

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

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I. Introduction

The use of non-traditional dispute resolution processes, falling within the rubric of Alternative Dispute Resolution (ADR), is now widely accepted in a variety of dispute contexts. In recent years, similar processes have been adapted and applied in a criminal justice context as part of an overall package of criminal justice reforms. Across Australian and international jurisdictions, there have been developed a range of ‘alternative’ methods for dealing with criminal offenders, including programs such as victim-offender mediation, family group conferencing, and circle sentencing. A number of these programs have been applied in Australian jurisdictions, and conferencing in particular has been embraced as a method of dealing with young offenders.

The debate as to whether such processes can or should be applied in a criminal justice context raises normative questions as to the role of the justice system, sociological questions as to the nature of criminal offending and the relationship between the individual, the community and the state, and descriptive questions as to the adequacy of particular justice practices. Such analyses must also involve an understanding of the limits of the law in context – in other words, political and economic considerations must be taken into account.

The Australian Law Reform Commission (ALRC) is currently looking into some aspects of ADR in the criminal justice system in the context of its review of the sentencing of federal offenders.¹ The Discussion Paper and final Report have yet to be released, however issues relating to deferred sentencing orders, the power to impose conditions when discharging an offender, the role of the victim in sentencing and a range of properly funded alternative sentencing options for Indigenous offenders are being considered. Further, the ALRC is aware of the work of African law reform bodies which have addressed aspects of the feasibility of ADR in the criminal justice system.²

This paper will provide an overview of the concept of ADR in a criminal context, with a focus on conferencing programs in Australian jurisdictions. Although it is just one of several innovations in criminal justice in Australia, it provides an excellent forum in which to analyse the application of ADR processes in the criminal justice system.

II. The Evolution of ADR

Throughout the 1970s and 1980s, a range of dispute resolution processes such as mediation, conciliation, and arbitration, all of which fall within the umbrella of ADR, gained popularity as an alternative to traditional litigation. The use of ADR in a variety of dispute contexts has grown rapidly in recent years, and has been institutionalised to a large extent through the introduction of

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¹ See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29, (January 2005), available on-line at www.alrc.gov.au.

² For example, see South African Law Commission’s, *Report on Juvenile Justice* (Project 106; July 2000); *Report on Sentencing* (Project 82; December 2000); and *Alternative Dispute Resolution* (Issues Paper 8; Project 94; 1997; Nigerian Law Reform Commission’s current project on bail and sentencing laws; Lesotho Law Reform Commission’s, *The Child Law Reform Project* (2004); Republic of Ghana Law Reform Commission’s current project restorative justice and alternatives to custodial sentencing.

legislative schemes and through the development of professional bodies which have fostered the use of ADR processes.³

It has been noted by commentators that ADR processes are not 'new' but rather have been rediscovered, as informal justice mechanisms have long been the dominant method of dispute resolution in many societies, and in Indigenous communities in particular.⁴ The 'rebirth' of ADR is often associated with the development of community justice centres to resolve neighbourhood disputes in the 1970s and 1980s. Subsequently, the use of ADR processes spread into other areas, such as family, environmental, commercial and industrial disputes.⁵

The term 'ADR movement' is in a sense misleading as it suggests a unity of agenda amongst ADR proponents. On the contrary, support for the development and implementation of ADR came from a variety of groups with differing agendas. Astor and Chinkin note that 'ADR enthusiasts were sometimes strange bedfellows, coming from within the legal system and from its critics, from government agencies and from opponents of bureaucracy who supported community empowerment.'⁶ Part of the support for the use of ADR processes sprang from a radical critique of the traditional Western justice paradigm. Formal court processes were criticised as being expensive, inaccessible, conflict-inducing, and disempowering for those involved. On the other hand, ADR was seen as a more accessible, flexible and efficient form of justice which allowed for the active participation of all parties and assisted in the preservation of relationships.⁷

However, not all proponents of ADR were critical of formal justice processes. Some simply saw ADR as a cheaper more effective way of dealing with more minor disputes that did not warrant the use of court resources. It has been noted that ADR has now become so widely accepted, and even institutionalised and promoted by governments, that 'what was born of resistance and opposition to the formal justice system has been extensively integrated and co-opted into the system'.⁸

What is ADR?

