endeavours to recruit representatives from all aspects of the community,

⁹⁴ New South Wales Law Reform Commission, above n 4, [7.46] (footnotes omitted).

⁹⁵ New South Wales Law Reform Commission, above n 4, [7.47].

⁹⁶ New South Wales Department of Juvenile Justice, above n 46, [1-2].

⁹⁷ New South Wales Department of Attorney General and Justice – Juvenile Justice, *Annual Report 2010-2011* (2011) 272.

especially Aboriginal and culturally and linguistically diverse workers. The initial and ongoing training packages were revised this year.⁹⁸

Similarly, the 2008-09 Annual Report noted that:

Fifty new convenors were trained during the year. The department endeavours to recruit representatives from all aspects of the community, especially Aboriginal and Torres Strait Islanders and culturally and linguistically diverse people.⁹⁹

Other than the statement that the Department 'endeavours to recruit' Aboriginal convenors, there is no reference to *actually* recruiting any Indigenous convenors.

In fact the overall (Indigenous plus non-Indigenous) number of *active* convenors is not stated – only numbers trained. The 2010-11 Annual Report states:

Seventy participants completed a four-day conference convenor training program in 2009/10. Fifty of these trainees were eligible for appointment in metropolitan areas and 20 eligible for appointment in regional areas.

Although the NSW Law Reform Commission reported in 2005 that the Department states that 8 to 10 per cent of conference convenors are Indigenous¹⁰⁰, we have no way of verifying this figure. We also do not know whether this is the current figure of *active* Indigenous convenors, nor their gender and geographic distribution. There is simply no mention in the Annual Reports, nor on Juvenile Justice's website, nor in any other published source, so our only course of action would be to make a Freedom of Information application (which we were unable to do in time for the submission deadline). As NSW government departments are only required to report equal employment opportunity statistics for *staff*, we have no way of knowing the EEO make-up of convenors, whom are contractors to the Department.

Given that any positive Indigenous-specific achievement by a government department is likely to be made public because of the good publicity, we can reasonably conclude that if there were a significant number of Indigenous convenors appointed in this group it

⁹⁸ New South Wales Department of Juvenile Justice, *Annual Report 2007-2008* (2008) 74.

⁹⁹ New South Wales Department of Human Services – Juvenile Justice, *Annual Report 2008-2009* (2009) 35.

¹⁰⁰ New South Wales Law Reform Commission, above n 4, [7.47].

would have been published in the Annual Report.

Unless we are missing something here, there seems to be a rhetoric about 'endeavouring' to recruit Aboriginal and Torres Strait Islander convenors, but in reality, at least according to the annual reports, there appears to be no specific recruitment of Indigenous convenors. This is despite the fact that '[a]t any given time Aboriginal and Torres Strait Islander young people represent almost half of our client base'¹⁰¹ and 24 per cent of young offenders participating in conferences in 2010-11 were Aboriginal or Torres Strait Islander.¹⁰²

We cannot locate, in any of the annual reports of the last 10 years, mention of a specific Aboriginal and Torres Strait Islander convenor recruitment process.

This adds to our anecdotal evidence that, at least in the Indigenous communities to which Kelly belongs (in north coast NSW), conferences for Indigenous offenders are being convened by non-Indigenous convenors. As Kelly argued in 1999, cultural matching of Indigenous offenders with Indigenous convenors seems to be interpreted as 'whenever we can find the time and money'.¹⁰³

Perhaps funding has been the problem in the past. But consider the recent additional allocation of funds for conferencing. The Annual Report 2009-10 notes:

Planned initiatives

Juvenile Justice received an additional \$1.8 million recurrent funding for youth justice conferencing in the 2010/11 State Budget. This will provide additional resources and 13 new positions to improve the performance of youth justice conferencing by reducing the average time between referral and conference.¹⁰⁴

While this additional funding is to improve the performance of conferencing by

¹⁰¹ New South Wales Department of Attorney General and Justice – Juvenile Justice, *Annual Report 2010-2011* (2011) 150.

¹⁰² Ibid 151.

¹⁰³ Loretta Kelly and Elvina Oxley, 'A dingo in sheep's clothing? The rhetoric of Youth Justice Conferencing' (1999) 4(18) *Indigenous Law Bulletin* 4, 5.

¹⁰⁴ New South Wales Department of Human Services – Juvenile Justice, *Annual Report 2009-2010* (2010) 188.

‘reducing the average time between referral and conference’,¹⁰⁵ all of the requirements argued throughout this submission for culturally appropriate conferences will assist in meeting these timeframe goals.

