

Criminal justice and ADR

14 Sep 2016

This paper was settled jointly by the members of ADRAC.

What does ADR mean in the criminal justice context?

Assessing the use of ADR processes in the criminal justice context is attended by difficulty because of the absence of clear boundaries around the definition of ADR.¹ For this reason, much of the literature on ADR makes only limited reference to its role in the criminal justice system.²

Inherent in many people's understanding of the notion of ADR is the existence of a dispute between identifiable parties. Criminal justice, however, is not usually conceptualised as a dispute between victim and offender, but is instead seen as a matter concerning the relationship between the offender and the state.³ This raises a complex question as to whether a criminal offence can properly be described as a 'dispute'.

The goals of criminal justice also differ from the usual goals of ADR. While ADR is often restricted to consideration of the interests of parties to the relevant dispute, criminal justice involves consideration of a number of public policy goals such as, among others, punishment, deterrence, protection of the community, and rehabilitation.⁴ For this reason, the state plays some role in many ADR-type processes used in the criminal justice system.

In part, because of these definitional issues, much of the literature dealing with the use of ADR processes in the criminal justice context (such as conferencing and victim-offender mediation) does not actually use the term 'ADR'. Most of the

literature on this topic refers, instead, to the closely related concept of 'restorative justice'.⁵

What is restorative justice?

A commonly accepted definition of restorative justice comes from Marshall, who defines restorative justice as 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.⁶

Restorative justice processes can be used to divert offenders away from traditional criminal justice processes or can be complementary or supplementary to such processes.⁷ In comparison with the traditional criminal justice processes, restorative justice places more overt focus on the victim, gives decision-making power to a broader range of actors, and allows for more free discussion between a wide-range of parties.⁸

The topic is addressed in more detail in [Restorative Justice](#).

Is ADR used in the criminal justice context in Australia?

In Australia, the use of ADR processes in the criminal justice system is now 'mainstream' for juvenile offenders⁹ and has largely come in the form of: conferencing (including 'forum sentencing'), circle sentencing, and victim-offender mediation.

Broadly, the goals of each of these processes are to:

- divert offenders (particularly young offenders) away from court proceedings;
- allow for community involvement;
- provide an active role for victims in the criminal justice process;
- support victims of crime and assist their recovery;
- increase the confidence in the sentencing process amongst participants;
- encourage healing;
- allow the offender to make amends;
- empower the offender, the victim and communities; and

- address the causes of offending.¹⁰

Conferencing (or ‘Youth Conferencing’) as an ADR process in criminal matters

Youth or family conferencing is the most widely adopted form of ADR in the Australian criminal justice system.

Conferencing refers to a facilitated group discussion about the impact of an offence between a young offender, the offender’s support persons, the victim, the victim’s support persons, police and an impartial facilitator.¹¹ In all jurisdictions other than the ACT, the conference can take place without the victim’s participation.

The aim of conferencing is for the parties to mutually develop a plan for the offender to repair the harm caused by the offence. Plans may require an offender to do such things as make an apology, undertake community service, undergo counselling, complete treatment for drug or alcohol addictions, or donate to a charity.¹² If parties are unable to agree on a plan, the matter is sent back to the referring party (either the police or the court). By involving both the victim and the offender in developing this plan, conferencing aims to meet the specific needs of particular victims and to engender a sense of accountability in the offender.¹³

Young offenders who are assessed as suitable can be referred to conferencing by police, prosecutors or courts, depending on the regime in place in the relevant jurisdiction. Whether a matter is suitable for conferencing depends on a number of factors including the seriousness of the offence, whether the offence involved violence, the harm suffered by the victim, and the extent of offending by the offender.¹⁴ The legislation in some jurisdictions excludes certain offences from conferencing.¹⁵

Conferencing is available in each State and Territory of Australia. All jurisdictions but Victoria have statutory youth conferencing schemes.¹⁶

The topic is dealt with in more detail in Children and ADR.

Conferencing is also available for adult offenders in certain circumstances in NSW, and South Australia, and pilot programs for adult conferencing have been undertaken in other jurisdictions.

Forum sentencing

In NSW, adult conferencing, called Forum Sentencing, is available only through referral by a court after a plea or finding of guilt.

In Forum Sentencing the conference develops an intervention plan which is then approved by the court. The offender must then complete the plan before sentencing. The court is then notified of the completion of the plan and this completion is a relevant factor in sentencing. Alternatively the plan may form part of the sentence subsequently imposed by the court.

Circle sentencing

Circle sentencing refers to a process in which sentencing of some adult Aboriginal offenders is performed in a community, rather than court, setting. The offender, a judge and community members (possibly including lawyers, the police, the victim, the offender's family and respected community members) form a circle to discuss the offence and the offender, and to communally determine a sentence that is appropriate for the specific offence and offender.¹⁷ Circle sentencing is available in NSW and Western Australia.

A 2008 study found that circle sentencing in NSW has had positive outcomes by reducing barriers between Aboriginal communities and the courts, empowering Aboriginal communities, supporting Aboriginal victims and offenders, increasing confidence in the sentencing process, reducing barriers between Aboriginal communities and the courts, and providing more appropriate sentencing options.¹⁸

Victim-Offender Mediation

Victim-offender mediation (VOM) refers to a facilitated discussion between the victim and offender about the offence, its consequences, and possible means of repairing the harm caused. NSW, Queensland, WA, NT and Tasmania all offer VOM

services.¹⁹ VOM usually involves a trained mediator, the victim, the offender, and support persons.

