

Entertaining the Possibility of Using a  
Restorative Justice Response Regarding Adult  
Sexual Violence in Aboriginal and Torres Strait  
Islander Communities

Summary Report

prepared as part of the University of Melbourne  
Criminology and Sociology Internship Program in  
partnership with the Victorian Aboriginal Legal Service  
Co-operative Ltd October (2009)

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## **Executive Summary**

Sexual violence within Aboriginal and Torres Strait Islander communities has and continues to be enveloped in cultural assumptions, predicated on stereotypes, and reinforced by hegemonic discourse(s).<sup>1</sup> The notion that sexual violence is a strong component of Aboriginal and Torres Strait Islander culture, and is dismissed, entirely lacks validity (VALS: 2004). Sexual violence is frowned upon among persons of Aboriginal and Torres Strait Islander descent and certainly requires immediate attention.

Thomas (1993) explicates just how sexual violence is a problem in most communities; however, ‘Aboriginal women have identified a large number of issues which specifically relate to them in the area of sexual assault’ (p. 140).<sup>2</sup> Currently, the criminal justice system continues to uphold issues and barriers concerning race and sex and the profoundly negative impact these beliefs have on persons of Aboriginal and Torres Strait Islander descent (Thomas: 1993). Therefore, culturally appropriate alternatives for justice need to be recognized and legitimized. It is quite

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<sup>1</sup> Victorian Aboriginal Legal Service (2004) *Intervention in Sexual Assault and Domestic Violence Experienced by Indigenous Australians*, Victoria: Victorian Aboriginal Legal Service Co-op Ltd

<sup>2</sup> Thomas, C. (1993) ‘Sexual Assault: Issues for Aboriginal Women’, Aboriginal Women’s Policy Coordinator Office of Aboriginal Affairs, New South Wales

evident that a more familiar and/or culturally appropriate response should be considered for justice, rather than a reliance on the current oppressive regime.

Recently, more attention has been given to the possibility of a restorative response to more violent crime. Annan (2005) explains 'while that there are a few existing programs internationally which use restorative justice principles to address sexual violence, the concept is still considered quite new' (p.1).<sup>3</sup> Preconceived notions and/or stereotypes regarding both Aboriginal and Torres Strait Islander culture and the societal perceptions regarding restorative justice have impeded any genuine acknowledgement and/or progress towards embedding restorative justice (Strang & Braithwaite: 2002). Thomas (1993) has posited that a genuine sense of hostility remains highly prominent between non-Indigenous or conventional law practices and persons of Aboriginal and Torres Strait Islander descent (p. 140).

This research report wishes to accomplish a few objectives, hopefully, to better inform people regarding the complicated past and the concept of colonization concerning persons of Aboriginal and Torres Strait Islander descent.<sup>4</sup> Invariably, persons of Aboriginal and Torres Strait Islander descent encounter issues and/or barriers as it pertains to conventional law (Thomas: 1993).

The objectives of this research report/literature review are as follows:

- An examination of the harmful effects that colonization has had and continues to have on Aboriginal and Torres Strait Islander communities.

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<sup>4</sup> Thomas, C. (1993) 'Sexual Assault: Issues for Aboriginal Women', Aboriginal Women's Policy Coordinator Office of Aboriginal Affairs, New South Wales

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- An explanation of what restorative justice entails and why it should be considered regarding sexual offences.
- A comparative analysis of both the restorative and retributive models of justice, to clearly define the strengths and limitations in relation to achieving justice for people of Aboriginal and Torres Strait Islander descent.
- An investigation regarding the preconceived notions and/or stereotypes held by mainstream society concerning restorative justice and persons of Aboriginal and Torres Strait Islander descent that is perpetuated by hegemonic discourse.
- This report will provide illustrations of international programming, from Canada, United States, and Denmark to strengthen the position concerning the legitimacy of a restorative justice response regarding sexual violence.
- And a brief summation/findings/recommendations of the research report and what the future of criminal law and restorative justice may hold for persons of Aboriginal and Torres Strait Islander descent.

This is a detailed literature review and includes a plethora of research sources, which attempts to entertain the possibility of using restorative justice, of why a restorative justice response should be utilized concerning sexual violence within Aboriginal and Torres Strait Islander communities. This research report reveals just how the retributive model of justice is entirely culturally inappropriate to meet the needs of persons of Aboriginal and Torres Strait Islander descent. Furthermore, this report wishes to promote social justice for persons of Aboriginal and Torres Strait Islander descent by providing a more appropriate response concerning sexual

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violence. Ideally, a more appropriate response would be one that would promote empowerment and cultural identity, and above all, that Aboriginal and Torres Strait Islander culture is recognized and realized.

## **Introduction**

Keel (2004) advances the notion that sexual violence goes far and beyond Indigenous communities, ‘but unless it is more effectively dealt with, Aboriginal women and children will continue to be victims of sexual violence and communities will suffer’ (p1).<sup>5</sup> Currently, the criminal justice system amplifies the social injustices and/or barriers regarding persons of Aboriginal and Torres Strait Islander descent (Thomas: 1993). Sexual violence is perceived by persons of Aboriginal and Torres Strait Islander descent as a very serious problem and is not at all a part of their culture. Cultural assumptions and/or stereotypes only affirm negative perceptions of persons of Aboriginal and Torres Strait Islander descent.

