AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION INC

AUSTRALIAN MADE DISPUTE RESOLUTION

COMMUNITY OPTIONS FOR THE FUTURE

PROCEEDINGS OF THE NATIONAL CONFERENCE 1993

Edited by

ROBYN CLAREMONT

1993 CONFERENCE COMMITTEE

ROBYN CLAREMONT
PATRINA DUFFY
PATRICIA FRATER
DAVID ROLLINSON

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Australia

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Introduction

The impetus for ADRA's 1993 Conference arose from the same concerns which saw the inception of its Community and Environmental Divisions.

Dispute resolution in commercial and family areas has had considerable exposure in conferences and the media generally. It seemed timely to reconsider the role which community dispute resolution has played in the development and use of processes such as mediation on the Australian scene since the founding of the NSW Community Justice Centres in 1980.

Some uncertainty as to what defines community dispute resolution, and what it can - or ought to - deal with has arisen as dispute resolution practice has widened and new waves of practitioners appear on the scene.

It seems that there is a tendency to assume that community dispute resolution can be defined by its supposed subject matter: that it is the process which deals with neighbourhood matters - trees, fences, dogs and so on. The real definition of community dispute resolution, however, emphasises its location within the community, on its use of dispute resolvers who are drawn from the community in which they are to practise.

It is important here to take a wide view of the concept of 'community'. We all move in and range across a variety of communities, in which we live, or work, or socialise, or with whose interests and values we identify. We all have the potential to influence and affect these communities by our very participation in them. Conflict and change are features of communities, and effective dispute resolution skills and techniques are vital to ensure that communities are able to benefit from that conflict and change in a positive way. Dispute resolution processes which challenge societal assumptions open up the way for the conscious use of change. It is important that people with the will to do so are given the opportunity to develop the expertise to enable them to develop appropriate approaches to dispute resolution in those communities.

The 1993 Conference brought together a wide range of people drawn from many areas of the community who pointed to a varied use of dispute resolution options in broad community settings. These ranged across programs in schools, in public institutions, in retirement villages, in the workplace, in Aboriginal communities, in local government areas, in environmental issues, in changing family contexts.

A feature of the dispute resolution scene at present seems to be that there are increasing numbers of people whose interest in the field has led them to undertake training, usually in mediation, and who then find themselves without the opportunities they would like to practise these skills. I think it is likely that, even with the increasing development of court-annexed mediation programs, there will only ever be a limited use of what might be called 'pure' or 'classical' mediation.

On the other hand, however, in the light of the diversity of experience that the ADRA 1993 Conference brought to light, it may be that community dispute resolution, as widely defined, is the 'growth industry' of the dispute resolution scene. That is to say, more and more people will be encouraged to use mediation skills within their own communities to develop appropriate, culturally relevant dispute resolution programs.

This is not to say, of course, that we can happily pick up bits and pieces of processes, and smatterings of skills, and call them mediation. A number of speakers, notably Wendy Faulkes and Justice Stein, warned about the importance of developing standards of practice, and of testing programs against the philosophical imperatives of mediation.

It is important that in this evolution of community based dispute resolution there is a conscious eclecticism, a deliberate process of consultation and development, of testing and evaluation to ensure that what is developed is valid and valuable both in terms of the community's values and those of the chosen form of dispute resolution.

One of the most important attributes of a mediator is self-awareness and self-knowledge. This ability to analyse and to evaluate, to be aware of intention, is just as vital in program development and management.

The materials which form the Proceedings of this Conference are of several kinds. There are papers and presentations, there are reports of workshops, and in some instances there are also papers prepared for discussion at those workshops. Where the workshop report gives extra depth and includes outcomes of discussion, it has been published along with the paper itself.

ADRA wishes to thank all participants in this Conference for their readiness to share knowledge and experience, to examine new options, to be open to new ways of proceeding. To the speakers and workshop leaders we give particular thanks for so readily giving up time in their crowded schedules to make the Conference the success it was.

Without the work of the Conference Committee, the 1993 Conference would never have proceeded beyond the concept stage. The many hours of time which the Committee gave were rewarded by the attendance and enthusiastic participation of such a wide section of the community.

The Committee is indebted to Ms Judy Gillespie, of Focus Event and Meeting Management, for providing unfailingly effective administrative organisation for the Conference.

Robyn Claremont
ADRA President 1992-93

Tomorrow's Disputes:

Designing the Process to Meet the Times

Wendy Faulkes

Director, NSW Community Justice Centres

As we move towards the 21st Century, we are recognising more and more that we should be considering the needs of the next millenium.

It is no longer good enough to 'trust evolution and plan for the short term'. The world's environmental problems are a clear demonstration of the success of *that* policy.

As practitioners in what may still be considered 'an emerging profession' it would be easy to assume that we are all ready and willing to be in the vanguard of change - after all we have adopted and fought for this new and trendy thing called 'mediation'. *We* have argued with the traditionalists in the legal environment; we have won over a few, worn down a few. *We* have been the radicals, the ones calling for change, the ones taking up the challenge to do, to improve, to develop.

One might think then that in this area, change would come easily. Sadly, I see more of claiming 'ownership' of mediation, I see more people wanting to enclose it within rigid boundaries, than I do of fresh ideas. Consideration of the needs of service users - as *they* understand them - has been lost in the push to impose mediation schemes as a panacea to the problems of the world.

It is not unreasonable for a new profession or discipline to take some years to establish its principles and practice, and to articulate this. I believe mediation practice has developed well in this country and against tough opposition. But the stagnation and lack of creativity when it is only just a teenager worries me.

There are too many assumptions about 'what mediation is', and about its 'essentials'. On the other hand, there is a distressing tendency to call anything that involves settling disputes 'mediation'. Perhaps it is this which provokes the 'true believers' into over-zealous restrictions, and enthusiastic cloning of existing programmes.

Nowhere is this more evident than where professional service providers seek to extend service to minority groups and other cultures.

For most of our existence we (Community Justice Centres) have been under pressure to provide mediation services and mediation training to the Aboriginal community and to other cultural groups. The pressure comes sometimes from the groups themselves, or from politicians, sometimes from academics and others. The requests are often a response to crisis, on a 'do it now' basis, sometimes more pragmatically a response to the availability of money.