When the next year’s additional funding becomes available (given that it is recurrent funding), we argue for a change in the policy and practice of conferencing to provide Indigenous juveniles and their families with access to culturally appropriate conferencing.

The focus of this submission has been on ensuring that Indigenous young offenders participate in culturally appropriate conferences. The elements that, we argue, must be met for cultural appropriateness, will have the added benefit of reducing the time between the referral to a convenor and the conference taking place.

We argue that a culturally appropriate service delivery model can ‘reduce the average time between referral and conference’. This is because the appointment of local Indigenous convenors for Indigenous offenders means that the convenors are more likely to either know the family (due to being a member of the Indigenous community), or who will know a person who can “vouch” for the convenor to the Indigenous offender’s family/kin. Having connections in the local Aboriginal community will enable the convenor to identify which Aboriginal elder would be appropriate to participate, given the particular family involved.

Preparation for the conference for the juvenile and his/her family will be more efficient if the participants trust¹⁰⁶ the practitioner (the convenor) and the practitioner has credibility¹⁰⁷ in the community. Furthermore, Indigenous practitioners are more likely to hold ‘authority and connectedness’¹⁰⁸, which enables the practitioner to be more effectiveness and efficient.

¹⁰⁵ Ibid.

¹⁰⁶ Kelly, above n 35, 221 and 203.

¹⁰⁷ Ibid.

¹⁰⁸ See Chris Honeyman, Bee Chen Goh and Loretta Kelly, ‘Skill is Not Enough: Seeking Connectedness and Authority in Mediation’ (2004) 20(4) *Negotiation Journal* 489.

If an Indigenous convenor is appointed, who is respected by the young offender and his/her family, the convenor will be able to invite, in consultation with the offender's family, the appropriate Aboriginal elder or another respected Aboriginal community member 'for the purpose of advising conference participants about relevant issues'¹⁰⁹, which will include advice on cultural matters.

There is no legislative or policy impediment for the Aboriginal elder to be involved in the initial stages of preparing the offender and his/her family for the conference.¹¹⁰ The involvement of an Aboriginal elder that, as we have argued above, is 'widely respected' for his/her 'fairness, reasonableness, honesty and wisdom' will hasten this aspect of the conferencing process. We appreciate that there can be considerable time delays in working with the victim to gain their confidence in attending the process. But if one aspect can become more efficient, then this can reduce the overall timeframe.

Kelly spoke to the Elders Council in Coffs Harbour, which covers the country of the Gumbaynggirr nation, who reported that they had not been consulted on youth justice conferencing over the last several years (according to their recollection). When Kelly asked them whether the 'person in charge of youth justice conferencing had come to see them recently', no one was able to identify who that person was. When Kelly prompted them by stating the person's name, the elders responded that this person had not attending their meetings for a 'long time'.¹¹¹

In speaking with members of another three elders councils¹¹² in the NSW north coast, it was rare for any member to be able to identify the Indigenous convenors from their community. This is despite statements in annual reports that one of the department's initiatives is 'working in partnership with Aboriginal communities'.¹¹³

¹⁰⁹ Section 47(2)(a) of the *Young Offenders Act 1997* (NSW).

¹¹⁰ The conference convenor prepares the participants for the conference in accordance with sections 45 and 48 of the *Young Offenders Act 1997* (NSW).

¹¹¹ General meeting of Garlambirla Guuyu-girrwa Aboriginal Elders Corporation (24 November 2011), Coffs Harbour.

¹¹² The submission deadline prevented Kelly from going through all the cultural protocols and obtaining informed consent from each of these three elders council in order to "go on record" in this submission.

¹¹³ New South Wales Department of Attorney General and Justice – Juvenile Justice, *Annual Report 2010-2011* (2011) 7.

So what are the reasons for not recruiting and training Aboriginal and Torres Strait Islander convenors? Again, we can only speculate.

While we can only speak anecdotally, we know from Kelly's community that it is typical practice for Aboriginal and Torres Strait Islander young offenders to be conferenced by non-Indigenous convenors. We argue that a research project should be undertaken to ascertain whether our anecdotal evidence does in fact reflect practice (and, indeed, whether cultural matching of offender with convenor does produce better outcomes).