This research report wishes to provide awareness and the necessary response to better deal with sexual violence within Aboriginal and Torres Strait Islander communities. Currently, the retributive model of justice is inadequate for handling criminal offences, specifically, sexual violence offences; however, both justice models should be used to achieve an ‘ultimate justice’. There are a myriad of reasons why the current retributive model of justice is incapable and/or deficient for handling sexual violence offences within Aboriginal and Torres Strait Islander communities. I define the current retributive model of justice as the Western legal system or conventional law.<sup>6</sup> Razack addresses the issue of systemic discrimination concerning

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<sup>5</sup> Thomas, C. (1993) ‘Sexual Assault: Issues for Aboriginal Women’, Aboriginal Women’s Policy Coordinator Office of Aboriginal Affairs, New South Wales

<sup>6</sup> Razack, S. (1998) Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms, Toronto: University of Toronto Press

race and gender which remain; therefore, justice may be difficult to obtain (Razack: 1998).

Moreover, this report will explore restorative justice, what it entails and why it should be considered for sexual violence within Aboriginal and Torres Strait Islander communities. Bluett-Boyd (2005) offers the claims made by supporters of restorative justice: 'it provides greater ground for self-determination practices, demonstrates a greater capacity to deal with the effects of colonization, better reflects an indigenous view of justice', and offers a more familiar alternative than the current model of justice (p.2). These claims are precisely why a restorative response should be considered regarding sexual violence in the Aboriginal and Torres Strait Islander community.

Furthermore, a comparative analysis examining the strengths and limitations of both restorative and retributive models of justice will be included; highlighting why restorative justice is a more appropriate response. Furthermore, a thorough examination of how the wide held cultural assumptions and/or stereotypes held by non-Indigenous Australians regarding persons of Aboriginal and Torres Strait Islander descent and restorative justice. They must be understood, denounced, and/or dispelled if any progress towards justice is to be achieved.

This research report will provide illustrations of restorative justice international programs relating to sexual violence from Canada, United States, and Denmark that will lend support to the idea that such programs could be implanted here in Australia as it relates to sexual violence. The research report will then conclude with a brief summation of findings and possible recommendations as we move further into the 21<sup>st</sup> century.

## **Background to the Issue: Effects of Colonization**

The harmful effects of colonization on persons of Aboriginal and Torres Strait Islander descent need to be understood if any significant inroads are to be made. LaRocque (1994) offers the notion that ‘colonization refers to that process of encroachment and subsequent subjugation of Aboriginal peoples since the arrival of Europeans’ (p.73). Invariably, morals, values, sacred traditions, and Aboriginal and Torres Strait Islander beliefs are regarded as contemptible or are perceived as insignificant by mainstream culture.<sup>7</sup> During colonization and the years proceeding it persons of Aboriginal and Torres Strait Islander descent have experienced absolute trauma, resulting in a sense of powerlessness and a loss of self-identity that has and continues to occur across Aboriginal and Torres Strait Islander communities across Australia (Dwyer: 2005). Dwyer (2005) explains how ‘following European settlement in 1788, law enforcement and judicial officers were instrumental in imposing a discriminatory system of punishment and regulation. Recent riots between police and members of the Aboriginal community in different locations around Australia are ample evidence that serious tensions remain’ (p.1).

Behrendt (2002) discusses the impact that colonization has had on Aboriginal and Torres Strait Islander communities concerning their families (p.178). Furthermore, she comments on the harmful effects that it may have on persons of Aboriginal and Torres Strait Islander descent that come into contact with the criminal justice system (p.178). LaRocque (1994) advances that ‘from the Aboriginal perspective, colonization refers to loss of lands, resources, and self-direction and to

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<sup>7</sup> Dwyer, P. (Year Unknown) ‘Sentencing Aboriginal Offenders: The Future of Indigenous Justice Models’ University of Sydney

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the severe disturbance of cultural ways and values' (p. 73). A restorative response would be much more appropriate, in that it would recognize Indigenous culture.

Blagg (2002) notes that 'the empowerment of Aboriginal women remains quite low, Indigenous women are at an extreme disadvantage due to the inherent gender and racial bias that exists within the criminal justice system' (p.197).<sup>8</sup> This may in fact explain why rape may go unreported in Aboriginal and Torres Strait Islander communities (Thomas: 1993).