There is no doubt that many communities would benefit if they had available an alternative to the existing legal system that is so often alien and incomprehensible. However I question the morality, the common sense and the effectiveness of discarding one universally applied system (such as the present legal system) and replacing it with another imposed, system -

even though it might be a better one. Let me hasten to say that I'm not suggesting a 'do-nothing' option. Far from it!

What I am suggesting is that we have to do much, much more than take a system that we know is effective in one society, and transport it, maybe with some cosmetic changes to another culture. That the system to be transported may in fact be the most appropriate is not the issue.

At issue is the cultural imperialism that *assumes* it is, and the fantasy that what works here will work anywhere else. Surely by now we know enough about how and why disputes emerge and are resolved or not, to design programmes and processes that will model co-operative and creative problem solving not simply 'plonk' mediation into the community, without reference to the cultural needs of the service users and the requirements for human rights and natural justice.

We need to carefully identify the needs of the users and to establish an unbending commitment to adequate professional standards. We need to know the cultural and economic climate in which the programme will be operating. We need to understand clearly just what it is that we are proposing, and what all of the dispute resolution options are. It is only then that attention can be given to designing a process that is appropriate to

- the culture, or cultures
- the environment
- the times.

In 1980 CJCs adapted an American model to suit metropolitan NSW. The major adaptations were to ensure that it would be appropriate to the multi-cultural community in which it was operating, and would fit (or could co-exist) alongside the existing courts and legal structure. In the beginning it was a plain canvas - the decisions on whether it would provide mediation, conciliation or arbitration were not made until all options had been considered. Its design was appropriate to the culture, the environment and the times. Most later developments in Australia built on this success, some re-importing US models, especially those servicing the Family Courts and the commercial sector. I have seen little evidence though of a thorough understanding of the options and the differences between the processes - perhaps we succeeded too well, and everyone assumed mediation was the *only* way to go!

In 1991, a model for design of a culturally relevant ADR programme was developed. This was used initially to assist in the development of the WA Aboriginal Mediation Programme. Its usefulness has since been recognised in designing programmes within the framework of the courts. It has a much broader application, and can assist in programme design and process design, provided it is accompanied by careful attention to defining the essential requirements of the specific type of ADR programme proposed.

Designing an ADR programme for any strongly traditional culture - be that a formal court culture, or the Aboriginal culture, will raise many difficult issues and servicing inconsistencies. These become insoluble only if ignored. They need to be recognised and explored in detail if the proposed programme is to operate at an acceptable professional standard, and is to be relevant and sensitive to the culture in which it is to operate.

A mediation programme does not operate in a vacuum. (See Fig 1) It operates within a culture, or a mix of cultures and any one of these can place requirements or restrictions on the programme. Of course any programme may be designed without considering the 'culture' but it is unlikely to be either very effective or have a very long life.

This model was born out of the frustration of being expected to assist with inappropriate mediation proposals - or to repair them after an initial failure. (See Fig 2)