As argued above, cultural safety is critical to practice with Indigenous people. The best way to ensure cultural safety practice is for an Indigenous young offender to be conferenced by an Indigenous conference convenor. Williams argues that, due to the many challenges facing non-Indigenous people with cultural safety:

The people most able or equipped to provide a culturally safe atmosphere are people from the same culture.¹¹⁴

Kelly's local Elders Council believe that:

Conference convenors must be Aboriginal or Torres Strait Islander if the juvenile is Aboriginal or Torres Strait Islander.¹¹⁵

Despite this commonly argued view of Indigenous people, and similar appreciation of this viewpoint by non-Indigenous people who understand cultural safety, it has been submitted by Barga that 'Aboriginal families have specifically requested a non-Aboriginal convenor that is accepted and respected by their community.'¹¹⁶

Barga does not explain the reasons behind the request, but she consequently argues that it is acceptable in such circumstances for non-Indigenous convenors to be appointed. Whatever the reasons are for the request, we submit that if there is a thoughtfully constituted Indigenous convenor panel – one that is broadly representative of families and factions in regions and contains Indigenous people from across the State

¹¹⁴ Williams, above n 42.

¹¹⁵ Unanimous oral submission to Loretta Kelly in relation to youth justice conferencing (24 November 2011) Garlambirla Guuyu-girrwa Aboriginal Elders Corporation, General Meeting, Coffs Harbour.

¹¹⁶ Barga, above n 93.

– an Indigenous convenor should be appointed from this panel.

Kelly has explored this issue previously in relation to Indigenous mediation. We believe that the explanation equally applies to conferencing.

Kelly has argued that there needs to be an open and honest dialogue between the Indigenous client and the practitioner or administrator to determine the reasons behind the Indigenous person's request for a non-Indigenous staff member to deal with their case.¹¹⁷ Kelly has argued previously that sometimes Indigenous people fear their confidentiality will not be respected by the local Indigenous practitioner who, they suspect, may gossip about their matter.¹¹⁸

During Kelly's 13 years of practice as a dispute resolution practitioner with Indigenous clients, in the cases when an Indigenous person or group has requested a non-Indigenous mediator, only rarely did they persist with that request after discussion with Kelly. Kelly discussed with them their reasons for this request, and addressed any concerns, such as assuring them that the practitioner must maintain the client's confidentiality or they will lose their job. , Kelly reports that, in relation to mediation of over 200 Indigenous disputes, only in two cases did the clients still desire a non-Indigenous practitioner – and that desire was respected by Kelly.¹¹⁹

We believe the same point applies to conference convenors. Moreover, what is required is an increase in the number of Aboriginal and Torres Strait Islander conference convenors, in order to be representative of the different family groups and factions that exist in Aboriginal communities.

Furthermore, Indigenous consultants need to be appointed to develop an Indigenous Conference Convenor Training Manual and to implement a culturally appropriate training program for Indigenous convenors. In our research for this submission, we could only locate a mainstream Conference Convenor Manual. We could not find, in any recent annual reports of the Department of Juvenile Justice, details on specific

¹¹⁷ Kelly, above n 35, 201-202.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

Indigenous recruitment nor the development of an Indigenous recruitment model, nor the existence of an Indigenous Conference Convenor Training Manual.

Sokol and McKeagg, in their paper in the 2010 Special Edition of the Human Rights Law Resource Centre Bulletin on NSW conferencing, argue that:

Recruitment, selection and training aims to work co-operatively with Indigenous community members and community people from non-English speaking backgrounds.¹²⁰

Such comments seem to support the NSW Law Reform Commission's 2005 report on young offenders in the section that deals with Indigenous juvenile offenders. The Commission noted that:

The YJCD has addressed these concerns [about insufficient Indigenous convenors] by recruiting convenors from specific cultural groups and training convenors to address specific cultural needs.¹²¹

What is required is evidence that now, more than 10 years later, the Directorate has Indigenous-specific policy on Indigenous recruitment of conference convenors with a training package that caters to the unique training needs of Indigenous people. The need to alter training for Indigenous participants is not a new concept, but is an essential component of any scheme's Indigenous service delivery model.

The persistence of issues considered as "women's business" and "men's business" (whether based on customary law or not) strongly suggests that it is necessary in some cases to appoint a convenor of the same gender as the offender. Our review of the 2005 *Youth Justice Conferencing Policy and Procedure Manual*¹²² for the purpose of this submission could find no reference to a policy of appointing the convenor to match the gender of the juvenile.

New Zealand research finds that there are differences between girls and boys in their experience of conferencing, in particular as to how they appreciate the experience of

¹²⁰ Sokol and McKeagg, above n 60.

¹²¹ New South Wales Law Reform Commission, above n 4, [7.47]. The footnoted reference for this statement is a 1999 journal article written by the Director of the Youth Justice Conferencing Directorate: Jenny Barga, 'Young offenders and the new options in youth justice' (1999) 37(10) *Law Society Journal* 54, 57.