Johnstone (2002) explains why persons of Aboriginal and Torres Strait Islander descent would 'wish to promote and share their own values and beliefs' (p.3). It concerns cultural identity and self-determination; it was an appropriation of culture, which was subjected to 'cultural genocide' (In conversation with Dr. Andrew Woolford). Cultural genocide is the notion of confiscating land, traditions, values, and beliefs by threat of force or by use of force. Persons of Aboriginal and Torres Strait Islander descent should not be denied their rights as Australian citizens.<sup>9</sup> Persons of Aboriginal and Torres Strait Islander descent should have access to advice, assistance, proper legal representation, and a criminal justice system that does not alienate, support, and encourage discrimination, but rather treats them with the respect and fairness that all Australians should enjoy (Victorian Aboriginal Legal Service: 2004). A multitude of discriminatory practices continue to pervade the criminal justice system.

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<sup>8</sup> Thomas, C. (1993) 'Sexual Assault: Issues for Aboriginal Women', Aboriginal Women's Policy Coordinator Office of Aboriginal Affairs, New South Wales

<sup>9</sup> Victorian Aboriginal Legal Service (2004) *Intervention in Sexual Assault and Domestic Violence Experienced by Indigenous Australians*, Victoria: Victorian Aboriginal Legal Service Co-op Ltd

<sup>10</sup> Racial and gender inequalities continue to thrive, neglecting the principle of equality (McGlade: 2006). Braithwaite (1996) comments on how ‘all western criminal justice systems are brutal, institutionally vengeful, and dishonest to their stated intentions’ (p.2). It begs the question, how can persons of Aboriginal and Torres Strait Islander descent continue to rely on a system that discriminates against them? Braithwaite (1996) goes on to explain that ‘restorative justice offers a solution’ (p. 2). Perhaps, a more familiar method of justice would be more culturally appropriate. Cox (2008) offers the notion concerning ‘the lack of education about sexual assault, and the compounding effects of colonization, contribute to the normalization and acceptance of violence in some contemporary Indigenous communities’ (p.2).

Perhaps, by providing literature that debunks and/or demystifies mainstream cultural assumptions regarding persons of Aboriginal and Torres Strait descent inroads could be made. Persons of Aboriginal and Torres Strait Islander descent do not condone, nor have they condoned sexual violence, it is not part of their culture. These assumptions must be extinguished if persons of Aboriginal and Torres Strait Islander descent are to receive equal and respectful treatment by law enforcement and the criminal justice system.

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<sup>10</sup> McGlade, H. (2006) ‘Aboriginal Women, Girls and Sexual Assault’, Australian Centre for the Study of Sexual Assault (ACSSA) Newsletter No. 12 09/2006

## **What is Restorative Justice?**

Roberts and Stalans (2004) explain that ‘within the past decade, restorative justice has emerged as a truly global phenomena’ (p.315). Restorative justice can be used in a myriad of areas due to its malleable qualities, tailored to meet the needs of everyone involved.<sup>11</sup> Restorative justice is often difficult to define because it often contains various types of programming (Stubbs: 2004). The Law Reform Committee (2009) offers the most widely accepted definition was offered by Tony Marshall of the United Kingdom Home Office: ‘Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’ (p.190).<sup>12</sup> Restorative justice practice is based on three key components:

- Crime is a violation of persons and of interpersonal relationships;
- Violations create obligations;
- The primary purpose is to put right the wrongs (Law Reform Committee: 2009).

Clearly, necessary changes and/or adjustments would have to be made if a restorative response to sexual violence is to be incorporated concerning persons of Aboriginal and Torres Strait Islander descent. Furthermore, what needs to be explicated is how conventional law is heralded by non-Indigenous Australians as the only genuine model of justice. Mainstream perceptions that only speak on behalf of

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<sup>11</sup> Stubbs, J. (2004) ‘Restorative Justice, Domestic Violence and Family Violence’ in Australian Domestic & Family Violence Clearinghouse, Issues Paper No. 9

<sup>12</sup> Law Reform Committee, Victorian Parliament Final Report, 2009, Inquiry into Alternative Dispute Resolution and Restorative Justice, Victoria

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persons of Aboriginal and Torres Strait Islander descent should be refrained from being used. Otherwise, this will only continue to silence those who desire to see change.

Some persons of Aboriginal and Torres Strait descent proposed a few possible amendments. Thomas (1993) stresses the need to review the effectiveness of the current retributive model, that persons of Aboriginal and Torres Strait Islander descent have felt alienated with the current system, and that the current system should be re-examined to ‘determine how best it can include the needs of Aboriginal women’ (p.143). Clearly, persons of Aboriginal and Torres Strait Islander descent wish to see changes regarding the current retributive model.

## **Why a Restorative Justice Response?**

Generally, the reason(s) for a restorative justice response relates back to the harmful effects of colonization.<sup>13</sup> Attempting justice in an unequal society rather complex; however, inequality continues to remain, especially, as it pertains to sexual violence within Aboriginal and Torres Strait Islander communities.<sup>14</sup> ‘Indigenous communities often show a willingness to engage with alternative forms of justice, born in part from critique of the damage wrought by conventional criminal justice, and many are keen to adopt restorative justice’ (Daly: 2006) Obviously, there is a desire by some for an alternative response regarding sexual violence. McLaughlin, Ferguson, Hughes, and Westmarland (2003) explicate just how ‘our experiences of restorative justice programs in Australia are that they have been quite successful in empowering women’s voices in the justice process’ (p.160).

