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ADR Bulletin

Restorative justice in Australia

Difference difference everywhere …[1]

Peter Condliffe

For many people, the legal system appears to be an indecipherable morass that proclaims high ideals but frustrates and annoys many who have to use it. Over the last 20 years, the criticisms of the traditional court system, in both its civil and criminal jurisdictions, have risen to become a continuous chorus of complaint.[2]

A particularly disturbing paper entitled 'A Matter of Priority: Children in the Legal Process', produced by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, found that many laws and legal processes failed to meet the obligations established under the United Nations Convention on the Rights of the Child. It also found that services and assistance for children were inadequate.[3] The 18 month investigation which led to the report found there had been a national failure, in particular, to look after the most vulnerable children in need of care and protection.

The research showed Australians tended to either patronise or demonise young people, rather than adopt an approach designed to encourage self-esteem, individuality and a sense of responsibility. The research also found that there is absolutely no evidence of the juvenile crime wave widely reported in the media. Nor was there any evidence of a collapse in the standards of young people or the wider community. The report found that all facets of the legal system failed to accommodate the changing notions of children's evolving maturity. Instead it seems that society's only interest is to protect themselves from its children. The available statistics continue to portray a grim picture.

It is these perceived shortcomings of the legal system that has added impetus to the interest in the ADR movement, which promises to provide a more cost effective, more available and more satisfying context for disputants. Most of the attempts to use ADR processes like mediation, case appraisal, and conciliation have occurred in the civil sphere. However, in the last decade in Australia, there have been attempts to introduce similar innovations into the criminal justice system, particularly for young people, who are regarded as particularly disadvantaged.

One of the most significant responses to the perceived problems in the criminal justice system, especially relating to young people, has been the development of a process known as victim-offender mediation. In these programs, victims and offenders are brought together to negotiate reparation. Victim-offender mediation programs began in Ontario, Canada in 1974. Such programs have been operating in the United States and, to a lesser extent, in the United Kingdom for over 20 years.[4] Over the past 20 years, victim-offender mediation programs have been widely introduced around the world. There are now more than 300 victim-offender reconciliation projects in Europe and North America, with 175 programs in the US and Canada.

More recently a process known as 'conferencing' has emerged. Conferencing builds upon the victim-offender mediation programs by attempting to bring together not just the individuals involved in the particular criminal offence, but the wider 'communities of care' who may be affected. The conference is essentially a process through which the communities affected by a criminal act can come together to discuss and respond to what has happened. For example, the family of an offender can provide support for an offender but they can also describe their own 'secondary victimisation' in a conference. Also, in a conference the focus is not on a dispute but on the offence, its consequences upon those affected and what they can do to repair the damage and minimise further harm.[5]

Conferencing originally developed in New Zealand. The process finds its roots in traditional Maori practices and is commonly called 'family group conferencing'.[6] Family group

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conferencing was incorporated into New Zealand juvenile justice and child protection legislation in 1989. Similar conferencing programs, modelled on the New Zealand model, were soon introduced into Australia with a number of states introducing legislation and other pilot programs. Conferencing is now being promoted and is operating in a number of other countries including the United States, Britain, Canada and South Africa. The most popular theory that has emerged to support these developments is called 'restorative justice' or sometimes 'reparative justice'.[7]

Restorative justice attempts to place the victim with the offender at the centre of the process. Therefore, instead of defining crime simply in terms of a violation of the state, it defines crime in terms of the violation of one person by another. The focus is upon providing a forum for the offender to take responsibility and to make amends rather than to establish guilt and exact punishment. Victims, rather than being spectators to a process which they do not fully understand, can participate and speak their feelings directly to the person who has caused the injury. Victims also can attempt to seek answers to questions about why the crime occurred and participate in the process of working out how the injury and damage can be repaired. On the other hand, offenders have an opportunity to admit their offence and to understand the consequences of their behaviour on others and also participate in how to make things right. Restorative justice therefore attempts to move the emphasis from guilt and punishment to responsibility and reparation. In this model, justice is achieved through the offender taking responsibility for their actions and taking steps to make reparation.

The claimed advantages to people using a mediation or conferencing process are summarised in Table 1 at right.

