

INDIGENOUS JUSTICE ALTERNATIVES

(A paper delivered by Judge Michael Forde to the Ecole Nationale de la Magistrature at Bordeaux on 26 September 2007)

Introduction

1. Bon jour. Merci d'occasion de vous parlez aujourd'hui. France and Australia have had a long and cordial relationship since the First World War , when tens of thousands Australian and French troops died to ensure the freedom of future generations such as our parents, our children and you and me. This bond has always existed between our countries. I hope that by being here today, that friendship is further confirmed.
2. The topic which I speak about today touches upon a minority group in Australian society, the Aborigines or indigenous. The indigenous settled in Australia some 40,000 years ago. The term indigenous will be used as it includes both Aborigines and Islanders who live near or on the mainland of Australia. Just as we have minority groups in Australia, so too does France. In recent times, there have been riots and extensive damage to persons and property in your country. It might be said that those involved are part of a minority group seeking to assert their rights. I do not want to express a view about the justification for those acts, except to say that developed countries such as Australia and France can do more to understand what causes such conduct and develop policies which can assist minority groups to fit into society more cohesively and to avoid being part of the criminal justice system.
3. To give you an example: In Queensland, where I come from, the indigenous form around 3.2% of the population and yet unfortunately make up 23.1% of the prison population. In other words, they are seven times more likely to be imprisoned

than their non-indigenous counterparts. The problems which they face are lack of education, high unemployment, third world living conditions in the more remote communities where they live, poor health facilities and drug and alcohol dependency. Do these problems also relate to the problems which minority groups or non-Europeans face in France? The ideal is to keep young offenders out of the prison system. Once they are part of that system the likelihood of repeat offending is as high as 70%. Therefore, the topics about which I would like to talk to you relate to alternative methods of dealing with criminal conduct.

Relevant laws

4. The United Nations has suggested some obligations which apply to signatory countries. The International Covenant on Civil and Political Rights provides that ‘all persons shall be equal before the courts and tribunals’. In June 2006 the Human Rights Council of the United Nations adopted the United Nations Declaration on the rights of Indigenous Peoples. It provided for measures which would ensure that ‘indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means’.
5. In the European Union, there are laws which are relevant to Human Rights of which you are probably aware of. The problem often is providing the means by which practical effect can be given to those laws, e.g. providing interpreters or timely legal advice. In Australia, the problem is exacerbated by the long distances which one has to travel. When I go on circuit to the remote indigenous communities in the north of the state, it takes some hours to fly from the city where I am based, Brisbane, to reach the communities.

Problems facing indigenous (For a more complete list see S. Bradley DCJ “Using Indigenous Justice Initiatives in Sentencing”, Judges Conference Perth, 20-24 January 2007 p 3. It can be found at : <http://jvl.courts.qld.gov.au/> and then go to Queensland Courts-Publications-Articles & speeches- District Court – Judge Bradley)

6. In a general sense, the following issues arise in the administration of justice and indigenous groups (for indigenous you might think in terms of minority groups in France):
 - a. Problems of communication amongst indigenous peoples, the police and the judiciary.
 - b. The lack of comprehension by indigenous of the process which they are facing.
 - c. The cultural differences facing indigenous and those interviewing them.
 - d. Problems of distances which make it difficult to get timely advice which is understood.
 - e. Health problems affecting indigenous which include alcohol and drug abuse.
 - f. A lack of understanding by lawyers, judicial officers and juries of the effect of customary law and cultural issues on indigenous offenders and witnesses.

7. One matter which is referred to by Judge Bradley is the recent change in the Commonwealth law which deletes reference to the 'cultural background' as a factor which a court must take into account in determining sentences. That will not affect state courts sentencing indigenous under state law. More enlightened states such as Western Australia have recently accepted a report from their Law Reform Commission which recommends the establishment of Aboriginal Courts and that cultural backgrounds be a relevant sentencing factor.(S. Bradley, *ibid.* p 1) I should had that in Queensland, in sentencing, the background of both white and indigenous are taken into account in sentencing. The deprived background of those indigenous who appear before the courts are given significant weighting by judicial officers who go to the remote communities.