Conventional criminal law continues to endure harsh criticism regarding issues around gender and race, and it is believed by many proponents of restorative justice that a restorative response would be more appropriate, especially as it relates to persons of Aboriginal and Torres Strait Islander descent. Hadley (2001) explains how ‘traditions, values, and beliefs differ considerably to those of the non-Indigenous

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<sup>13</sup> Daly, K. (2003) ‘Restorative Justice: The Real Story’ in McLaughlin, E., Ferguson, R., Hughes, G., Westmarland, L. (Eds) *Restorative Justice: Critical Issues*, London: Sage Publications in Association with the Open University Press

<sup>8</sup>Daly, K. (2006) ‘Feminist Engagement with Restorative Justice’ in *Theoretical Criminology Volume 10: 1-19*

<sup>9</sup>Hadley, M. (Ed) (2001) *The Spiritual Roots of Restorative Justice*, New York: State University of New York Press

peoples (p.61).<sup>15</sup> Further, Hadley discusses the various indigenous law practices prior to the arrival of the European settlers, they were never codified but they were strictly adhered to (Hadley: 2001).

Blagg (2002) reveals just how the ‘cultural and physical survival of Aboriginal people is dependent on self-determination’ (p.199). This certainly points to the fact that a solution lead by Aboriginal and Torres Strait Islander peoples needs to be considered. Persons of Aboriginal and Torres Strait Islander descent should be able to celebrate and/or recognize their own traditions, values, and/or beliefs. Koss and Achilles (2008) suggest that restorative justice can be quite useful concerning survivor’s validation, empowerment, and repair of harm and preventative of future sexual assault (p.1).

Moreover, Strang & Braithwaite (2002) address the social injustices such as race, gender, and class, ‘which are strongly evident within the conventional criminal justice system’ (p.64). All of the aforementioned reasons should be duly considered regarding the utilization of a restorative justice response to sexual violence within Aboriginal and Torres Strait Islander communities. Cox (2008) advances the notion that ‘within Indigenous cultures, the core values are spiritual, ecological, consensual, and communal’ (p. 4). Furthermore, persons of Aboriginal and Torres Strait Islander descent possess ‘core values that relate or are primarily focused on the wellbeing of the community and family’ (p.4). Differences in cultural morals and values need to be better understood and change needs to be immediate if persons of Aboriginal and Torres Strait Islander descent are to be recognized and legitimized.

## **Comparative Analysis: Restorative Justice vs.**

### **Retributive Justice**

It is only appropriate that a comparative analysis be included in this report to identify the strengths and limitations of both the retributive and restorative models of justice. Canadian Resource Centre for Victims of Crime (2001) provides the following list of principles comparing the focus of the retributive model with the restorative model (p.2).

<b>Retributive Method</b>	<b>Restorative Model</b>
<ul style="list-style-type: none"> <li>• Focus on establishing blame and guilt.</li> <li>• Stigma of crime permanent.</li> <li>• No encouragement for repentance and forgiveness.</li> <li>• Dependence upon proxy professionals.</li> <li>• Action directed from state to offender: Victim ignored-Offender passive.</li> <li>• Offender accountability defined as taking punishment.</li> <li>• Offence defined in purely legal terms- devoid of moral, social, economic, political dimensions.</li> <li>• “Debt” owed to state and society.</li> <li>• Response focused on offender’s past behavior.</li> <li>• Imposition of pain to punish and deter/prevent.</li> <li>• Conflict seen as individual vs. state- interpersonal, conflictual nature of crime obscured, repressed.</li> </ul>	<ul style="list-style-type: none"> <li>• Focus on problem solving, liabilities and obligations, focus on the future.</li> <li>• Stigma of crime removable.</li> <li>• Possibilities for repentance and forgiveness.</li> <li>• Direct involvement by participants.</li> <li>• Victim and offender’s roles recognized in both problem and solution: Victim rights/needs recognized; Offender encouraged to take responsibility.</li> <li>• Offender accountability defined as understanding impact of action and helping decide how to make things right.</li> <li>• Offence understood in whole context- moral, social, economical, political.</li> <li>• Debts/liability to victim</li> </ul>

<ul style="list-style-type: none"> <li>• Community represented abstractly by the state.</li> </ul>	<p>recognized.</p> <ul style="list-style-type: none"> <li>• Response focused on harmful consequences of offender’s behavior.</li> <li>• Restitution as a means of restoring both parties; reconciliation /restoration as a goal.</li> <li>• Crime recognized as interpersonal conflict.</li> <li>• Community as facilitator.</li> </ul>
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Clearly, the restorative approach is much more culturally appropriate, and more culturally sensitive in handling cases of sexual violence within Aboriginal and Torres Strait Islander communities compared to that of the retributive model. Invariably, conventional law leaves offenders and survivors out of the system, not permitting the dialogue that restorative justice offers. Further, conventional law recognizes the harm against society not at the individual and community levels. Moreover, the stigma of the offender remains which is extremely difficult to

overcome and almost paralyzes, resulting in a diminished self-confidence and self-worth.