¹²² New South Wales Department of Juvenile Justice, above n 46.

victims.¹²³

This NZ research found that:

over half the girls said that they felt too intimidated to say what they wanted to, although this was reported by only 40% of the boys; both these differences were significant.¹²⁴

This means that the conferences for more than half of female juveniles were not culturally safe; they were not provided with an environment of “true listening”.¹²⁵

We believe that such findings would be replicated in Australian Indigenous female young offenders. The NZ findings support our argument for the need to appoint a female Indigenous convenor where the juvenile offender is female.

Furthermore, the finding that 40 per cent of boys feel too intimidated to express themselves¹²⁶ suggests something very unsatisfactory is occurring in conferencing. It also provides some support for the concomitant argument that Indigenous male conference convenors should be appointed when an Indigenous juvenile offender is male.

This NZ research also found that:

about three-quarters of the young people reported understanding how the victim felt and seeing the victim’s point of view. Three-quarters of the boys said that they understood how the victim felt, but only half the girls reported this – a significant difference.

About three-fifths to two-thirds reported feeling really sorry for offending, showing that they felt sorry, and that they thought that the victim had accepted their apology. Boys were more likely to say these things than girls, although the differences were not significant. About 80% felt that they were able to make up for what they did and, again, these were more likely to be the boys, and this difference was significant.¹²⁷

¹²³ Gabrielle Maxwell and Venezia Kingi, ‘Differences in how girls and boys respond to family group conferences: Preliminary research results’ (2001) 17 *Social Policy Journal of New Zealand* 171 <www.ms.govt.nz/documents/about.../17_pages171_182.pdf> at 15 November 2011.

¹²⁴ Ibid 178.

¹²⁵ Williams, above n 42.

¹²⁶ Maxwell and Kingi, above n 123, 178.

¹²⁷ Ibid.

These findings show us that training specific to the gender of young offenders is required for conference convenors. Further research is required, but in the meantime training needs to be designed to assist girls, for instance, in feeling more confident to be 'able to make up for what they did'.¹²⁸

These NZ research findings make for a strong argument for convenors to have more gendered-specific knowledge, and well as race-gender knowledge in order to be able to conduct a culturally safe conference for Indigenous male and female offenders. Training is required so that the conferencing process does not intimidate Indigenous juvenile offenders and to ensure that their identity is respected and reflected in the process; they should feel that they can share their experiences by 'learning together with dignity, and truly listening.'¹²⁹

The cultural nuances in Indigenous communities cannot be taught in a few days of training session. A non-Indigenous convenor would have to have had many years' experience, both personal and professional, with the local Indigenous community before s/he could be considered being appointed in a conference involving an Indigenous juvenile offender.

Without this extensive lifelong personal and professional engagement with the local Indigenous community, how would a non-Indigenous convenor be able to practice in a culturally appropriate and culturally safe manner?¹³⁰

The *Youth Justice Conferencing Policy and Procedures Manual* provides for mandatory cross-cultural and Aboriginal training of administrators and convenors:

The following training should be mandatory for administrators and convenors:

¹²⁸ Ibid.

¹²⁹ Williams, above n 42.

¹³⁰ This gives rise to a particular issue that relates to the way in which the status of Aboriginal elders is acknowledged and the ways in which one addresses and converses with an Aboriginal elder. This is culturally and locally specific; a non-Indigenous convenor may need to undertake Indigenous specific cultural safety practice training, even with if they purport to have extensive personal and professional experience with the local Indigenous community. Such a person may be able to contribute to the training (as a participant) by explaining how they have attempted to overcome the challenges of cultural safety: see also Williams, above n 42.

- Module on cross-cultural Issues
- Cultural Issues and Aboriginal Young People¹³¹.

We are concerned that the “should” qualification may have led to a situation where the Youth Justice Conferencing Directorate does not hold such training. In reviewing the annual reports of NSW Juvenile Justice over the last 10 years,¹³² we could not locate a reference to training being conducted on “cultural issues and Aboriginal young people” in relation to youth justice conferencing.¹³³

The rhetoric of the Youth Justice Conferencing Directorate since its inception has been that ‘[p]articular efforts have been made to recruit convenors from Aboriginal and non-English speaking backgrounds.’¹³⁴ We would like to see more evidence of this in practice.