FIG 1

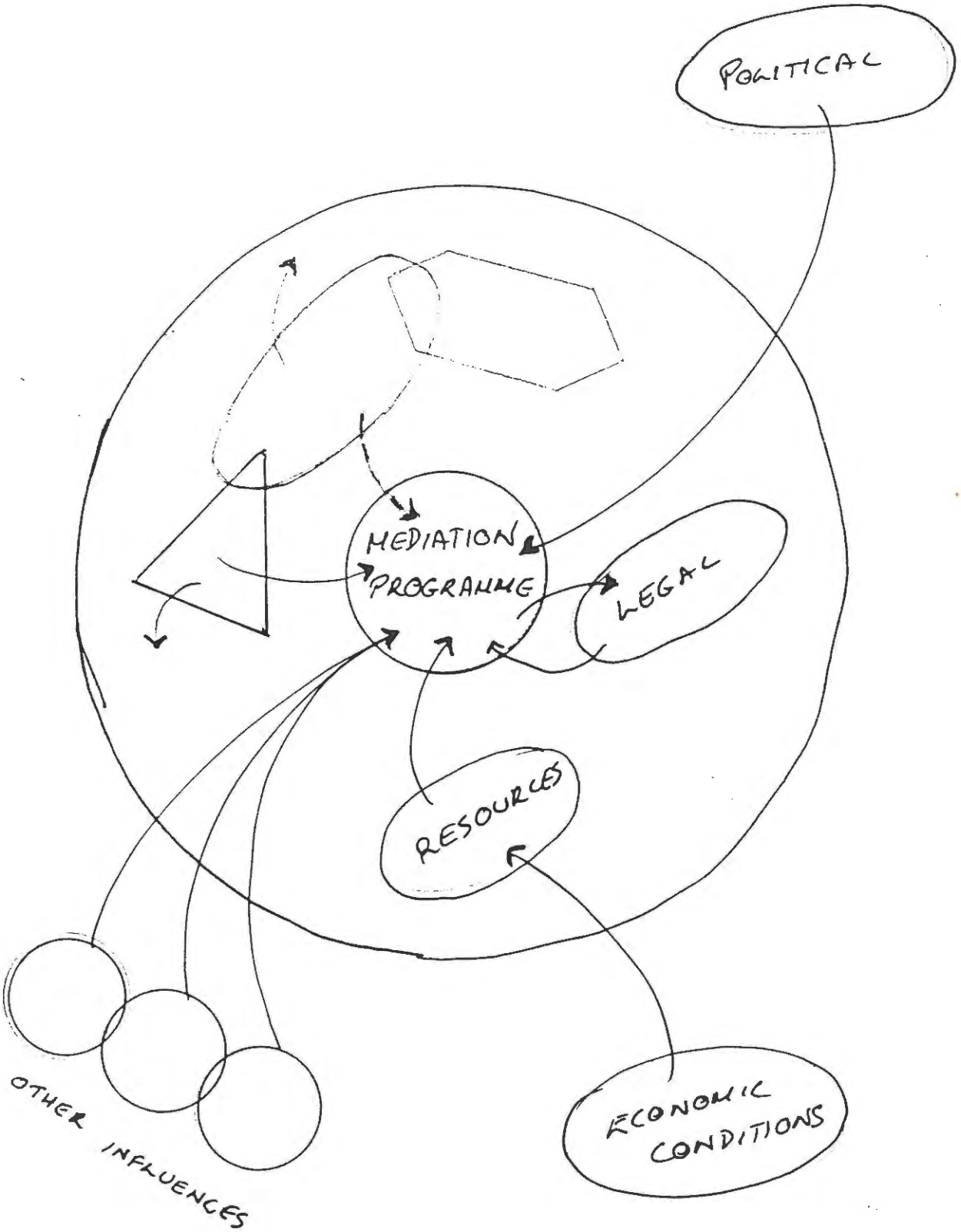
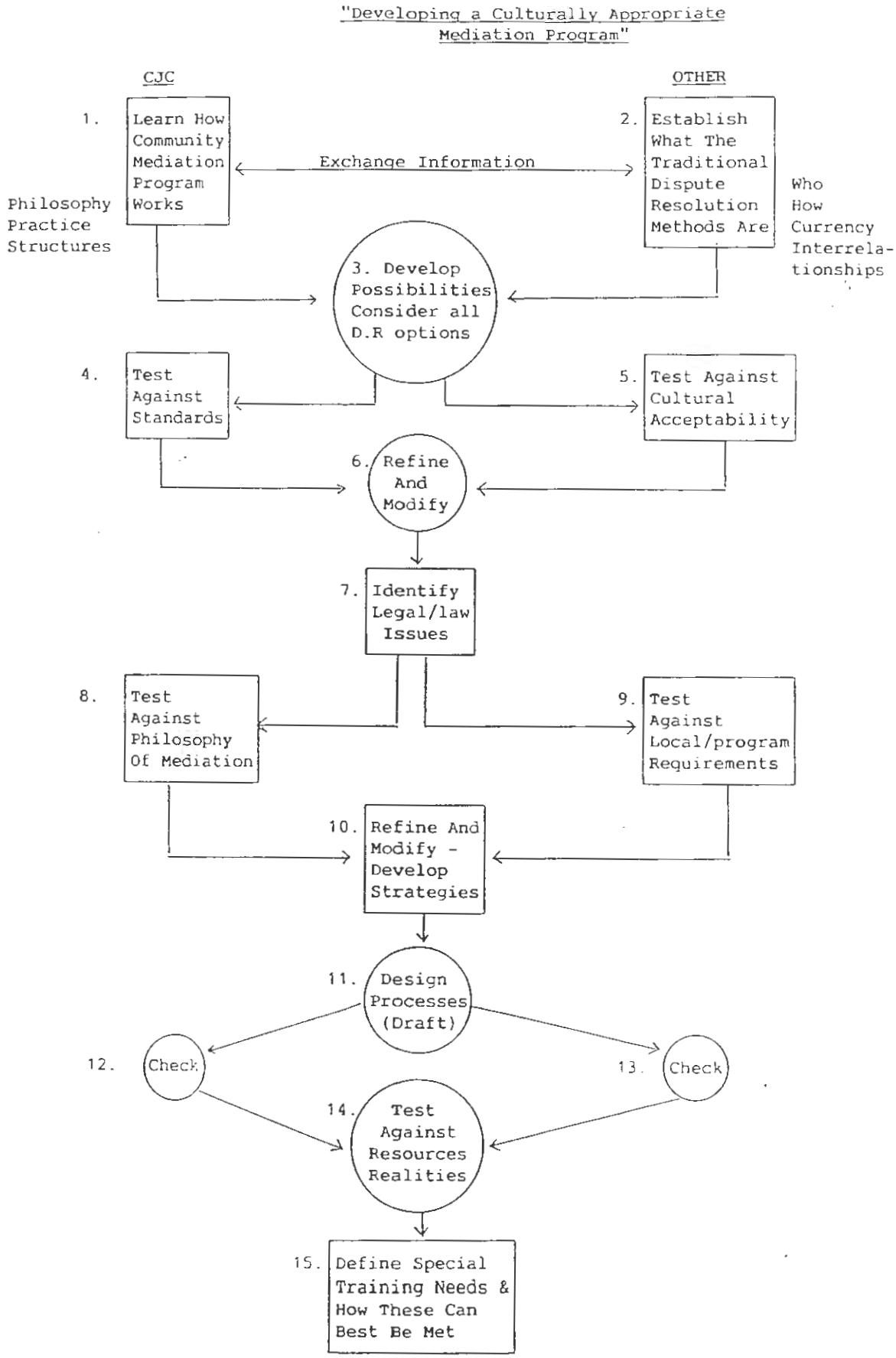

POLITICAL
MEDIATION PROGRAMME
LEGAL
RESOURCES
ECONOMIC CONDITIONS
OTHER INFLUENCES

FIG 2



Wendy Faulkes
Director CJCs

October 26, 1993

The first stage is one of the planners informing themselves about how a mediation programme works, and to establish the culture's traditional methods of dealing with disputes. We need to ask what the traditions of the culture will accommodate and whether part of the agenda for the programme is to promote some changes in the culture. After an information exchange it should be possible to develop the possibilities - at this stage neither rejecting nor accepting very much at all.

The next stage is to test these possibilities against the standards of mediation on one hand, and cultural acceptability on the other. This will lead to the ability to refine and modify the proposal.

By this stage many issues will be emerging and it is important that these issues and their relative importance be clarified. Any such issues, along with the refined proposal need to be tested again. Is it consistent with the philosophy of mediation? Or have we drifted away? On the other hand, there are likely to be requirements of the local community, or the sponsors of the programme (the Minister, perhaps, or the Department). Are these being met? Or is the refined proposal now in conflict with them? Does it undermine the rights won by a specific group?

This process will allow these issues to be fully explored and the proposal to be further modified if necessary. At each stage of modification the check - against mediation standards and philosophy on one hand, and cultural requirements on the other - needs to be completed.

Finally it will be possible to develop strategies, design the processes and test against the realities of resources, personnel, time and other constraints. The process of checking for acceptability at each stage should continue.