What restorative justice aims to do is provide meaningful dialogue between the offender, survivor, and the community and/or family members, ultimately all parties are part of the justice process. The expression that, “tell me and I will forget, show me and I may remember, involve me and I will understand” explains that an all inclusive approach like restorative justice should be considered (VALS, 2009). Furthermore, restorative justice recognizes the harm done to all parties, not just wider society and it assists in combating against the social stigma that result from violent crime; that it is in fact removable. The idea that persons of Aboriginal and Torres Strait descent relate and understand holistic approaches as opposed to authoritative patriarchal law. Possibly, the restorative justice model should be entertained prior to proceeding to use a retributive response to sexual violence due to the overwhelming benefits it provides.

## **Cultural Assumptions and/or Stereotypes**

There are innumerable cultural assumptions and/or stereotypes regarding restorative justice that requires immediate attention.<sup>16</sup> Regrettably, restorative justice has come under intense scrutiny, especially, as it pertains to more violent crime (Strang & Braithwaite: 2002). However, these myths often have very little or no merit. It is extremely important to dispel of these myths and to have restorative justice recognized as a very likely alternative regarding sexual violence within Aboriginal and Torres Strait Islander communities.

### **Myth #1<sup>17</sup> Restorative justice is the opposite of retributive justice (Daly: 2001)**

This is grossly inaccurate; both models of justice do not work in isolation of each other, rather both models of justice should certainly work together to serve justice for both Aboriginal and Torres Strait Islander descent and non-Indigenous Australians; although, a restorative response should be used prior to relying on the retributive model for persons of Aboriginal and Torres Strait descent. Daly (2001) suggests that ‘advocates seem to assume that an ideal justice system should be of one type only, that it should be pure and not contaminated by or mixed with others’ (p.197). Regrettably, this notion is shared by the dominant group.

### **Myth # 2 Restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice (Daly: 2001).**

Daly (2001) explicates that ‘restorative justice is not necessarily an aspect of Indigenous culture; however, restorative justice relates much better to their culture’

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<sup>16</sup> Strang, H., Braithwaite, J. (Eds) (2002) Restorative Justice and Family Violence, Cambridge: Cambridge University Press

(p.201). It is a much more familiar and culturally appropriate alternative as opposed to the retributive model. Furthermore, it is more understood by persons of Aboriginal and Torres Strait Islander descent, being a more familiar way to restore past harms than to incarcerate. Daly (2001) advances that conferencing is better understood as a ‘fragmented justice form: it splices white, bureaucratic forms of justice with elements of informal justice that may include non-white (or non-western) values or methods of judgment, with all the attendant dangers of such ‘spliced justice’’ (p.202). Further, restorative justice tends to be gendered.

**Myth # 3 Restorative justice is a ‘care’ (or feminine) response to crime in comparison to a ‘justice’ (or masculine) response (Daly: 2001).**

Terms linked to restorative and retributive justice:

<b>Restorative Justice</b>	<b>Retributive Justice</b>
Pre-modern	Modern
Indigenous (informal)	State (formal)
Feminine (care)	Masculine (justice)
Eastern (Japan)	Western (US)
Superior justice	Inferior justice

The above lists illustrate why the two models would be perceived as being in opposition to each other.<sup>18</sup> The retributive model (masculine) demonstrates a more formal, hierarchal structure of law. The restorative model (feminine) demonstrates a more informal, egalitarian structure of law (Daly: 2003). Daly (1999) explains how restorative justice principles and practices can be extremely beneficial concerning

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<sup>18</sup> Daly, K. (2003) ‘Restorative Justice: The Real Story’ in McLaughlin, E., Ferguson, R., Hughes, G., Westmarland, L. (Eds) *Restorative Justice: Critical Issues*, London: Sage Publications in Association with the Open University Press

‘cultural sensitivities and to addressing relations of inequality’ (p.22). What needs to be understood is that both models have their strengths and limitations, although, the models are indeed very different, one model should not be heralded as superior or inferior. The first thing that needs to be understood is that there is space for both models. Daly (2001) suggests that restorative justice has indigenous roots is to just reinforce “a white-centered view of the world” (p.202). Restorative justice practices are often perceived to possess an indigenous quality, but that is simply another cultural assumption that must be denounced.

**Myth # 4 Restorative justice can be expected to produce major changes in people (Daly: 2001).**

There is no one model that will solve every problem, which is not what’s being advanced. However, retributive justice may be foreign to some populations, specifically, persons of Aboriginal and Torres Strait Islander descent. Other alternatives need to be considered, what cannot occur are generalizations regarding the success stories of restorative justice. Daly (2001) explains that while ‘personal and social transformation ‘undoubtedly occurs at some of the time, and is likely to be rare in a courtroom proceeding, advocates lead us to think that it is accomplished by telling a moving story, which is then used to stand as a generalization’ (p.204). Daly is referring to the idea that no one solution will be entirely effective, that there will invariably be a need for improvements. Restorative justice cannot be perceived as being the absolute best and/or successful at handling violent crime. To reiterate, there is no one justice model that will provide all the answers, however, options are often favorable.

