

## **ADR pilot schemes and programs**

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*This paper was prepared and settled jointly by the members of ADRAC.*

### **1. What are pilot programs, or pilot schemes, in ADR?**

In Australia, extensive use has been made of pilot schemes, or pilot programs, that include the use of ADR processes as an integral component. Pilot programs can be used specifically to introduce ADR processes for resolving disputes in a discrete context, or for trialling novel approaches to established dispute resolution processes. The use of pilot programs is widely recognised as a fundamental requirement for effective Dispute Systems Design.

A pilot program is ordinarily a planned, structured, discrete, standalone initiative, or project, with formal links to a pre-existing, related scheme; pilot programs are usually time-limited. The design of a pilot program includes effectiveness measures that can be evaluated while the program operates, or after it has been completed. In most cases, the effectiveness measures will be linked directly to the settlement rates, participant satisfaction, and cost reductions which the program achieves, and how those compare with the same measures in the pre-existing scheme.

It is preferable for a pilot program to be independently evaluated, to improve the credibility and reliability of the evaluation results.

A hypothetical example of a pilot program could be where one branch of a court's system establishes a 12-month pilot program to test the effectiveness of mandating mediation as a pre-filing requirement. In order to protect the integrity of the pilot

program and of its evaluation results, some decisions would need be made beforehand and included in its design. For example:

- Who in the court system would be authorised to mandate mediation within the pilot program (e.g. registrars, magistrates, and/or judges)?
- How would litigants be notified about the pilot?
- Would litigants be able to opt out of participation in the pilot if they did not want to participate?
- What effectiveness measures would be incorporated in the pilot?
- What sort of data would need to be gathered in order to evaluate the effectiveness of the pilot program?
- What would be the baseline below which the pilot would be deemed to be ineffective, and above which it would be deemed to be effective?
- Who would collect the data – and how would it be gathered (e.g. through written questionnaires, through structured or semi-structured or unstructured interviews, through focus groups, through direct observation of ADR processes, through access to court records, etc)?
- What levels of consent, confidentiality and ethics approval would be required to ensure fully informed participation by litigants?
- What would happen to the evaluation results and any evaluation report (e.g. would they be publicly available, or have limited availability, or be restricted only to key personnel)?
- Based on the evaluation of the pilot program, how feasible would it be to formalise its operation?

## **2. Why are pilot programs important for ADR and its development?**

Pilot programs have been instrumental in introducing ADR processes into new areas, both in Australia and overseas. For example, pilot programs have resulted in a wide range of ADR processes that:

- operate either in association with, or parallel to, courts and tribunals;
- operate within various parts of the justice system to provide restorative justice processes;

- operate either in-house or externally to address many forms of workplace dispute; and
- operate within indigenous communities, using indigenous practitioners, to enable culturally sensitive and appropriate dispute resolution processes.

### **3. What are some examples of pilot programs in Australia?**

**1987:** The Federal Court of Australia conducted a Pilot Mediation Program in Sydney.

**1991-92:** The Administrative Appeals Tribunal (Commonwealth) conducted a Pilot Mediation Program in several jurisdictions.

**1992:** The Family Court of Australia conducted a Pilot Mediation Program at its NSW and South Australian Registries.

**1991 - 1992:** Settlement and Resolutions Weeks were introduced in NSW (October 1991), Queensland (January 1992), and Western Australia (November 1992), with each event being actively supported by its local Law Society. Settlement, or Resolutions, Week provided *pro bono* mediation services in association with the court system; the programs provided a ready source of ADR evaluation data that was accessed by many students of ADR.

**1994 and 1995:** Two pilots were conducted of innovative approaches to juvenile offenders; in the ACT, the diversionary conferencing program, the Re-Integrative Shaming Experiment (RISE); and, in Victoria, the Victoria Youth Justice Group Conferencing; these were pivotal to the development of Restorative Justice processes in Australia.

**2001:** The Columbus Project – a pilot program initiated by the Family Court of Western Australia that trialled the use of ADR as a case management tool in situations involving allegations of violence and/or abuse in families; it led to ongoing interdisciplinary research and relevant professional education.

**2005:** The American Arbitration Association conducted a pilot mediation program for insurance disputes arising from the effects of Hurricane Katrina (New Orleans, USA); parties to the mediations were insurers and policy holders.

**2010:** Magistrates Court, Victoria initiated three pilot programs: early neutral evaluation to be conducted by a magistrate; a pilot of mandatory mediation; and a pilot to test the effectiveness of using mediation only for specific types of court matters.

**2011:** Family Group Conferencing – a pilot program arising from an enquiry into the operations of the care and protection of children in NSW; the program evaluated the use of ADR processes within the child protection system in NSW.

**1991 – present day:** A range of pilot programs has been developed for use in indigenous communities, especially in the Northern Territory, Queensland, and NSW.<sup>1</sup> The purpose of the programs has been to develop processes and services that are sensitive to indigenous cultural and social needs, especially where these have been damaged by intra-community disputes and social disintegration; some of the programs have also sought to provide a means of incorporating aspects of both indigenous law and court-based law. The programs have sought to use indigenous practitioners and to create indigenous-specific ADR processes. Examples of these programs include: The Sunrise East Arnhem Mediation Project (SEAM - Northern Territory), the Aboriginal and Torres Strait Islander Family Mediation Program (ATSIFAM – NSW), the Ponki Mediation Project (Northern Territory), and the Legal Aid Queensland Indigenous Family Conferencing Program (Queensland). On the whole, evaluations of these programs have demonstrated high levels of cost benefit and social empowerment for the subject communities.

**1960s and 1970s:** In the USA, the use of mediation to reduce community division arising as a result of the policy of desegregation of schools, and the busing of students to desegregated schools. Although this was not a structured, planned pilot program, it is widely credited with having been the birthplace of modern mediation – and it is also widely accepted to have been unsuccessful in its objective of community repair.

#### 4. What needs to happen in relation to pilot schemes

The purpose of many pilot programs – especially those associated with tribunals and courts - has been to increase levels of dispute resolution efficiency within the systems to which they are attached. Consequently, program evaluation measures have tended to centre on readily quantifiable factors such as settlement rates, participant satisfaction, and reductions in costs, all of which efficiency measures tend to be defined according to the pilot program's context.

ADRAC supports the establishment of pilot schemes whose primary purpose is to provide evidence-based data that will inform the ongoing development and improvement of all ADR processes.

ADRAC recognises that establishing pilot programs can be an effective way to introduce ADR processes into areas of identified need, and supports the continuing development of such programs for effective and innovative use of ADR.

1. For more detail on indigenous dispute resolution pilot programs, see: Federal Court of Australia, *Solid work you mob are doing: Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia* (Report to National Alternative Dispute Resolution Advisory Council, Commonwealth of Australia, 2009).