Despite the fact that ADR processes are now regarded as mainstream, there is not consensus as to what the acronym 'ADR' signifies, nor as to what constitutes.⁹ In Australia, the National Alternative Dispute Resolution Advisory Committee (NADRAC) has defined 'ADR' broadly as 'processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.'¹⁰ The breadth of this definition or description constitutes a recognition of the fact that 'ADR' is an umbrella term for a variety of processes which differ in form and application. Differentials include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement reached.

³ Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR – Its Role in Federal Dispute Resolution*, IP 25 (1998), [2.5]–[2.9].

⁴ H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 5.

⁵ *Ibid.*, 6.

⁶ *Ibid.*, 3.

⁷ L Boule, *Mediation: Principles, Process, Practice* (1996), 35.

⁸ H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 8.

⁹ See National Alternative Dispute Resolution Advisory Council, *ADR Terminology: A Discussion Paper* (2002).

¹⁰ National Alternative Dispute Resolution Advisory Council, *Brochure* (2002).

Debates regarding ADR terminology have arisen in two respects. Firstly, there has been considerable attention paid to how each individual dispute resolution process within the ADR spectrum should be defined. Astor and Chinkin note that ‘there has been a great deal of angst about what is included within the term ADR and what excluded’.¹¹ Whilst cautioning against getting caught up unnecessarily in semantics, the authors note that:

Definitions are important. They have particular utility in an actively evolving area and provide clarity and consistency ... Definitions are also needed in that they convey crucial information about what the definer believes to be central to the process and what the user can expect from it.¹²

Second, and perhaps more pertinent to the debate as to the role of ADR processes in the criminal justice system, there has been contention as to the meaning and significance of the acronym ‘ADR’. This debate is significant as it relates to deeper theoretical questions as to the relationship between such processes and more traditional legal processes. As will be discussed below, the conceptualisation of this relationship affects the development, implementation and evaluation of such programs. This is no longer as relevant in non-criminal contexts, given that ADR processes have been institutionalised within courts, government departments and private enterprise to such an extent that they must be viewed as part of the overall schema of dispute handling.¹³ However, the debate remains relevant in the criminal justice context given that the application of ADR processes in this field is relatively new.

Alternative?

The term ‘alternative dispute resolution’ has become entrenched, despite the fact that the description of such processes as ‘alternative’ attracted significant criticism in earlier decades. There are two conceptual criticisms of the use of the word ‘alternative’. One is that it incorrectly suggests that such processes can supplant the traditional court mechanisms. Sir Laurence Street, the former Chief Justice of New South Wales, said in this regard:

It is not in truth ‘*Alternative*’. It is not in competition with the established judicial system ... Nothing can be alternative to the sovereign authority of the court system. We cannot tolerate any thought of an alternative to the judicial arm of the sovereign in the discharge of responsibility of resolving disputes between state and citizen or between citizen and citizen. We can, however, accommodate mechanisms which operate as *Additional* or subsidiary processes in the discharge of the sovereign’s responsibility. These enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of the sovereign.¹⁴

The other criticism is that it suggests a conceptually and empirically unsustainable binary distinction between ADR processes and traditional litigation. A third criticism is that the term

¹¹ H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 77.

¹² *Ibid*, 76.

¹³ *Ibid*, 79.

¹⁴ L Street, ‘The Language of Alternative Dispute Resolution’ (1992) 66 *Alternative Law Journal* 194, 194.