Nor, in our review of all Juvenile Justice Annual Reports since 2000, could we find any reference to an actual Indigenous specific convenor recruitment or training program being undertaken.¹³⁵

Recommendation 10

That where a young offender is Indigenous, an Indigenous conference convenor should be appointed. In addition, the gender of the young offender should be matched with the convenor’s gender where possible. Where an Indigenous young offender’s family does not wish to have an Indigenous convenor appointed, the conference administrator/manager should explain the benefits of having a convenor from the juvenile offender’s cultural and gender background. If the offender’s family nevertheless desires to have a non-Indigenous convenor, that request should be respected and a non-Indigenous convenor appointed, provided that s/he has undertaken the ‘Indigenous

¹³¹ New South Wales Department of Juvenile Justice, above n 46, [4-1].

¹³² From 2000-01 to 2010-11.

¹³³ We have tried our best to determine this, based on the annual reports, but will stand corrected if evidence of actual training is provided to the contrary.

¹³⁴ New South Wales Department of Juvenile Justice, *Annual Report 2000–2001* (2001) 8.

¹³⁵ A research assistant was appointed with the task of reviewing all annual reports of the Department of Juvenile Justice (as it was previously called) over the past decade, from 2000-2001 up to and including 2010-2011, to determine whether any Indigenous specific recruitment or training of Aboriginal convenors had taken place. This was the only reference that was found.

Cultural Safety Practice' training.

Recommendation 11

That Indigenous consultants be appointed to develop an Indigenous Conference Convenor Training Manual and develop a culturally appropriate training program for Indigenous convenors. This should be done in cooperation with the Youth Justice Conferencing Directorate.

Recommendation 12

That gender- and race-specific training be provided to all conference convenors based on the best research available, to ensure culturally safe practice that will take into account the different experiences of Indigenous male and female juveniles.

6. Indigenous-specific monitoring and evaluation

This section is a response to question 23 of the *Consultation Paper*, 'Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?'¹³⁶ Our response is limited to how monitoring relates to Indigenous people.

In order to provide both quantitative and qualitative data on the experiences of Indigenous juveniles who have attended a youth justice conference, ongoing monitoring, evaluation (which specifically includes "grass-roots" evaluation models) and research must be undertaken.

This is the only way to inform policies, and thereby practice, which will be culturally appropriate, culturally effective and culturally safe.

When Indigenous specific evaluation and research is undertaken, in a culturally effective Indigenous research environment, we can develop benchmarks for conferencing in order to satisfy the legislative amendment that we recommend (recommendation one). That is, section 34(1) should be amended as follows:

- (a) The principle that measures for dealing with children who are alleged to have committed offences are to be designed so as:
 - (v) to be culturally appropriate, ~~wherever possible~~, and

Indigenous-specific monitoring, evaluation and research are the keys to a conferencing scheme that is culturally appropriate for Indigenous juveniles, their families, the local community and local Aboriginal elders who need to be part of the scheme.

¹³⁶ New South Wales Department of Attorney General and Justice, above n 2, 32.

6. (a) Ongoing monitoring and review

Most legislative-based restorative justice programs have provisions for ongoing monitoring of the scheme.¹³⁷

The review of the Act, tabled in 2002, was constituted by ‘three components to the review of the Act, namely’:

- An interim report of a study by the University of New South Wales (UNSW);
- A re-offending study by the Bureau of Crime Statistics and Research (BOCSAR); and
- This report, which brings together the findings of the UNSW and BOCSAR studies and the issues raised by individuals and organisations in submissions received by the NSW Attorney General’s Department in relation to the review.¹³⁸

The Aboriginal and Torres Strait Islander Social Justice Commissioner holds the view that best practice Indigenous juvenile diversion must include independent monitoring of the scheme with a role for consultation with Indigenous communities and Indigenous organisations:

The diversionary scheme should provide for independent monitoring of the scheme, including the collection and analysis of statistical data. There should be a regular evaluation conducted of the effectiveness of the scheme. In reviewing options for diversion, there should be a role for consultation with Indigenous communities and organisations.¹³⁹

¹³⁷ It appears that section 76 of the *Young Offenders Act 1997* provides only for *initial*, and not ongoing, review:

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of commencement of this section.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

¹³⁸ New South Wales Attorney General’s Department, above n 86, 3.

¹³⁹ Human Rights and Equal Opportunity Commission of Australia – Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Issue 2: Specific issues relating to the administration of justice – Indigenous women; public order laws; mandatory sentencing schemes; and best practice for diversion of Indigenous juveniles’ (*Submission to the expert seminar on Indigenous peoples and the administration of justice*, Madrid,

We would add to this requirement that there must be a role for consultation with the local Indigenous elders for any scheme that operates within their traditional boundaries.