Restorative Justice

8. In presenting this section, I am once again indebted to my colleague Judge Sarah Bradley from Cairns. Judge Bradley also goes on circuit to the remote communities in the Cape area which is north of Cairns. (S. Bradley DCJ “Applying Restorative Justice Principles in the Sentencing of Indigenous Offenders and Children”, A paper given at the Conference ‘Sentencing Principles, Perspective and Possibilities’, Canberra 10-12 February 2006)

9. What is restorative justice. Judge Bradley defines it as follows:

Restorative Justice involves an emphasis on reparation, rehabilitation and reconciliation rather than punishment, condemnation and retribution. It is about healing rather than hurting and usually involves some sort of community participation and involvement.(ibid p 1)

Restorative justice has some of the following features:

- an emphasis on what harm is done rather than the offence
- shows equal concern for both victims and offenders and their communities
- tries to work towards restoring victims, in relation to their needs.
- supports offenders and making them understand the impact of their behaviour.
- provides an opportunity for dialogue between victim and offender if it is appropriate.
- encourage collaboration and reintegration rather than coercion

10. The application of restorative justice is usually confined to the less serious offences dealt with in the lower courts in Australia which are the Magistrates Court. It is not in my view appropriate to some offences such as sex offences where the victim is likely to be upset with meeting the assailant. In Queensland, there are Disputes Resolution Centres available through the Justice Department.

In Australia, conferencing has more of a role to play in the juvenile justice system. This is an alternative to juvenile offenders being charged by police. There exist Youth Justice Conferences which can be used by way of a referral or prior to sentencing.

Indigenous or Murri Courts

11. These courts consist of a magistrate and Elders who play a part in consultation with the magistrate as to what the appropriate penalty should be. The courts have been established in several Australian States. The offender must be indigenous and must plead guilty before the court has jurisdiction to allow the involvement of Elders. Elders are usually well respected members of the particular community or tribe in the centre where the magistrate is sitting. The Elders can give advice to the magistrate or address the offender from the bench. Many youthful offenders are more shamed if dealt with by an Elder than by a European white magistrate.

Community Justice Groups

12. This is the area where I have had most involvement. The CJGs were established in the 1990's. This followed a move by the Queensland Government to encourage indigenous leaders to become more involved with law and justice issues within their communities. There are some 43 CJGs in Queensland. Legislation requires a court "to have regard to the submissions made by CJG members when sentencing an indigenous person. These submissions may include such factors as the offender's relationship with his or her community, cultural considerations and what rehabilitation programs are available in the particular community including drug counseling, alcohol management and assistance with issues concerning domestic violence.(M.Forde DCJ 'Indigenous Community Justice Groups in Queensland' a paper delivered to the Sino Australia Judicial Conference in Taiyuan, China, March 2006)
13. The CJGs are also involved with preventative programs within their communities. Unfortunately, there is insufficient training provided for the CJGs. Recent

- initiatives by the Federal Government in the Northern Territory are attempting to deal with these issues including sexual abuse of children. It is the first attempt by the Federal Government to be involved directly in funding and maintaining hard hitting programs. It is a holistic approach with regards to health issues as well.
14. The role of the CJGs in the court process can vary depending upon the ability of members of the CJGs to give of their time. Except for the co-ordinating person, the other members are volunteers. Therefore, it is difficult to maintain regular and ongoing commitment from members particularly those who live in the more remote communities. The CJGs attend court and can comment on the particular offender. Often the submissions made are vary candid and allow the court to be better informed than perhaps what the defence counsel might have said. However, there are various pressures from other members of their tribe or community which may make it difficult to contribute. This is particularly evident if members of their extended family or tribe appear before the court. A member of the CJG has to disclose any conflict of interest. The CJG are not required to suggest the appropriate penalty. It only advises the judge or magistrate about factors which may influence the court e.g. recent behaviour or employment or programmes which the offender is attending to avoid future problems. These might be community anger management programs or counseling for alcohol or drug abuse

Conclusions

15. It is hoped that by sharing these developments with you that you may see the relevance of these initiatives in your country. You may also have a different approach to that adopted in Australia to minority groups. There are alternatives to imprisonment particularly for youthful offenders. Maintaining law and order is one thing. A proper understanding of the reasons for the social disorder is one step towards maintaining law and order. Unemployment is often seen as a cause of criminal activity particularly for young and bored juveniles. We have high levels of employment in Australia at the moment. It does not mean that the high levels of imprisonment for indigenous has stopped. Better education is one

answer. Unfortunately, for judges and magistrates it is too late when an offender appears before the courts and a term of imprisonment is imposed. Once the offender is exposed to the criminal justice system the likelihood of recurring offending is predictable.