‘alternative’ is socially and historically inaccurate, bestowing an undeserved primacy on litigation where in reality the majority of ‘disputes’ have traditionally been resolved without the use of formal legal processes.¹⁵

Other definitions have been proffered, including: additional dispute resolution; appropriate dispute resolution; assisted dispute resolution and amicable dispute resolution.¹⁶ It is noteworthy that there has also been some contention as to the scope of the words ‘dispute’ and ‘resolution’.¹⁷

Debates continue as to what the acronym ‘ADR’ signifies, what processes it includes and the precise nature of those processes. There is insufficient scope in this paper to explore these in more depth. It is important, however, to note that ADR has been conceptually and terminologically problematic. As will be seen below, such problems are relevant when exploring the role of ADR processes in the criminal justice context.

III. Criminal Justice Reform: ADR in the criminal justice context

Most of the literature dealing with ADR contains little or no reference to its use in the criminal justice context, and as a corollary, most criminal law texts dealing with processes such as conferencing do not utilise ADR terminology. This is because ADR is usually described as a method of resolving disputes between parties without resorting to formal court-based adjudication. Traditional theories of criminal justice, on the other hand, view criminal offending as largely a matter between the offender and the state.¹⁸

The use of ADR processes in criminal matters is a relatively new phenomenon in Western countries. In part, the increased interest in the application of ADR processes to the criminal justice system was borne from a general dissatisfaction with traditional adversarial methods of dispute resolution. However, the criminal justice system has attracted a particular set of criticisms: it is seen as unsuccessful in reducing rates of recidivism (and even may increase the likelihood of re-offending for particular groups, such as juveniles and Indigenous persons); it ignores the victims of crime and fails to recognise crime as a form of social conflict.¹⁹

One important proponent of the application of ADR techniques to criminal ‘disputes’ was Nils Christie, a Professor of Criminology from Norway, who asserted that ‘conflicts become the property of lawyers’ and that formal legal processes rob individuals of the right to full participation in the dispute resolution process.²⁰ The proliferation of the idea that a criminal offence represents not just a violation of state but also a community conflict which requires resolution between individuals has led to increased support for the use of non-traditional criminal justice methods.

¹⁵ H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 77–78.

¹⁶ *Ibid*, 78.

¹⁷ National Alternative Dispute Resolution Advisory Council, *ADR Terminology: A Discussion Paper* (2002), 9–11.

¹⁸ R Sarre and K Earle, ‘Restorative Justice’ in R Sarre and J Tomaino (eds), *Key Issues in Criminal Justice* (2004) 144, 145.

¹⁹ S Kift, ‘Victims and Offenders: Beyond the Mediation Paradigm?’ (1996) *Australian Dispute Resolution Journal* 71.

²⁰ N Christie, ‘Conflicts as Property’ (1977) *British Journal of Criminology* 1, 4.

Christie also posited that traditional criminal justice processes make the offender ‘an object for study, manipulation and control’, and that we have ‘reduced the victim to a nonentity and the offender to a thing’.²¹ Further, he took objection to the fact that the law defines what is relevant and therefore deems irrelevant the contextual factors which the parties may view as important.²² Christie noted that:

The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state ... The one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena ... She or he is a sort of double loser; first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important encounters in life. The victim has lost the case to the state.²³

What constitutes ADR in the criminal justice context?

In a criminal justice context, the term ADR can encompass a number of practices which are not considered part of traditional criminal justice: victim/offender mediation; family group conferencing; victim offender-panels; victim assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance; community service; plea bargaining; school programs. It may also be seen to include cautioning and specialist courts (such as Indigenous Courts and Drug Courts).

These practices can occur at different stages of the criminal process: they can be a diversion from the court process or they can be in parallel with the court process. These processes are generally only applied to offenders who have admitted the offence.

As noted above, there has been considerable discussion about what ‘ADR’ signifies and what processes are considered to come within its ambit. There has also been discussion about whether ADR is a term that can be applied to criminal justice reforms. For example, NADRAC noted in its 2002 Report that victim-offender mediation and diversionary conferencing posed a challenge to the setting of boundaries around ADR. Such processes resemble mediation generally in that they bring the parties together and attempt to negotiate an agreed outcome, but challenge accepted definitions of the terms ‘dispute’ and ‘resolution’. The role of the state in criminal matters differs from its role in civil matters, and the question arises as to whether an offence constitutes a ‘dispute’.²⁴

In part, this discussion is a semantic one as to whether the term ADR can be appropriately applied in a criminal context. However, such debates are relevant in that they examine the conceptual bases for the development of ADR processes and generate discussion as to whether ADR-type processes can and should be applied in a criminal context.