In contrast to conferencing (in which victim involvement is usually optional), the victim must be involved in order for VOM to proceed. Depending on the jurisdiction mediation may be initiated by the offender, the victim or, in the case of WA and NT, the judge, the prosecutor or corrections officers. VOM services in WA and Tasmania take place prior to sentencing. In both Tasmania and WA mediation is available for certain offences after a finding of guilt but prior to sentencing. A mediation report is prepared and may be taken into account by the court in sentencing. In NSW, Queensland and NT, VOM is offered only after sentencing. In these jurisdictions, mediation has no impact on the sentence received by the offender and takes place strictly for 'restorative' purposes.

Are ADR processes in the criminal justice context 'effective'?

Numerous studies have been conducted to determine whether ADR in criminal justice is 'effective'. These studies have largely addressed two criteria of effectiveness: (i) effect on reoffending; and (ii) party satisfaction with ADR processes. Although these are the most commonly studied metrics of effectiveness, it should be noted that there are other relevant measures of effectiveness. In particular, the comparative cost of ADR and court processes is a notable consideration.

A study of conferencing in NSW found that youth conferences cost 18% less per person than Children's Court proceedings.²⁰

Effect on reoffending

The results of studies on the effect of conferencing on reoffending have been mixed.

In 2012, Smith and Weatherburn reviewed previous studies of the effectiveness of restorative justice in reducing reoffending.²¹ While some of the reviewed studies found that conferencing reduced the likelihood or frequency of reoffending, Smith and Weatherburn identified multiple methodological problems in those studies, and argued that there was no clear basis for believing that conferencing reduces

reoffending. They subsequently compared the rates of reoffending of youth offenders who participated in conferencing in NSW and those who were eligible but did not participate, and found no effect on the rate of reoffending time before the next offence or the frequency of reoffending.

Other studies have, however, had different findings. For example, a study of restorative justice programs in the ACT found lower rates of reoffending amongst violent offenders who participated in conferencing as compared with similar offenders who did not participate in conferencing. However, conferencing had no impact on reoffending amongst property offenders and shoplifters.²²

An evaluation of circle sentencing in NSW in 2008 found that circle sentencing had no effect on the likelihood and frequency of reoffending,²³ though this must be considered alongside the identified positive outcomes of circle sentencing identified above.

Party Satisfaction

There is a substantial amount of evidence from various jurisdictions that victims who participate in conferencing are highly satisfied with those processes.²⁴ Similarly, studies have identified high levels of satisfaction amongst participants in circle sentencing.²⁵ Notably, some studies have found that satisfaction with these processes is distinct from satisfaction with the outcome of the process.²⁶

1. NADRAC, *ADR Terminology: A Discussion Paper* (2002).

2. Melissa Lewis and Les McCrimmon, 'The Role of ADR Processes in the Criminal Justice System: A View from Australia' (Paper presented at ALRAESA Conference, Entebbe, Uganda, 4 9 September 2005) 4.

3. Ibid.

4. See e.g., *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

5. Lewis and McCrimmon, above n2, 4.

6. Australian Institute of Criminology (AIC), 'Restorative Justice in Australian Criminal Justice System', (2014) 127 *Research and Public Policy Series*, 23-28.

7. Kathleen Daly and Hennessey Hayes, 'Restorative Justice and Conferencing in Australia' (February 2001) No 186 *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology.

8. Ibid.

9. AIC, above n6, 5.
10. See Evi Kadar, *Victim-Offender Mediation Program (VOMP)* (paper presented at National Conference on Juvenile Justice, Canberra, 22-24 September 1992); AIC, above n6, 16; Gordon Bazemore and Mark Umbreit, '[A Comparison of Four Restorative Conferencing Models](#)' (February 2001) *Juvenile Justice Bulletin*, Washington: Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, 6; NSW Department of Justice and Attorney General, '[Circle Sentencing](#)' (2009) *Factsheet*.
11. Daly and Hayes, above n7.
12. AIC, above n 6, 6.
13. Lewis and McCrimmon, above n2, 10.
14. AIC, above n 6, 6.
15. See AIC, above n 6, 8-9; e.g. in NSW sexual assault, drug offences, traffic offences, offences causing death and breaches of AVOs are excluded offences under the *Young Offenders Act 1997* (NSW).
16. See AIC, above n6, 8-14 for a detailed summary of youth and adult conferencing schemes in each jurisdiction.
17. AIC, above n6, 16; NSW Department of Justice and Attorney General, above n10.
18. AIC, above n6, 17; Kathleen Daly and Gitana Proitetti-Scifioni (2009) *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending*, Brisbane: Griffith University.
19. See AIC, above n6, 18-21 for a detailed summary of victim-offender mediation schemes in each jurisdiction.
20. AIC, above n6, 28; Andrew Webber, 'Youth Justice Conferences Versus Children's Court: A Comparison of Cost-Effectiveness' (2012) 164 *Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research.
21. Nadine Smith and Don Weatherburn 'Youth Justice Conferences Versus Children's Court: A Comparison of Re-offending' (2012) 160 *Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research.
22. AIC, above n6, 24-25.
23. Jacqueline Fitzgerald 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research.
24. AIC, above n6, 27-28.
25. Ibid 17.
26. Ibid.