This model is intended as a 'skeleton' - a bare minimum really. Whilst impossible to depict in a two-dimensional chart it is misleading to consider only one culture - all of the cultures within our multi-cultural society co-exist within the dominant culture.

Overlaying the whole model is the most important question - 'Is it in the public interest?' Most of us would be unwilling to discard the hard-won rights - to equal access and opportunity, for example, or for consumer or environmental protection. This is not a question to be asked at the end, but should be an active consideration right from the start.

This model is not intended as a check-list of all the issues. It is to enhance the likelihood that all relevant issues will be considered, and a real attempt made to resolve the conflicts and inconsistencies which are inevitable. It is a framework to promote discussion, not a detailed formula.

Let me go back now to a more detailed consideration of the model, to 'flesh out' the skeleton a little. It is vitally important to understand the implications of

- operating a mediation programme and
- incorporating a mediation programme into a community.

I will assume that the 'design team' includes members of the 'other culture', and not dwell on this part of the process. The specifics of course differ according to the culture.

What is the philosophy of mediation? This philosophy includes such elements as:

(a) it is a neutral forum; it is non-judgmental - the mediators do not make decisions about who is right and who is wrong;

(b) it is self-determining; it does not impose a solution or settlement;

(c) it is an empowering process; it leaves the ownership of the dispute with the disputants. They are the only people who know all about the dispute and they are the ones who have to live with the consequences of its resolution or non-resolution; it assumes

they can and will make reasonable decisions for themselves, and that they have the right to do so.

(d) it is based on open and honest communication between the parties in dispute;

(e) it seeks co-operative solutions rather than an adversarial contest or resolution by superior power or force.

It is a common misconception that

- confidentiality and
- voluntary attendance

are essential to the philosophy of mediation. They are not. A mediation programme could be designed to provide for mandatory mediation, in public - it could still be legitimately termed 'mediation' - it may not be particularly effective in many circumstances, but this does not make it not 'mediation'. These two elements of confidentiality and voluntary attendance are, in effect, cultural factors and should be considered in the light of other cultural needs.

A *mediator*, however, must be

- impartial;
- non-judgmental;
- able and willing to leave the decision making to the parties;
- able to focus the attention of the parties on positive and co-operative outcomes.

Whenever the third party neutral begins to

- give advice;
- decide what the outcome should be and push the parties towards it;
- decide who is right and wrong, truthful or not;
- take sides, become an advocate;
- make decisions for the parties;

the process changes from one of mediation to any one of many other processes. This process may or may not be helpful to the parties but IT IS NOT MEDIATION. (See Attachment).

A 'generic mediation process' - i.e. one stripped to its bare bones - could be expected to include

- an (implied) agreement to mediate;
- a statement from each party, in the presence of the other;
- an identification of the issues;
- an orderly discussion on the issues;
- generation of options for settlement and/or future;
- negotiation of outcome.

This is a logical progression - but not strictly essential. It is the qualities and actions of the Third Party Neutral that make it mediation (or not):

- being non-judgmental
- being impartial
- leaving the decision making to the disputants
- focussing on positive and co-operative outcomes.

Before work can begin in earnest on 'developing possibilities', *all* dispute resolution options should be identified and considered. I would expect many to be quickly eliminated, but some should perhaps remain on the sidelines for a while.

ATTACHMENT

Dispute Resolution Process - Definitions

Adjudication:	Presence of a third party who has the authority to intervene in a dispute whether or not the principals want it, to make a decision and to enforce compliance with that decision.
Arbitration:	Both principals consent to the intervention of a third party whose judgment they must agree to accept beforehand.
Mediation:	Involves a third party who intervenes in a dispute to aid the parties in reaching an agreement. Both parties must agree to the intervention of a mediator, who can be appointed by an authority, or approached by the parties.
Conciliation	This may precede or form part of any ofthe other processes. In conciliation, a third party neutral acts to assist the parties by bringing them together, and/or transmitting offers between them
Dispute Counselling	This is a relatively unexplored and undeveloped process by which one party to a dispute is encouraged to develop methods and techniques which will enable direct negotiation with the other party. It is largely an educational function which encourages dispute resolution behaviour, and discourages disputing behaviour. It is a TPN process which can be delivered to both parties separately.
Conflict Management:	This is a third party neutral intervention which assists the parties to establishe adequate rules and structures for necessary communication even though the dispute continues and there is little or no goodwill between the parties. It may be necessary over a long period of time to enable sufficient trust to develop so that other negotiations may be successful.

ATTACHMENT (continued)

Independent Expert Appraisal: This refers to the appointment of an independent expert on the subject matter of the dispute who can appraise the technical issues in dispute, and can advise on the technical aspects of the case. An independent expert is appointed by the parties, or perhaps by the mediation agency at their request. This expert is a third party neutral with special technical expertise, and who may have a range of mediation skills. However, the process is one of providing information to the parties jointly, not advising them separately.

Early Neutral Evaluation: Like Independent Expert Appraisal, this is a Third Party Neutral intervention which will assess the arguments which will be put forward by both parties, and may advise on the probable outcome. Its use may be principally to create doubts in the minds of the parties that they have a "certain winner" on their hands.

Facilitated Settlement: Although similar in some aspects to mediation, this moves away from a mediation process when the facilitator adopts a role that involves diagnosis of the dispute, advice on possible outcomes (see ENE), or making substantive recommendations. This process may involve some investigatory functions, if the agency involved is responsible for compliance with certain statutes as well as resolution of the dispute (e.g ADB, HREOC, Ombudsman)

Issues Identification: Perhaps only the first phase of many facilitated settlement processes, this more-or-less relates to the procedures being adopted in some courts, in pre-trial conferences. Particularly in relation to these court processes, more work on specific definitions and appropriate terminology needs to be done.

Generation Of Options: This may also form part of many other dispute resolution processes (including mediation), but is mentioned separately because of its use in some workplace disputes, where it is often part of a training process. In these circumstances, the training process may have been implemented in order to resolve disruptive conflict, or the conflict may have come to the surface during the course of a training exercise.