²¹ Ibid, 5.

²² Ibid, 8.

²³ Ibid, 3.

²⁴ National Alternative Dispute Resolution Advisory Council, *ADR Terminology: A Discussion Paper* (2002), 9–11.

It is not a matter of contention that there are crucial differences between the application of ADR processes in non-criminal and criminal matters. Conferencing and victim-offender mediation draw on elements of mediation in non-criminal areas, however differ in many practical and theoretical respects. Mediation refers to conflict and compromise, and seeks to avoid 'blaming'. It seeks to achieve the best outcome for all parties through collaboration, procedural flexibility, interest accommodation, contextualisation, active participation, and relationship preservation.²⁵ In the criminal context, the perceived benefits of more informal methods of justice apply, but conferencing also involves a particular theoretical basis (informed by criminological, psychological and sociological theory) and aims specifically to attach stigma to the criminal *act* (not the offender) and to achieve an acceptance of responsibility.²⁶ What is a matter of contention is whether and in what manner such processes should be applied in a criminal justice context.

ADR and Restorative Justice

The use of ADR processes in the criminal justice system is also often associated with the restorative justice movement, which seeks to shift the emphasis from the ideas of violation of the state and punishment towards reparation and inculcating in the offender a sense of responsibility towards the victim and the community. Restorative justice is viewed as more 'victim-centred' – indeed, the movement grew largely from victims groups who felt that victims were excluded and disempowered by formal criminal justice processes.

Some commentators have noted that there is no well-accepted definition of restorative justice - it is often defined by indicating what it is not.²⁷ In other words, it is defined in opposition to the dominant Anglo-American criminal justice model, known as Retributive Justice. Key features of the retributive justice model are that the crime is viewed primarily as a violation of the state, and punishment is premised on deterrence and retribution.²⁸ In this traditional model, crime is defined in legal terms and is removed from its moral, social and political context.²⁹ In contrast, restorative justice views crime as the violation of one person by another, and focuses on problem-solving, dialogue, repentance and forgiveness.³⁰

The development of restorative justice principles can be traced back to the beginning of the twentieth century, but it has been greatly developed in the last 20 years by a number of theorists, including Howard Zehr, Dan Van Ness, Mark Umbreit, John Freeman, and John Braithwaite.

The principles of restorative justice have been summarized as follows:³¹

- Justice requires that we work to restore those who have been injured.

²⁵ L Boule, *Mediation: Principles, Process, Practice* (1996), 35.

²⁶ T O'Connell, *Restorative Justice for Police* (2000) Real Justice Australia, 9.

²⁷ D Schmid, 'Restorative Justice: A New Paradigm for Criminal Justice Policy' (2003) *Victoria University of Wellington Law Review* 4; K Daly and H Hayes, *Restorative Justice and Conferencing in Australia*—No 186 (2001) Australian Institute of Criminology, 1.

²⁸ R Sarre and K Earle, 'Restorative Justice' in R Sarre and J Tomaino (eds), *Key Issues in Criminal Justice* (2004) 144, 145.

²⁹ *Ibid.*, 148.

³⁰ *Ibid.*

³¹ <www.restorativejustice.org/intro/tutorial/lesson3>

- Those most directly involved and affected by crime should have the opportunity to participate fully in the response if they wish.
- The government's role is to preserve a just public order, and the community's is to build and maintain a just peace.

Notable features of this model of restorative justice include that it:³²

- 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 (reintegration); and
- provides opportunities for parties with a stake in a specific crime to participate in its resolution (inclusion).