We note that the Council of Aboriginal Legal Services (COALS), which was the national representative body for Aboriginal Legal Services, made a submission to the 2002 review of the Act.¹⁴⁰ Indeed COALS seems to have had a lot to do with the recommendation that a customary law process be ‘investigated’ as per Recommendation 16 of the Review that:

The NSW Attorney General’s Department in consultation with the Department of Aboriginal Affairs, the Aboriginal Justice Advisory Council, the Department of Juvenile Justice, and other relevant agencies, investigate conferencing frameworks that incorporate customary law.¹⁴¹

While we have no particular criticism of COALS, the fact is that most local grass-roots Indigenous communities and organisations do not have the ability to write a submission to a review of legislation. This is not being paternalistic; it is an acknowledgment that those Indigenous community members who *do* possess the research and writing skills to facilitate a process for their “mob” (whether it be a family group or an organisation), are usually in too much demand to write a comprehensive review based on the myriad of issues that their mob would be presenting with.

As stated by the Aboriginal and Torres Strait Islander Social Justice Commissioner, any monitoring or review must provide for consultation with Indigenous communities and organisations.¹⁴² If a review is truly interested in the views of Indigenous communities and organisations, then there are two options that we suggest:

- 1) Use some of the review funds to appoint a policy advisor/s in grass-roots communities and organisations who will assist those communities or organisations to make a submission, if so approached. A policy advisor would need to be appointed

12-14 November 2003) <http://www.hreoc.gov.au/social_justice/madrid/issue2.html> at 15 November 2011.

¹⁴⁰ New South Wales Attorney General’s Department, above n 86, 57.

¹⁴¹ Ibid 7.

¹⁴² Human Rights and Equal Opportunity Commission of Australia, above n 139.

to assist the local Indigenous community or the organisation to put together a submission for the review of the Act that represented the concerns and experiences of Indigenous people, particularly those Indigenous families who have experienced warnings, cautions, or conferences under the Act.

- 2) Establish an Indigenous review panel that undertakes a consultation process with Indigenous communities. One model that we argue may be effective is the one used by NSW Aboriginal Education and Consultative Group, in their Indigenous community consultation on identity and Aboriginality. An Indigenous consulting firm with Indigenous research experts was appointed and a statewide community consultation process was undertaken. We are not arguing that this resulted in consulting *all* Aboriginal communities and organisations in NSW, but it is far better than the current model of a mainstream review process that invites community members, but which in practice excludes the very people who need to be consulted – given the desperate issues facing our juveniles and our over-representation in the criminal justice system.

The *Consultation Paper* notes that:

The YOA originally established a Youth Justice Advisory Committee (YJAC) that was responsible for advising the Attorney General and the then Attorney General's Department on the making of regulations, the preparation of guidelines for conferences, the selection criteria for, appointment of and training of conference convenors, the conduct of the statutory review of the YOA, the performance of monitoring and evaluation of the Act, and any other matter relevant to the administration of the conferencing Part of the Act, or any other provisions of the Act.¹⁴³

The YJAC was abolished in 2008.¹⁴⁴ We believe that it is essential that the YJAC be re-established. We recommend an amendment to re-establish the YJAC under the Act and to provide legislative authority in making recommendations that the Attorney General (AG) must consider; if the AG determines that the recommendations are not appropriate

¹⁴³ New South Wales Department of Attorney General and Justice, above n 2, 32.

¹⁴⁴ *Ibid.*

then there must be a requirement to provide a response to the YJAC as to why the AG is not adopting the recommendation.

Furthermore, a legislative-backed sub-committee of the YJAC should be established to advise on Indigenous policy regarding the culturally appropriate implementation of the Act. This sub-committee is to have Indigenous members only. The members must meet the three-part definition of Aboriginality as defined by section 4 of the *Aboriginal Land Rights Act 1983* (NSW). Any person wishing to become a member of the Indigenous Youth Justice Advisory Sub-committee must provide a confirmation of Aboriginality from a Local Aboriginal Land Council, a Native Title Body Corporate or a Indigenous corporation registered under the *Corporations (Aboriginal and Torres Strait Islander Act 2006* (Cth).

Recommendation 13

That the Youth Justice Advisory Committee, together with a sub-committee, the Indigenous Youth Justice Advisory Sub-Committee, be established by legislative amendment to the Act.

Recommendation 14

That, in any future monitoring or reviews of the *Young Offenders Act 1997*, the relevant department commit to a process to ensure that the review is informed by the views of grass-roots Aboriginal communities and grass-roots local Indigenous organisations.