WENDY FAULKES
DIRECTOR CJCs NSW

October 28, 1993

Much more work needs to be done on defining *other* ADR processes as clearly as we have defined mediation, as it is not until the processes are defined that standards can be articulated. Most of us are familiar with the old debates on terminology, so rather than re-visit this, I have appended to my paper a list for discussion.

I would like to re-visit briefly the US research on the emergence and transformation of disputes - as this gives us a chance to clarify the most appropriate process to fit the dispute. (See Fig 3) This chart illustrates the way that disputes typically emerge, and the role of the Third Party at each stage

The first stage in a dispute is an Unperceived Injurious Experience (UnPie) - where a person has an injurious experience, but because of lack of knowledge or understanding of rights and norms, does not perceive it as injurious.

Recognising that the experience is injurious is the 'naming' part of the process - which turns the UnPIE into a PIE. At this stage the injured person feels wronged and believes something can be done to remedy the wrong. Educating - on human rights, and legal rights - and a raising of expectations is necessary if the first stage of the transformation, the 'naming' stage is to be accomplished.

'Blaming' - attributing the injury to the fault of another person or social entity - transforms the PIE into a grievance. At this stage the injured person wants the person responsible to remedy the wrong. (At this stage also the terms become more recognisable.)

At the 'blaming' stage, grievance handling personnel might make the injured person aware of options, and act more as support and encouragement to seek a remedy. This role may include counselling, education or even investigation.

In 'claiming', the grievance is conveyed to the person believed to be responsible, and a remedy is asked for. At the 'claiming' stage where the experience is voiced to the other person, the third party role is more likely to be as a conciliator, or in some circumstances as an advocate.

The grievance is not transformed into a dispute until the 'claim' is rejected or delayed. The Third Party's role after the grievance is transformed into a dispute may be one of those we probably have less trouble defining - mediator, arbitrator or adjudicator.

This concept is useful in considering the purpose of a programme and the usefulness of a specific process. The time frame for this process may be years, or may be accomplished in seconds! Most programmes are probably conceived because of recognised cost and trauma of the end of the process.

To go back to the design model.....

Having considered the options and developed possibilities, the next step is to test against standards on one hand, and cultural acceptability on the other.

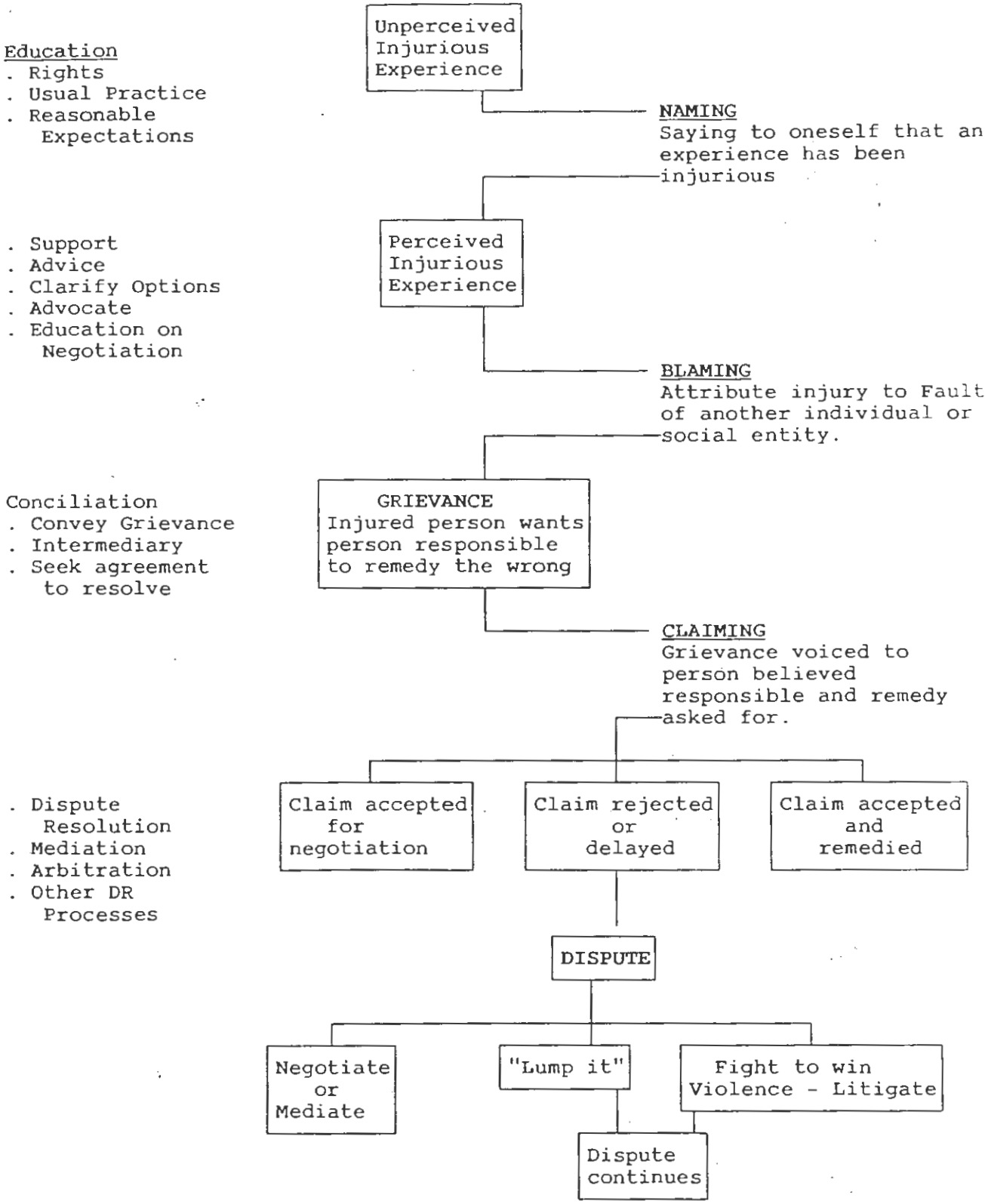
CJCs have led the way in Australia in developing acceptable (and achievable) standards of mediation practice.