The term 'restorative justice' gained currency in the 1990s, but it has modern antecedents in the informal justice movement and the victim-offender mediation programs of the 1970s and 1980s.³³ Prior to this, the notions underpinning restorative justice can be seen in the establishment of the Children's Court in Australia and the use of police cautioning as an alternative to charging first time offenders.³⁴ One commentator notes that restorative justice has had many names over the years (for example, informal justice, reparative justice, transformative justice) and that the concept has been applied after the fact to programs already in place.³⁵

Integrating theories of justice: Restorative, Rehabilitative and Retributive Justice:

One issue that arises in criminal justice reform is the tendency to regard models of justice as conceptually and descriptively distinct. This creates several difficulties in relation to an assessment of the role of ADR processes in the criminal justice context. These difficulties are similar to those involved in the debate as to whether ADR processes are really 'alternative'.

Daly notes that it is misleading to pit one model of justice against another, and that,

[a]s practiced, restorative justice contains emotional and psychological elements of both retributive and rehabilitative justice...On core elements of justice aims and purposes (eg to punish, rehabilitate, provide restitution, repair harm), the oppositional contrast is not appropriate.³⁶

³² <www.restorativejustice.org/intro/>

³³ K Daly and H Hayes, *Restorative Justice and Conferencing in Australia*—No 186 (2001) Australian Institute of Criminology, 1.

³⁴ H Strang, *Restorative Justice Programs in Australia* (2001) A Report to the Criminology Research Council, 5.

³⁵ K Daly, *Restorative Justice in Diverse and Unequal Societies* (1999) Paper prepared for the Flinders University Symposium on Criminal Justice in Diverse Societies, 2.

³⁶ *Ibid.*, 4.

Daly contends that conceiving of restorative and retributive justice as dichotomous cannot be sustained empirically, and that the strength of conferencing is that it permits multiple justice aims.³⁷ She further asserts that it is neither necessary nor appropriate to remove the notion of punishment from a restorative justice process or outcome.³⁸ Most advocates of restorative justice do not assert that it should replace current penal laws and procedures – rather that such processes should form a larger share of the criminal justice system than they do presently.³⁹

Daly suggests new terminology as a way of avoiding mythical dichotomies between models of justice and as a way to ‘rehabilitate retribution’.⁴⁰ She relabels them ‘old’ and ‘new’ justice practices. ‘New’ justice practices have elements of retributive justice in them. Daly notes,

Discussions about whether the sanctioning (or reparative) process ought to be radically individualised (with upper limits) or related in some proportional way to the offence harm are further down the road. We have learned our lessons about the failure of ‘just desserts’ to deliver a more superior justice than ‘individualised’ justice, but we must remember why just deserts made good sense in the first place: the failure of individualised justice to appear fair to a broad constituency. Restorative justice (or new justice practices generally) will not be able to resolve that longstanding justice problem either.⁴¹

Multiple influences

As with the development of ADR in general, the development and proliferation of various ‘alternative’ criminal justice processes cannot be attributed solely to one influence or to one policy agenda. Other motivations for the implementation of such reforms include: case management; cost-effectiveness and efficiency; and the desire to create a more appropriate and culturally flexible system for dealing with offenders (especially Indigenous and juvenile offenders).

More cynically, some see criminal justice reform as being a response to the fiscal ‘crisis’ that results from an increase in number of those incarcerated and a response to the call to reduce public spending. One cost-cutting measure, therefore, is to try to reduce the rate of incarceration of offenders on the less serious end of the criminal spectrum and to remove less serious offenders from the formal justice system.⁴²

In the early 1990s, one commentator noted that there were two forces exerting pressure in the direction of divestment strategies such as conferencing: firstly, the bid to counter the spiralling costs of justice (given that it is expensive to deal with offenders via the formal justice system); second,

³⁷ Ibid.

³⁸ Ibid, 3.

³⁹ Ibid, 4.

⁴⁰ K Daly, *Sexual Assault and Restorative Justice* (2000) Paper prepared for Restorative Justice and Family Violence Conference, Australian National University, Canberra, July 2000, 8.

⁴¹ Ibid, 27.