**Myth # 5 Cultural assumptions and/or stereotypes exist concerning persons of Aboriginal and Torres Strait Islander descent.**

Cultural assumptions and/or stereotypes exist concerning Aboriginal and Torres Strait Islander descent. A wide held belief is that sexual violence is a part of their culture. Razack (1998) advances the concept of *culturalization*, ‘in cases of sexual violence involving Aboriginal women and immigrant women, the contexts of both the victims of violence and their attackers are often culturalized, that is, understood as cultural and frozen in time, rather than as dynamic, historical, and social’ (p.4). Hegemonic discourse and/or conventional law continue to be extremely harmful regarding persons of Aboriginal and Torres Strait Islander descent. Wide held beliefs and/or misconceptions of persons of Aboriginal and Torres Strait Islander descent need to be denounced and/or demystified if any legitimate progress is to be made.

## **Restorative Justice: International Programming**

There are a few programs that rely on a restorative justice response regarding sexual violence offences that currently exist across the world. Canada, United States, and Denmark all have a couple of programs that have been tailored to meet the needs of survivors of sexual violence relying on a restorative justice response, although, this is certainly not an exhaustive list.

### **Fraser Region Community Justice Initiatives Association**

This particular program offers a selection of restorative approaches regarding sexual violence. A couple of restorative responses may include Victim Offender Mediation (VOMP) and Victim Offender Reconciliation (VORP). These programs operate in unison with the conventional system of justice. Both programs operate at the post-incarceration stage; however, are designed to assist in the recovery of both the survivor and the offender (Fraser Region Community Justice Initiatives Association: 1985). The purpose of the Victim Offender Mediation Program is to assist people affected by serious crimes by:

- Empowering them to address issues and concerns surrounding the crime and its consequences;
- Providing the parties with a process which can lead to new insight, thereby reducing levels of anxiety, and contributing to therapeutic gains;
- Addressing questions and concerns regarding the offender's eventual release into the community;
- Providing sensitive staffs that are committed to being agents of healing and restoration for those who suffer crime's effects (Fraser Region Community Justice Initiatives Association: 1985).

Further, there is a rather elaborate program that exists in the United States, in the state of Arizona that handles sexual violence cases.

**Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience (RESTORE)**

The University of Arizona (2003) advocates that the RESTORE program provides an ‘alternative to conventional justice for both Survivors of sexual assault and the Responsible Persons who commit such crimes’ (p.1). This program is offered at the post-offence stage. There is a selective screening process in place; therefore, the offenders must meet standard eligibility requirements.<sup>19</sup> The participants must be 18 years of age, the crime must have been reported to police, and the Pima County Attorney’s Office or Tucson City Attorney’s Office decides if a case is eligible for RESTORE (University of Arizona: 2003).

RESTORE provides the opportunity for dialogue, regarding what occurred and a plan of action to assist in ‘remorse and acceptance of responsibility’ (University of Arizona: 2003). The understanding is that survivors of the sexual offence(s) do not have to share what precisely occurred; this would be considered as a safe guard concerning revictimization. The University of Arizona (2003) ultimately, claims that ‘survivors avoid conventional justice’s sometimes destructive adversarial process that can lead to blaming the survivors.

Obviously, precautionary measures are in place for safety purposes and there are a myriad of strengths related to RESTORE:

- Involves family and friends in the healing process;

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<sup>19</sup> Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience (RESTORE) University of Arizona. (2003) ‘Restorative Justice for Sex Offences’ Retrieved June 26, 2009 from <http://www.restoreprogram.publichealth.arizona.edu>

- Allows the survivor to control his or her level of participation in the process;
- Offers a faster resolution than the conventional justice system;
- Offenders take full responsibility for their actions (University of Arizona: 2003).

Another program that has been designed to meet the needs of survivors of sexual violence currently exists in Denmark. What should be duly noted, that it was not the idea of the Centre for sexual assault for implementing this program. Sten Madsen (2006) puts it quite eloquently, 'It came to us from those women who were brave enough to show us that there are new paths to tread. Even when the crime is rape' (p.3). Again, the desire for change has been recognized but needs to be realized.

### **Centre for Sexual Assault in Copenhagen**

The Centre for Sexual Assault provides an array of services for women who have been victims of sexual violence, specifically; the centre offers victim-offender mediation. However, these programs operate without having to report sexual violence to law enforcement. The previous two programs are at the post-incarceration and post-offence stages; however, this particular program allows survivors and their offenders to sit face to face and allows for meaningful dialogue.

Ultimately, Madsen (2006) stresses that 'not only are these women contradicting preconceived notions about crime victims' attitudes; they are also challenging our ideas about how to relate to the people who commit the crimes' (p.1).<sup>20</sup> The Centre for Sexual Assault assures the following:

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<sup>20</sup> Madsen, K. (2006) 'How Could You Do This to Me', Retrieved September 18, 2009 from <http://www.restorativejustice.org/editions/2006/july06/denmark>

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- Dialogue is voluntary by nature;
- Have the opportunity to share their feelings and/or opinions, either face to face or by correspondence;
- Receive answers to their questions;
- Do not have to endure the judicial process, specifically, cross-examination (**Madsen: 2006**).

