

The Role of ADR Processes in the  
Criminal Justice System:  
A view from Australia

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For

ALRAESA Conference

4-8 September 2005

# Evolution of ADR in Australia

- 1970s – 1980s – a range of dispute resolution methods such as mediation, conciliation and arbitration gained popularity as an alternative to traditional litigation.
- Use of ADR in a variety of dispute contexts has grown rapidly in recent years, and in Australia have become institutionalised through legislative schemes and the development of professional bodies.

## ADR in a Criminal Context

- ADR may be defined broadly as “processes, other than judicial determination, in which an impartial person (ie: an ADR practitioner) assists those in a dispute to resolve the issues between them”.
- Use of ADR processes in criminal matters is a relatively new phenomenon in Australia.
- The proliferation of the idea that a criminal offence represents not just a violation of state law, but also a community conflict which requires resolution between individuals, has led to increased support for the use of ADR in a criminal context.

## What Constitutes ADR in a Criminal Justice Context?

- The term 'ADR' can encompass a number of practices that are not considered part of traditional criminal justice, for example:
  - Victim/offender mediation
  - Family group conferencing
  - Victim assistance programs
  - Community crime prevention programs
  - Sentencing circles
  - Ex-offender assistance
  - Community service
  - Plea bargaining
  - Specialist courts – such as Indigenous Courts and Drug Courts

## Principles Underlying the Use of ADR in a Criminal Justice Context

- Justice requires that we work to restore those that have been injured.
- Those most directly involved and affected by crime should have the opportunity to participate fully in the response if they wish.
- The state's role is to preserve a just public order, and the community's role is to build and maintain a just peace.

## Some Perceived Benefits of ADR in a Criminal Justice Context

- Creates opportunities for victims, offenders and community members who want to do so to meet to discuss the crime and its aftermath.
- Expects offenders to take steps to repair the harm they have caused.
- Seeks to restore victims and offenders to whole, contributing members of society.
- Provides opportunities for parties with a stake in a specific crime to participate in its resolution.

## ADR in a Criminal Context – the Australian Experience

- The primary ADR process adopted in Australia has been family group conferencing.
- Conferencing brings together the individuals involved in the criminal offence, and members of their families and the broader community.
- Statute based conferencing schemes are provided for in each of Australia's six states and two territories.
- All states and territories, except Victoria, have statutory schemes which provide for conferencing as an element in the hierarchy of responses to youth crime.

## Challenges for the Use of Conferencing in a Criminal Justice Context

Arguments to consider when deciding whether conferencing is appropriate:

- Victim-offender conferencing is likely to be highly emotionally charged, and arguably a conference can only be successful where there is a moderate level of conflict;
- There is no true 'dispute' which can be resolved – the dispute occurred in the past and entirely on the offender's terms;
- The offender may feel pressured to reach an agreement, rather than genuinely seeking to repair the harm done;
- ADR is usually seen as appropriate where the parties have an ongoing relationship (which provides a significant motivation to achieve reconciliation), which is not usually the case with victim-offender conferencing.

## Concluding Thoughts

- The Australian experience demonstrates, with its significant degree of jurisdictional variation, that programs must be adapted to the needs of particular communities.
- Conferencing and similar practices are not and cannot be expected to be a panacea. Nor should they be considered ‘failures’ because they cannot be universally applied.
- There is a need to think carefully about the goals to be achieved and whether ADR processes are desirable having regard to these goals.