⁴² K Polk, ‘Criminal Justice Reform in Australia’ in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (1994) 299, 300.

theoretical arguments in support of the notion that informal methods can be a more effective way of responding to criminal offending, particularly with respect to young offenders.⁴³

IV. ADR in a Criminal Context – the Australasian experience

Victim-offender mediation programs, which most closely resemble ADR processes in civil matters, were first trialled in Ontario, Canada in the early 1970s. Later in that decade, similar programs were developed throughout the United States, the United Kingdom and Europe. It is worth noting that such programs were not necessarily considered to be part of a radical reform agenda – in some cases, the term restorative justice was applied to such programs after they had been implemented.⁴⁴ In victim-offender mediation, a trained mediator facilitates discussion between the victim and offender. Both parties are given the opportunity to express their feelings about the offence, and an attempt is made to reach agreement as to what steps the offender can take to repair the harm.

Victim-offender mediation programs have never really been trialled in Australia. The primary model adopted in Australia has been family group conferencing, which originated in New Zealand in the 1980s.⁴⁵ Conferencing builds on victim-offender mediation programs by bringing together not just the individuals involved in the criminal offence but also members of their families and the broader community. In conferences, family members of victims and offenders can provide support and additionally can describe their ‘secondary victimisation’.⁴⁶ The purpose of having support persons present at the conference is also to demonstrate to the offender that people care for him or her and to inculcate a sense of responsibility towards his or her family, social circle and the community in general.⁴⁷

Conferencing is used in a number of overseas jurisdictions, however Australia and New Zealand stand out in that they have sustained statutory-based schemes for such processes unparalleled in other jurisdictions.⁴⁸ New Zealand was the first jurisdiction to introduce a statutory-based conferencing scheme, passing the *Children, Young Persons and Their Families Act* in 1989. The legislation was largely a response to concerns that the welfare model applied to juvenile justice was inimical to Maori traditions and values, leading to a disproportionate number of Maori children being removed from their families.⁴⁹

The development of the conferencing model in Australia differs from that in New Zealand in several respects. In Australia, reforms were confined mainly to youth justice rather than child and family welfare decisions, and race considerations played a lesser role in the impetus for reform.⁵⁰

⁴³ Ibid, 304.

⁴⁴ <www.restorativejustice.org/intro/tutorial/processes/vom>

⁴⁵ *Children, Young Persons and Their Families Act 1989* (NZ).

⁴⁶ P Condliffe, ‘Difference difference everywhere’ (2004) 6(10) *ADR Bulletin* 192, 192.

⁴⁷ <www.restorativejustice.org/intro/tutorial/processes/conferencing>

⁴⁸ K Daly and H Hayes, *Restorative Justice and Conferencing* (2002) <www.griffith.edu.au/school/ccj/kdaly_docs/kdpaper18.pdf> at 25 July 2005, 2.

⁴⁹ D Schmid, ‘Restorative Justice: A New Paradigm for Criminal Justice Policy’ (2003) *Victoria University of Wellington Law Review* 4.

⁵⁰ K Daly and H Hayes, *Restorative Justice and Conferencing* (2002) <www.griffith.edu.au/school/ccj/kdaly_docs/kdpaper18.pdf> at 25 July 2005, 5.

In Australia, the conferencing model also draws upon the theory of reintegrative shaming, developed by Australian academic John Braithwaite. Braithwaite argues that traditional criminal justice sanctions shame offenders without offering any form of reconciliation, thereby alienating the offender from the community and reinforcing criminal behaviour. He argues, however, that shame may be used constructively in a community or family context where reconciliation is offered. In Braithwaite's opinion, where offenders enter into constructive dialogue with victims and community members about their behaviour, they may restore self-esteem and self-worth and move closer to reintegration within the community.⁵¹

Conferences aim both to develop responses to criminal offending which meet the needs of victims and to make offenders accountable for their behaviour by giving them a more active role in the process (where they talk about why they committed the offence and listen to the victim describe the impact of the offence). The theory behind this is that it is more difficult for offenders to deny the harm they have caused or to offer excuses when placed in front of their victims, and that such encounters are more likely to induce remorse.⁵²

It can be seen that some aspects of conferencing draw on ADR theories and practices. However, as is noted below, such programs in the criminal justice context involve other considerations, some of which may be viewed as incompatible with ADR models.