Many people believe that they 'mediate' - some may even be effective in resolving conflict - or more often resolving problems. However, few are aware of the essential elements of mediation, and most are unlikely to be particularly skilled in their application.

To establish a mediation programme based on self assessment of abilities in tasks that have perhaps not even been articulated seems to be akin to a few people interested in first aid setting up a hospital, or, to put it in the context of the legal culture, a bunch of 'bush lawyers' and JPs opening a court.

FIG 3

EMERGENCE AND TRANSFORMATION OF DISPUTES



WENDY FAULKES CJCs, OCTOBER 1993

Based on "Emergence Transformation of Disputes: Naming, Blaming & Claiming". Abel, Sarat and Felstiner, 1982

Attention to appropriate standards and competencies in the field of mediation is every bit as important as ensuring legal (or any other professional) practice is of an acceptable standard. To do otherwise is to fail in our application of professional ethics.

'Mediation' may be seen as a 'soft option', but in many circumstances it is intervening in the lives of the disputants in a most significant way. 'Bad' mediation, where, for example, the mediator makes decisions, or even encourages parties to accept certain outcomes, can severely disadvantage a disputant, in just the same way that bad legal advice can. Where 'poor mediation' makes a dispute worse, or fails to assist the parties towards resolution (or at least understanding) of the dispute, the disputants can leave believing that nothing can be done to resolve it, leading in turn to acceptance of the status quo, depression or even a violent solution.

When testing against cultural acceptability, the issues will be as diverse as the cultures.

We could use our imagination to raise issues which could be important within certain cultural groups.

- Are females acceptable as mediators; is a segregated mediator panel acceptable?
- Do mediators have to be 'people of status' to be accepted?
- How important is anonymity?
- Do mediators have to subscribe to certain religious or political beliefs?
- Can the programme accept funds from Government?, from the Church? from Macdonalds?

After again refining and modifying the proposal, legal issues will be emerging. How will the proposed programme relate to existing systems?

The way these issues are determined may affect the cultural acceptability of the programme, especially if the 'other' culture is, for example, the Court. For example, in considering a court annexed scheme, it could be important to consider the following:-

- Will the agreements be legally enforceable?
- Can/should mediation be ordered by the Court?
- Can documents be subpoenaed?
- Can mediators report to the Court?
- Do mediators have to be lawyers to be acceptable to the Court?
- If an agreement is broken, what sanctions are appropriate?
- What will the Court do if the mediator/agency refuses the case? Can they in fact refuse, if it is ordered by the Court?
- Should people be given a second chance? A third, fourth, fifth?
- Should some types of disputes be specifically excluded?

This essentially consultative process of refining and modifying, and testing against often competing needs continues to the real test - that of resource allocation.

These are difficult economic times. In designing process to fit the times we would be foolish to fail to recognise the economic realities. Mediation in Australia has gained substantial acceptance simply *because* it is less expensive than the courts. This is a very dangerous argument to use, even though compelling to politicians and administrators. It is also misleading. Yes, mediation can be a less costly system than the Courts, but it doesn't come for free.

We should be arguing that mediation programmes are more appropriate for certain disputes, not just that they are cheaper and faster. It is, long term, a much more sustainable argument. To do this coherently we must be able to present a clear understanding of how

disputes emerge, and of the dispute resolution processes that may be appropriate at any given stage.

By consistently using a design model it should be easier for us to demonstrate that the eventual proposal has taken into account the needs of the culture, the sponsors (and funding agency) and the community in which it is to operate.

Diligent use of a design model will also make the work of implementation more efficient and effective. The specifics of the mediation process and training will fall quickly and painlessly into place, provided the programme design is consistent with the expressed philosophy.

A final question I would like to raise - and it is today a question which I don't intend to answer - relates to the *scope* of mediation programmes. In these days of increasing specialisation (some law firms even have ADR specialists!), should each programme be specialised, or can we be all things to all people?

The answer may seem simple enough in metropolitan Sydney, where four million people are in disputes of one kind or another. But what about in Moree? or Mudgee, or even Dubbo? This is where, to go back to the Process Design framework, the impact of reality and resources must be taken into account.

Often the first casualties in times of economic stringency are access and standards. There is no easy answer to the question of access in a country as big and as sparsely populated as Australia. It is up to us to look to technology to help us provide an accessible service, not right now, perhaps, but down the track a bit.

On the question of standards we can only look to ourselves. *We* must maintain our own standards and *we* must not sit by silently while mediation programmes are planned and implemented with little regard to standards - on the basis of 'it's cultural', 'it's traditional' and 'it's cheap'.

These are not enough.

Mediation might be able to change the world, but only if we can say

- 'It's cost effective';
- 'It works', and
- 'People use it'.

If we do it right we will be able to demonstrate that mediation can grow from cultural roots and, nourished by good practice and ever improving standards, it will bear fruit well beyond 2000.

Mediation in Aboriginal Communities:

Incorporating Community Development into Alternative Dispute Resolution Provision for Aboriginal People

Robin Thorne

Co-ordinator, Aboriginal Alternative Dispute Resolution Project, Western Australia

I appreciate the opportunity to speak to you on the developments that have taken place in the area of mediation/alternative dispute resolution, for the Aboriginal community, in Western Australia.

It needs to be understood that I speak about the AADR Project which was directed mainly at the Nyoongar cultural group of Aboriginal people, in the South West of WA. This is the area my people identify with.

The Aboriginal population in WA is made up of a number of cultural groups, the majority of which we have had neither the opportunity, or the resources, to discuss the relevance of these issues with local people. Those among you who understand the geographical problems which need to be taken into account in WA, can hopefully, understand why we haven't achieved this yet.

The task of creating an awareness among local Aboriginal people in WA, that this an area of expertise that can be adapted for application and acceptance within our community too, is one that has been very difficult, but also very rewarding.

I hope I can do that effort a service in the telling here today.

Some background information:

BACKGROUND

The Aboriginal Alternative Dispute Resolution Project (Project), was established in mid 1991 through the efforts of a number of Aboriginal community leaders, staff and members of the Special Government Committee on Aboriginal/Police and Community Relations (SGC).