6. (b) Indigenous-specific, culturally relevant and grassroots-level evaluation

In the 2002 *Review*, we note that respondents to the review were mostly peak bodies or departments responsible for Indigenous service delivery including:

- Aboriginal and Torres Strait Islander Commission
- Council of Aboriginal Legal Services
- NSW Department of Aboriginal Affairs¹⁴⁵

While it is essential that such peak bodies provide data on Indigenous people, it must be taken into account that these bodies are often criticised as not representing the views of “grassroots” Indigenous communities.

We believe that all Indigenous peak bodies should have a role in evaluating the effectiveness of programs for Indigenous people.

What is required is Indigenous-specific evaluation so that we can identify what are the current issues facing Indigenous juveniles attending conferencing, as well as the barriers preventing their families and community members from attending conferences.

The evaluation must consult with, and access data appropriately, the following:

- Staff members employed or involved in the program being evaluated
- Peak Indigenous representative bodies
- Indigenous government departments (and Indigenous sections within government departments)
- Indigenous organisations state-wide
- Grass-roots Indigenous communities, especially Indigenous people who have been dealt with under the Act or have accessed the program.

While such an approach may seem daunting, it is really the only robust way that we can state with accuracy that a certain issue, or that particular data, is representative of the Indigenous community.

¹⁴⁵ New South Wales Attorney General’s Department, above n 86, 57.

While it may be obvious to those who have been involved in evaluating Indigenous programs, we feel obliged to make it clear that the person or group undertaking the evaluation must include Indigenous researchers and have:

- demonstrated experience researching with Indigenous communities,
- understanding of restorative justice as it applies to Indigenous people, and
- understanding of the legislation and policy that informs the operation of Youth Justice Conferencing.

Until an Indigenous-specific, culturally-relevant and grass-roots evaluation is undertaken of Indigenous people and conferencing, we will experience the regurgitation of 'old data' about Indigenous participation in conferencing.

An evaluation program of the type suggested will provide evidence as to whether Bergen's claim of 'a high level' of Indigenous 'community participation' is a reality.

Employing Indigenous staff (even as managers of a scheme, together with a number of Indigenous community workers) is a typical bureaucratic response to the demand for Indigenous community participation. But as we have said above, in the language of restorative justice communities of concern are so much more than staff members of the program being from the local community.

What is required is an Indigenous-specific evaluation of conferencing to find out what works and what doesn't work for Indigenous juveniles who have attended conferences, what are the unique issues or barriers facing their families and what role Aboriginal community members have had with conferencing, and what roles they believe that they should have, especially as it relates to reintegrating the offender back into the community.

We need some baseline data, principles for best practice Indigenous service delivery, and processes in place for Indigenous community members and organisations to be involved at all levels of service design and delivery.¹⁴⁶ We need to undertake some solid research that asks "what does it really mean on a practical level for Indigenous community members to be involved in conferencing?" Of course this is just one aspect of

¹⁴⁶ Richards, Rosevear and Gilbert, above n 5.

research that needs to be done.

Part of this research project's objectives needs to be a full evaluation of the views of Indigenous young people who have attended a conference, including their views on the conference being facilitated by non-Indigenous convenors (if that is the case). This should generate some rich qualitative data, especially in relation to young Indigenous offenders' understanding of the concept and practice of "reintegrative shaming" (of course in language that is accessible to them).

This research could obtain first hand information on whether the principle under the Act for 'reintegration' (section 7) was actually achieved in practice for young offenders – were they reintegrated back into their community after the conference? Indigenous young people's views on participating in a customary law based process, and what this would look like in practice for them, would provide some solid principles for the implementation of the customary law juvenile diversionary pilot. Such research will provide critical insight into what really happens for Indigenous juveniles in conferencing and what they believe needs to happen in practice for conferencing to be culturally appropriate.

This qualitative research project, with a thematic interview approach adopted by the Indigenous researcher, and a research method that adheres to Indigenous research ethics, would be far more valuable than any 'satisfaction' survey. Indeed the conferencing evaluation and the use of satisfaction surveys have been appropriately criticised by Hayes and Daly. Hayes and Daly state that satisfaction is a 'notoriously fuzzy concept with varied referents for victims and offenders'.¹⁴⁷ In an Indigenous context, and particularly in an Indigenous juvenile context, mainstream evaluation surveys are even more likely to be 'fuzzy with varied referents'.