Conferencing in Australia: common themes

Conferencing occurs in each of Australia's six states and two territories, and it is possible to draw some common themes. However, there is a large degree of jurisdictional variation as to the form, purpose, scale, organisational location and application. For example, some jurisdictions only conference less serious offences, while others conference some more serious offences such as sexual assault.

All of the states and territories except Victoria have statutory-based schemes which provide for conferencing as an element in the hierarchy of responses to youth crime (the most recent being the Australian Capital Territory's *Crimes (Restorative Justice) Act* 2004). The overarching purpose of such legislative schemes is to divert young people from the formal justice system, to contribute to the development and reintegration of offenders, and to develop a response to crime which meets the needs of both the victim and the offender.⁵³ Hence, in Australia the focus has been very much on developing more effective ways to deal with offenders, particularly youth and Indigenous offenders.

Where conferencing is used as a diversion from court prosecution, the victim, the victim's family/supporters, the offender, the offender's family/supporters, and a conference convenor/police officer usually meet to discuss the offence, its impact, and possible solutions for reparation. Conferences usually last for 1 to 2 hours, and the conference coordinator will try to lead the discussion such that the criminal act is condemned while the offender is not (according to

⁵¹ J Braithwaite, *Crime, Shame and Reintegration* (1989).

⁵² Hennessey Hayes, 'Assessing Reoffending in Restorative Justice Conferences' (2005) 38(1) *The Australian and New Zealand Journal of Criminology* 77, 78-79.

⁵³ See, eg, *Young Offenders Act 1997* (NSW) s 3.

Braithwaite's model of reintegrative shaming). The offender is asked to explain why they committed the offence and what they think should be done as a result. The victim is asked to describe the harm that has arisen from the offence. The parties then may agree on a future plan of action.⁵⁴

Relationship with the traditional criminal justice system

One concern expressed by commentators in the early 1990s was that, if framed in terms of a restorative justice agenda, programs such as conferencing would face difficulties gaining widespread acceptance.⁵⁵ Indeed, one practitioner who worked on a pilot program in Queensland in 1992 noted that his experiences in the area made clear 'the difficulties of implementing a modest victim offender mediation program in a system that was not prepared for or perhaps was not sympathetic to it'.⁵⁶ He noted that despite a well thought out justification of the program, committed staff and the backing of several government Ministers, the program failed. The failure was not because individual cases were not well-managed or were unsuccessful in outcome, but because 'the existing court structures have not seen the merit of referring many cases to it'.⁵⁷ Another criticism levelled was that such programs, if integrated into the traditional justice system, would risk being corrupted by bureaucratic needs and interests.⁵⁸ As one commentator notes,

...while it might be politically attractive to indorse victim-offender mediation from a victimological perspective, a sub-current of tension exists even at this level of the debate when restorative philosophy is seeking broad based acceptance in the context of escalating law and order debates.⁵⁹

In the early 1990s, such criticisms were borne out in the Australian context by relatively low referral rates.⁶⁰ However, as at 2005, conferencing appears to be gaining momentum in Australia. As noted above, all jurisdictions except Victoria have statutory-based schemes, the most recent being legislation introduced in the Australian Capital Territory in 2004.

V. Is ADR appropriate in the criminal justice context

It has been argued that conferencing attempts to reconcile apparently conflicting objectives: victim empowerment and support versus offender empowerment and support; flexibility of outcomes in order to meet the needs of the offender versus accountability and punishment of the offender; informal consensus based decision-making versus equity and proportionality of outcomes.⁶¹ It is also suggested that there is little evidence to show that reconciliation of the offender with the victim and the community endures beyond the conferencing process.⁶²

⁵⁴ D Schmid, 'Restorative Justice: A New Paradigm for Criminal Justice Policy' (2003) *Victoria University of Wellington Law Review* 4.