The SGC was able to secure a funding grant of $90,000 for the AADRP through the Federal Government's 'Community Relations Strategy', sub section 'Mechanisms to mediate conflict, and to achieve systemic change', and along with an input of around $21,000 from the State, the Project became reality from mid 1991. A committee was formed, comprising representatives from relevant Aboriginal and Government agencies.

In October 1991, with the appointment of the Project Coordinator, the development of the AADRP began.

Forum

To place the Project in context, it must be acknowledged that the initial attempt to establish an ADR approach to resolving Aboriginal family feuds in W.A occurred in 1988, due to a number of Aboriginal community leaders in WA, pushing strongly for a non-violent means of dispute resolution for Nyoongar families affected by feuding, they have persisted for around fifteen years, since the late 1970's.

This first project was called the Aboriginal Initiatives and Support Forum (Forum), a project that was also created through co-operation between Aboriginal community leaders and the SGC, as a response to the level of feuding that was occurring in the Nyoongar community.

The Forum comprised a committee of prominent local Aboriginal people and with support from the SGC staff, was able to secure funding through the WA Aboriginal Affairs Planning Authority.

The committee appointed a full-time co-ordinator, Mr Andy Nebro, a prominent Nyoongar person and recognised community leader. Work began on attempting to resolve a number of those current feuds that I mentioned.

As the Co-ordinator was a person who was a recognised Aboriginal leader, the project traded much in the initial period, on the strength of his reputation. Much of the success achieved by him, with the assistance of the SGC Field Officer Mr Venis Collard, was due to their reputation for strength and neutrality. As both are ready to admit, those early days involved a lot of 'flying by the seat of their pants', due mainly to the fact that the supports that would normally be expected to be put in place to assist the development of such a program, in this case were sadly lacking.

No formal training was provided to build on the experience and skills of the Co-ordinator and the SGC field officer, and few resources were allocated to developing a model of mediation/conciliation or a training program for community mediators. As the host agency, the SGC filled in many of these gaping holes, through the sharing of staff and resources. The Forum was still responsible for resolving a number of high profile, very intense feuds.

This support from the SGC, is an aspect that has fortunately been provided to the AADRP also, and has meant the survival of this very important initiative for the Aboriginal community.

When funding support was withdrawn by the AAPA in 1990, the Forum effectively folded. The Project can rightfully be seen as continuing on the work the Forum began in 1988.

The Forum was responsible for establishing the concept of non-violent dispute resolution in the consciousness of the Nyoongar community in South West WA, and was successful, as I said, in resolving several high profile inter-family feuds.

The Aboriginal community response to the demise of the Forum was to continue to contact the SGC when seeking help for feuding problems. The same was true of many government agency staff who had previous assistance through the Forum. These people were seeking the kind of practical assistance they knew they were not likely to get from any other source.

Aboriginal leaders and the SGC saw no option but to respond to this continued demand, by creating a professional mediation/conciliation service, incorporating the supports so lacking in the Forum experience, and capable of providing the same level of service for the Aboriginal people of W.A., that would be demanded by the wider community.

Early AADRP Developments

As I indicated earlier, prior to the Forum, Aboriginal people of WA had little experience of established mediation services and practices. The early developmental work began prior to the appointment of the project Co-ordinator. The staff of the SGC established contact with the NSW Community Justice Centre. The CJC Director, Ms Wendy Faulkes showed a great deal of interest and support for the AADRP proposal, and offered to be an informal consultant to the Project. Through Wendy Faulkes and Mr Michael Ashford, formerly a Mediator with the NSW CJC and now living in WA, the SGC were able to gain access, not only to a good deal of relevant literature, but also to people with whom they could discuss problems, issues and concepts in a thorough manner.

One of the most useful outcomes from this early stage, was the drawing up of a fifteen stage flow chart for the AADRP model's development. This was provided by Wendy Faulkes, and has been most important in maintaining a sense of direction and progress for us all.

Mike Ashford assisted SGC staff in conducting three community workshops on ADR with Aboriginal leaders and other interested people. His interest has been ongoing, appreciated and free!

These workshops provided an opportunity to build on the work of the Forum by getting feedback from the Aboriginal community on how the concept of ADR fits with previous experiences and to identify issues, from an Aboriginal perspective, that might cause difficulties in the application of an ADR process to Aboriginal people's disputes.

These initial workshops were very important in showing local Aboriginal people, that the AADRP was something that could only develop into an Aboriginal appropriate service, if local Aboriginal people assisted in examining the concepts and then putting their thoughts and feelings forward, so the Project could be formed with those important considerations as an inbuilt part of the project, from the start.

This approach created a level of interest in the Project from this early stage that has been maintained with the Nyoongar community.

THE NATURE OF FEUDING

I feel it is necessary for me to give a clear picture of the area of disputation that the Project is aimed at resolving. This will help to provide a background to the adaptations and issues the project has had to incorporate, or overcome, in reaching the present stage of development.

Among Nyoongar people, the term feuding causes no offence or misunderstanding. When you go into the Aboriginal community in WA and mention feuding, people immediately know what you are talking about. Feuding refers to disputes between Aboriginal family groups, that nearly always end up in physical violence against people or property, or at least involve the threat and/or fear of violence.

Due to the dynamics of Aboriginal extended family relationships, there is always a high potential for rapid escalation of disputes, with the added concern that large numbers of people will become involved as retaliation and payback become issues for families.

The level of violence is often very serious, houses have been smashed, people have been hospitalised and maimed, and some have lost their lives. People are often frightened when they witness what seems to be a trivial incident, only to see the people concerned suddenly become involved in what seems to be a full-scale battle. The speed and intensity at which these incidents can develop, are frightening to people who have no background knowledge

of a dispute. Because there might be a history of feuding between the families involved, these sorts of incidents occur because long held grudges have been activated.

This scenario often happens when a family are angry at something another family might have done, and decide that payback must be taken out on them. So, while the incident or remark that triggers the violence may appear trivial, the meaning placed upon it can be quite substantial.

Payback

Payback attacks may be carried out immediately after an incident, or could take months before certain members of a family are able to get the people they want in the right circumstances.