There are a few restorative justice sexual violence programs that currently exist internationally that could certainly be tailored and introduced in the State of Victoria concerning the justice needs of persons of Aboriginal and Torres Strait Islander descent. Understandably, safety precautions would need to be considered and a strict screening process would have to be adopted, but there is certainly no reason why the State of Victoria could not incorporate a more culturally appropriate and culturally sensitive approach for persons of Aboriginal and Torres Strait Islander descent concerning sexual violence.

## **Conclusion/Findings/Recommendations**

What this report proposes is an appropriate response to sexual violence concerning persons of Aboriginal and Torres Strait Islander descent, although not disposing of retributive justice all together. The harmful effects of colonization regarding persons of Aboriginal and Torres Strait Islander descent need to be understood if any significant inroads are to be made.

The effects of colonization remain, persons of Aboriginal and Torres Strait Islander descent have to rely on a retributive model of justice that alienates, discriminates, and is unfamiliar to them. Invariably, Indigenous morals, values, sacred traditions, and their beliefs are regarded as contemptible or are perceived as insignificant by mainstream culture. Therefore, a restorative justice response should be considered regarding sexual violence within Aboriginal and Torres Strait Islander communities. There has been much success regarding restorative justice concerning other criminal offences, and with the incorporation of international programming concerning sexual violence there is no reason why Australia couldn't entertain the notion.

This research report identified the strengths and limitations of both restorative and retributive models of justice and it certainly highlights the need for a restorative response concerning justice for persons of Aboriginal and Torres Strait Islander descent. The restorative model is much more culturally appropriate, taking into account the aforementioned reasons that have been identified; focusing on holistic approaches which include all parties and that stigma can be greatly reduced or removed. Cultural assumptions and/or stereotypes have and continue to be highly problematic for both persons of Aboriginal and Torres Strait Islander descent and for the implementation of restorative justice practices dedicated to their communities.

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This report had advanced several reasons as to why conventional law is not appropriate for persons of Aboriginal and Torres Strait Islander descent. Mainstream culture needs to recognize that the current conventional model is not appropriate for all Australians. Keel (2004) stresses that ‘sexual violence is not an Aboriginal-only problem, but unless it is more effectively dealt with, Aboriginal women and children will continue to be victims of sexual violence and communities will suffer’ (p.1). The possibility of a restorative model needs to be considered, after all, all Australians are deserving of equal protection in the eyes of the law.

There are innumerable findings/recommendations that need to be recognized and/or realized:

- The effects of colonization need to be thoroughly understood if any genuine progress is to be made;
- The legal justice system, meaning police and court processes, is in many respects failing persons of Aboriginal and Torres Strait Islander descent experiencing family violence;
- Persons of Aboriginal and Torres Strait Islander descent experience of family violence has distinct characteristics (Victorian Aboriginal Legal Service, 2004);
- The strengths and limitations of both justice models and a need for both needs to be understood;
- Further education and/or awareness regarding preconceived notions and/or stereotypes are required;
- Australia needs to consider following in the footsteps of other global countries’ illustrations regarding restorative justice and sexual violence.

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These recommendations need to be considered and immediate action needs to occur to provide a genuine sense of justice regarding persons of Aboriginal and Torres Strait Islander descent. The Victorian Aboriginal Legal Service recognizes that if nothing is done, ‘the perpetuation of the over-representation of persons of Aboriginal and Torres Strait Islander descent will remain, and it will continue to deter persons of Aboriginal and Torres Strait Islander descent from calling police which means that more people will be placed in danger without assistance’ (p. 7). A much more appropriate response would be one that would promote empowerment and cultural identity, and above all, that Aboriginal and Torres Strait Islander culture is recognized and realized. The possibility of a restorative model needs to be considered, after all, all Australians are deserving of equal protection in the eyes of the law.