⁵⁵ P Condliffe, 'Conferencing – challenging the parameters of the criminal justice system' (Aug: 1998) *Proctor* 10, 12.

⁵⁶ P Condliffe, 'The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants' (1998) *Australian Dispute Resolution Journal* 139, 146.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ S Kift, 'Victims and Offenders: Beyond the Mediation Paradigm?' (1996) *Australian Dispute Resolution Journal* 71, 74.

⁶⁰ *Ibid.*

⁶¹ M Carroll, 'Implementational Issues: Considering the Options for Victoria' in C Alder and J Wundersitz (eds), *Family conferencing and juvenile justice: the way forward or misplaced optimism?* (1994) 167, 176.

⁶² *Ibid.*, 177.

It has also been questioned whether there is a criminological basis for the introduction of ADR in criminal justice processes. It is argued that there are factors specific to the criminal context which render ADR techniques unlikely to succeed. Firstly, it is argued that victim-offender mediation is likely to be highly emotionally charged, and that mediation can only be successful where there is a moderate level of conflict. Second, it is argued that there is no true 'dispute' which can be resolved – the dispute occurred in the past and entirely on the offender's terms. Hence there may not be sufficient motivation to reach an agreement. Further, the offender may feel pressured to reach an agreement, rather than genuinely seeking to repair the harm done.⁶³ Other criticisms include that 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 mediations.

The balancing of rights of both offenders and victims is clearly a challenge facing those contemplating the use of ADR in a criminal context. While an attempt to balance rights has been a driving force behind the implementation of such schemes, concern has arisen as to whether the interests of both parties can be reconciled.

It is important to recognise that conferencing does not operate in a vacuum, and that power imbalances can easily be reflected in the conferencing setting, despite all attempts in preparation to minimise them. Large scale inequalities cannot be dealt with immediately by preparation in relatively small-scale conferencing. While conferencing may serve an educative and normative function in the long term, in the immediacy of the conference setting, it may be impossible to achieve the desired balance. The ability to balance rights is an important factor when deciding whether conferencing is appropriate.⁶⁴

VI. Conclusion

What the Australian experience demonstrates, with its significant degree of jurisdictional variation, is that programs must be adapted to the needs of particular communities. While this variation has its drawbacks, for example non-uniformity, difficulty of accessing information about different programs and the failure to learn from the experiences of other jurisdictions, it is clear that the potential for flexibility is one of the major benefits of such programs.⁶⁵

It is apparent from attempts to make criminal justice processes 'fit' the language of what is known as ADR that existing terminology is inadequate. When commentators get caught up in debates as to whether a criminal offence constitutes a dispute and whether a negotiated outcome for an offence already committed can be correctly labelled a 'resolution', it becomes clear that language can obscure more important considerations. While language is important, such analysis of existing terminology serves to limit the scope of discussion, so that it remains within the parameters of

⁶³ S Kift, 'Victims and Offenders: Beyond the Mediation Paradigm?' (1996) *Australian Dispute Resolution Journal* 71, 79.

⁶⁴ This is particularly relevant to a consideration of whether conferencing is appropriate for cases involving offences such as sexual assault or domestic violence.

⁶⁵ M Carroll, 'Implementational Issues: Considering the Options for Victoria' in C Alder and J Wundersitz (eds), *Family conferencing and juvenile justice: the way forward or misplaced optimism?* (1994) 167, 177.

existing limitations, foreclosing on the development of new possibilities. For this reason, it might be beneficial to develop new terminology, particularly in relation to criminal justice practices.

Conferencing and similar practices are not and cannot be expected to be a panacea. Nor should they be considered 'failures' simply because they cannot be universally applied and cannot stand alone. There is a need to think carefully about what goals (practical and normative/ short and long term) are sought to be achieved and whether and where conferencing is desirable having regard to those goals. This may involve a contextualised and individualised analysis. It also involves balancing the need for particularity with those aspects of traditional justice which are generally seen as positive: predictability and consistency.