Not being able to get at people who may be imprisoned by the justice system only adds to the families' frustration. therefore the intensity, when that payback is extracted, is much more severe than if some satisfaction could have been extracted at the time of the original incident.

It is a fallacy to assume that Aboriginal people who are affected by these things, should feel satisfied that because the person has been arrested, they should be happy to let 'Justice' take its course. Aboriginal people's experience of 'justice', is, in the main, a totally different one to that of non Aboriginal people.

Suffice to say in this forum, however, that even for a great many urbanised Aboriginal people in WA, there has to be an element of payback, undertaken by family members, before things can be properly settled in their hearts and minds.

Other Factors

A lot of feud related violence is alcohol affected. Feuders are more likely to take offence over trivial incidents and remarks when they have been drinking heavily. They are also more likely to attract the attention of the Police and the media.

Several qualifications should be made at this stage.

- Not all the incidents are trivial; some involve cases of serious spouse abuse, rape, and assault causing death.
- Not all feuding has a long history based on a vendetta model; some feuds begin with present day incidents that spark them off.
- Not all fights are underwritten with alcohol; feuding takes place in prisons, is carried on between students at schools, and can involve pre-meditated violence such as when one party mobilises its forces and sets out for a 'square up'.

A lot of feuding occurs during the summer and at night time, when people are more actively involved in outdoor activities. As a result of these activities people come in contact with each other more frequently than in winter.

This type of contact promotes the type of incidents and chance remarks that eventually leads to confrontation and fighting, especially at sporting events.

Outsiders

Families have also told us of the frustration they feel when they make their peace, only to have it stirred up by visiting friends and relatives. They often feel powerless because the outsiders will arrive looking for trouble. At other times, the sheer physical presence of large groups of people is provocation enough to start a fight.

Changing patterns

The pattern of feud-related fighting has changed over the past twenty years. It is generally accepted that up until about 1970, disputes were fought out between two people, on a one-to-one basis. Two men would have a fist fight and then have a drink together afterwards; if anyone joined in to make it two or more against one, an elder would intervene and ensure a fair contest.

Everyone present was a witness to the outcome, and families were shamed if a son or brother lost the fight but wouldn't let the matter rest.

A family was obliged to punish that family member for trying to stir things up again. That punishment was very often quite severe. I know of instances where certain members of my extended family, uncles, etc, were said to have been badly hurt, or hospitalised in these circumstances.

Modern Dynamics

Today the dynamics have changed. A member of one feuding family will often be caught alone and assaulted by a group from the opposing family. The victim will then gather a group of supporters and retaliate when one of the protagonists is caught alone.

Having an established pattern of behaviour can lead to people being attacked at venues they attend regularly, withdrawing money from ATM's, going to the DSS, the CES or attending courts.

In the old days, fights took place with fists, more or less under Queensberry rules. Today attacks may be made with knives, baseball bats, machetes and iron bars, with no holds barred.

The fear of accidental injury or death to children has increased enormously since the Project has begun working in this area. When you add to this the mobility of modern forms of transport, the potential for rapid escalation in the number of incidents, and the intensity of the violence is increased enormously.

As I am sure people at this forum well know, these modern factors are not confined to disputes between Aboriginal people.

Impact of Drugs on Feuds

A serious concern regularly expressed about a very worrying trend which has become evident in Aboriginal feuds, is that the number of drug related inter-family feuds seems to be on the increase. This is something that causes Aboriginal people much anxiety and one that many Aboriginal leaders hope will warrant closer attention, research and action by the authorities.

Micro-political Factors

The micro-politics of Aboriginal organisations is known to frequently exacerbate conflict between Aboriginal families. These organisations are growing in resources, influence and status. Aboriginal people often view the election of office bearers as power struggles between different families, rather than individuals.

When one family gains control, other people express their dissatisfaction over the spending of money and the allocation of other resources. This dissatisfaction leads to boycotts of the organisation's program which further entrenches the power of the incumbent family.

Added tension is created when questions arise about whether elections have been conducted within the spirit as well as the letter of the constitution.

Physical fighting between Aboriginal organisations may be unheard of, but the atmosphere created by the inter-family politics that gets played in them, is generally accepted as generating a climate of hostility which fosters feuding.

Systemic Factors

Feuding can also be regarded as an outcome of systemic factors. Much of the frustration, resentment and hostility associated with feuding can be directly seen as a response to the continued presence of institutionalised prejudice and discrimination against Aboriginal people in our society.

If I can quote from the Evaluation Report of the AADRP:

> "A detailed study of one feud in 1988 found that while the initial incident was a fight over the ownership of a women's sports uniform, the contributing factors included poorly maintained houses, overcrowding, poor drainage, unsanitary conditions, depressing surroundings, and unemployment.
>
> The hostility produced by these harsh material conditions became turned in on the Aboriginal people themselves because systemic discrimination disadvantaged some Aboriginal groups more than others; for example, some families were seen to be favoured by government agencies in terms of jobs and housing.
>
> Another type of structural factor was identified as playing a prominent role in feuding. Conflict among Aboriginal people occurs when the police respond to feuding in a way that is perceived to be unfair.
>
> A recurring theme during the interviews was that when police arrive at the scene of a dispute they, like anybody else, respond more positively to the party with whom they can most positively identify, and who sound the most reasonable.
>
> Articulate Aboriginals who know how the system works quickly realise this and manipulate the situation to their favour. That produces resentment within members of the disadvantaged party who feel they have no option but to redress the perceived injustice by resorting to physical violence." (CHADBOURNE 1992)

Cost Of Feuding

> "Members of the Forum carried out foundation work in documenting the costs of feuding upon families involved, the Nyoongar people as a whole, and the broader WA community.
>
> Their most detailed account shows how one feud affected nine government and Aboriginal agencies and led to:
>
> - ten people being charged;
> - extensive damages to houses, cars and government property;
> - physical, psychological and emotional injury to individuals;
> - damage to relationships within families, marriages and friendships;
> - an unknown number of people being imprisoned; damage to the status and reputation of the Aboriginal community;
> - and costs of up to $300,000.