## Reference List:

- Annan, J. (2005) 'New Frontiers in Restorative Justice', Retrieved September 18, 2009  
from  
<http://www.asah.org.nz>
- Behrendt, L. (2002) 'Lessons from the Mediation Obsession: Ensuring that Sentencing 'Alternatives' Focus on Indigenous Self-Determination' in Strang, H. and Braithwaite, J. (Eds) Restorative Justice and Family Violence, Melbourne: Cambridge University Press
- Blagg, H. (2002) 'Restorative Justice and Aboriginal Family Violence' in Strang, H. and Braithwaite, J. (Eds) Restorative Justice and Family Violence, Melbourne: Cambridge University Press
- Bluett-Boyd, N. (2005) Internship Report, Victorian Aboriginal Legal Service, Melbourne
- Braithwaite, J. (1996) 'Restorative Justice for a Better Future', Retrieved June 26, 2009 from  
<http://www.iirp.org/library/braithwaite.html>
- Canadian Resource Centre for Victims of Crime, 'Restorative Justice in Canada' released 05/2000
- Charles, C. 'Restorative Justice, The Criminal Courts and Remote Aboriginal Communities'. Paper presented at the Australian Institute of Judicial Administration Conference, Mildura, September 2007
- Cox, D. (2008) 'Working with Indigenous Survivors of Sexual Assault', Australian Centre for the Study of Sexual Assault (ASSCA) Australian Institute of family Studies No. 5
- Cox, D. (2001) Sexual Assault Resource Centre as a result of the Gordon Inquiry. 'Indigenous Healing for Sexual Violence', Sexual Assault Resource Centre
- Daly, K. (1999) 'Restorative Justice in Diverse and Unequal Societies' in Special Issue on Criminal Justice in Diverse Communities Volume 17: 1-32
- Daly, K. (2003) 'Restorative Justice: The Real Story' in McLaughlin, E., Ferguson, R., Hughes, G., Westmarland, L. (Eds) Restorative Justice: Critical Issues, London: Sage Publications in Association with the Open University Press
- Daly, K. (2006) 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases in British Criminology Volume 46: 334-356

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- Daly, K. (2006) 'Feminist Engagement with Restorative Justice' in Theoretical Criminology Volume 10: 1-19
- Dwyer, P. (2005) 'Sentencing Aboriginal Offenders: The Future of Indigenous Justice Models' University of Sydney
- Fraser Region Community Justice Initiatives Association (1985) 'Programs & Services', Retrieved May 15, 2009 from <http://www.cjibc.org/Programs.htm>
- Hadley, M. (Ed) (2001) The Spiritual Roots of Restorative Justice, New York: State University of New York Press
- Hayes, H., Daly, K. (2001) 'Restorative Justice and Conferencing in Australia' in Australian Institute of Criminology No. 186
- Heenan, M., Cumberland, R., Gwynne, M. (1998) Who's on Trial? A Legal education and Training Kit for CASA Workers Advocating for Victim/Survivors of Sexual Assault, Melbourne: Centre Against Sexual Assault
- Johnstone, G. (2002) Restorative Justice: Ideas, Values, Debates, Devon: Willan Publishing
- Keel, M. (2004) 'Family Violence and Sexual Assault in the Indigenous Community' in Australian Centre for the Study of Sexual Assault, Briefing Paper No. 4, Canberra: Australian Institute of Family Studies
- Koss, M. 'Using Restorative Justice Approaches to Address Sexual Assault', Paper presented at the International Conference on Survivors of rape, Aarhus, Denmark, November 14, 2008
- LaRocque, E. (1994) 'Violence in Aboriginal Communities', Professor, Department of Native Studies, University of Manitoba, Health Canada
- Law Reform Committee, Victorian Parliament Final Report, 2009, Inquiry into Alternative Dispute Resolution and Restorative Justice, Victoria
- Marchetti, E., Daly, K. (2004) 'Indigenous Courts and Justice Practices in Australia, Australian Government-Australian Institute of Criminology No. 277
- McGlade, H. (2006) 'Aboriginal Women, Girls and Sexual Assault', Australian Centre for the Study of Sexual Assault (ACSSA) Newsletter No. 12 09/2006
- National Online Resource Centre on Violence Against Women, 'Restorative Justice Responses to Sexual Assault' Applied Research Forum 02/2008

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Razack, S. (1998) Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms, Toronto: University of Toronto Press

Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience (RESTORE) University of Arizona. (2003) 'Restorative Justice for Sex Offences' Retrieved June 26, 2009 from <http://www.restoreprogram.publichealth.arizona.edu>

Roberts, J., Stalans, L. (2004) 'Restorative Sentencing: Exploring the Views of the Public' in Social Justice Research Volume 17, No. 3 pp. 315-332

Sten Madsen, K. (2006) 'How Could You Do This to Me', Retrieved September 18, 2009 from <http://www.restorativejustice.org/editions/2006/july06/denmark>

Strang, H., Braithwaite, J. (Eds) (2002) Restorative Justice and Family Violence, Cambridge: Cambridge University Press

Stubbs, J. (2004) 'Restorative Justice, Domestic Violence and Family Violence' in Australian Domestic & Family Violence Clearinghouse, Issues Paper No. 9

Thomas, C. (1993) 'Sexual Assault: Issues for Aboriginal Women', Aboriginal Women's Policy Coordinator Office of Aboriginal Affairs, New South Wales

Tonkinson, M. (2006) 'Ways of Reading Sexual Abuse in Aboriginal Communities', Indigenous Issues 12/06/2006

Victorian Aboriginal Justice Agreement (2004) "A Sentencing Conversation" Evaluation of the Koori Courts Pilot Program, Victoria: Victorian Aboriginal Justice Agreement

Victorian Aboriginal Legal Service (2004) Intervention in Sexual Assault and Domestic Violence Experienced by Indigenous Australians, Victoria: Victorian Aboriginal Legal Service Co-op Ltd

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