There are further problems with the questionnaire survey method, such as bias in

¹⁴⁷ Hennessey Hayes and Kathleen Daly, 'Youth justice conferencing and reoffending' (2003) 20(4) *Justice Quarterly* 725, 733 cited in New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005) [7.36] and following. We note that Hayes and Daly state that 'a recurring finding to emerge from the literature on conferencing (and restorative justice generally) is that there are generally high levels of satisfaction with the process and outcomes among victims and offenders': cited in New South Wales Law Reform Commission, above n 4, [7.36]. However, we question the appropriateness and cultural bias in such surveys and question these findings as they relate to the experience of Indigenous young offenders.

favour of the person distributing the survey. For example, Trimboli's 2000 evaluation of conferencing was partly based on a participant questionnaire, which was administered by the convenor:

At the conference, the convenor gave participants instructions regarding the research; encouraged their co-operation; handed each subject a pen and the appropriate questionnaire with a reply-paid envelope attached; and, collected, from each subject, the completed questionnaire sealed in its own envelope.¹⁴⁸

Edwards, Nebel and Heinrich identify some important methodological and epistemological problems in the use of questionnaire surveys in ethnopharmacology.¹⁴⁹ They argue that field-based social research:

is very dependent on, and sensitive to, micro-politics, i.e. researcher-collaborator relations. The act of formal surveying through use of questionnaires can alter the *status quo* by creating a perceived imbalance in power between researcher and interviewee. From the perspective of a questionnaire respondent, the formal survey makes them an 'object of study', rather than a colleague on an equal footing.¹⁵⁰

The authors also point out, in their case studies of experiences in ethnopharmacological field research in the Wik (Australia) Greacenic (Italy) and Mixe (Mexico) communities, that:

respondents did not comprehend readily what the questionnaires were ultimately for, and certainly in the Wik and Greacenic communities the forms provoked an antagonistic reaction due to their perceived association with officialdom.¹⁵¹

In the case of Trimboli's questionnaires, the association with officialdom (due to the central role of convenors in the research) may well have elicited the *contrary* reaction amongst offenders and their support people: compliance. That is, the reported high

¹⁴⁸ Lily Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (2000) NSW Bureau of Crime Statistics and Research, 21. The endnote to this quote states that, 'Convenors were requested to encourage subjects strongly to complete their questionnaires at the conclusion of conference proceedings before leaving the conference venue. However, some questionnaires were taken home by subjects, completed several days after the conference and then posted to the Bureau in the reply-paid envelope provided.'

¹⁴⁹ We believe that the conclusion reached by the authors in relation to field-based ethnopharmacological and ethnobotanical research applies to many other areas of social research.

¹⁵⁰ Sarah Edwards, Sabine Nebel and Michael Heinrich, 'Questionnaire surveys: Methodological and epistemological problems for field-based ethnopharmacologists' (2005) 100 *Journal of Ethnopharmacology* 30, 35.

¹⁵¹ *Ibid.*

levels of satisfaction with conferencing may have reflected the desire of offenders and their families to please the authorities in charge of their liberty. After all, the conclusion of a conference is not the end of the matter; the young offender must still satisfactorily complete the outcome plan.

Furthermore, the Trimboli evaluation had no term of reference regarding the unique experiences of Indigenous conference participants; therefore her evaluation is unable to provide insight into the particular issues facing Indigenous juveniles in their experience of the conferencing process. The only finding of the Trimboli evaluation as it relates to Indigenous offenders is that 'young offenders of Aboriginal or Torres Strait Islander origin are being successfully diverted from court to conferences.'¹⁵²

Victim/offender satisfaction surveys conducted thus far on youth justice conferencing have been via a mainstream survey data collection tool with all of the western biases that come with such a method. Edwards, Nebel and Heinrich conclude about the survey method:

Therefore, the question that should be asked before developing a questionnaire survey is: what does a questionnaire actually *mean* to a community? Does it represent officialdom to be resisted? Or is participating in a survey perceived as work that should be compensated, or an exchange with something expected in return?¹⁵³

We argue for the gathering of data from Indigenous juveniles using an Indigenous research methodology with a specific term of reference for Indigenous young people. We argue that Indigenous youth specific evaluation tools must be used to be able to demonstrate, with some accuracy, the satisfaction rates of Indigenous juvenile offender who have attended conferencing.

Recommendation 15

That a research project be undertaken to assess the experience of Indigenous juvenile offenders and their families who have attended conferences. This project should examine the barriers preventing Indigenous families attending conferences, and the role of the offender's local Indigenous community, including Aboriginal elders.

¹⁵² Trimboli, above n 148, 65.

¹⁵³ Edwards, Nebel and Heinrich, above n 150.

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