Table 1: Advantages of conferencing

For young people

- Uses age and developmentally appropriate dynamics to change the young person's thinking and behaviour
- Focuses on addressing offending behaviour in a pragmatic and respectful manner
- Models socially appropriate solutions to conflict
- Avoids excessive and long-term criminal justice interventions
- Encourages the family, family group and/or significant others to support their young person
- Enables the young person to contribute to an outcome plan
- Allows for reparation to the victim directly or indirectly where appropriate
- Facilitates an opportunity for restoration to the family, family group and reintegration within the community.

For the young person's family/family group

- Enables effective participation in the decision-making and planning process
- Shares the responsibility for supporting the young person with other members of his/her support network
- Examines the impact of the young person's offences on his/her family/family group.

For victim/s

- Allows for active participation in the justice process
- Reduces the cost of follow-up counselling through facilitating a 'healing' resolution
- Enables victims to benefit from reparation where appropriate
- Consults victims in a respectful and non-adversarial manner.

For the community

- Encourages improved community relationships with young people
- Promotes healing and a restoration of harmony in the community.

For the justice system

- Offers an alternative sentencing and diversion option to the courts
- Promotes improved victim satisfaction with the justice process
- Promotes the community's trust in the justice system.

For cultural diversity

- By encouraging the involvement of family members, and/or other persons significant to the young person, these programs aim to better recognise the cultural diversity of a participant and the connections that can be gained from broader family and community involvement.[8]

There are a considerable number of major issues that have emerged in the development of restorative justice programs within Australia. These include co-existence with the traditional criminal justice system; net widening; an over-emphasis on individuality; community alienation; and the jurisdictional jigsaw. I will deal with each of these briefly in turn.

Co-existence with the traditional justice system

People who would want the wide scale implementation of restorative justice programs have essentially three choices. They may:

1. Try to gradually replace traditional correctional practices with restorative justice programs.
2. Attempt to allow restorative and traditional programs to co-exist independently of one another.
3. Try to integrate restorative practices into the repertoire of the state's court correctional interventions.[9]

The first choice is bound to be hindered by resistance from the established political and correctional infrastructures. The central feature of the justice model of western societies is that the state has dominant control over deviants, exercised through well-established institutional frameworks. The second choice implies that decisions must be made as to which cases are appropriate for restorative justice

programming. Evidence so far indicates that restorative justice is likely to be used only in a fragmented fashion for less serious offences. The third choice involves the attempted implementation of restorative justice practices in agencies that are occupied with bureaucratic needs and interests, which can be antithetical to it. This can lead to corruption of the restorative practices.

Traditional criminal justice systems operate within highly bureaucratic frameworks. Compassion and understanding are desirable outcomes of restorative practice, but these feelings may not be so forthcoming in settings where they are made subservient to bureaucratic priorities. The other concern is that restorative programs could become part of the mentality that cheaper control is better than no control at all, and the aims of restorative justice will become secondary to fiscal objectives. The work of Foucault and others has illustrated how correctional systems have moved from being emotionally charged public spectacles to ones which are hidden from public view and administered by bureaucrats striving for rationalised management of punitive processes.[10]

This movement away from the public eye has caused criminal justice processes to be less emotionally charged, but has led the community to feel alienated from them. This leaves a dilemma for those who would want to implement restorative justice programs. On one hand, if such programs were tied to the existing criminal justice bureaucracy, there would be greater potential for community alienation. On the other hand, those that are not tied to criminal justice bureaucracies are likely to experience difficulty in being widely implemented.

Net widening

Another point worth noting is that restorative justice programs can be viewed as another way of extending social control mechanisms. This net widening occurs when a community conferencing program, which is designed to represent an alternative to more formalised and punitive intervention, takes in people who would have had less or no action taken against them if the program had been unavailable. For example, there may be a danger that police may refer cases, which are too hard to prove in court, to conferencing instead. In this way, increasing numbers of people are pulled into the criminal justice system and state control is extended. This is bureaucracy's justification for allocating more funds and creating new agencies and programs. The process feeds on itself, because once such agencies and programs are created, they must be used. When such a phenomenon occurs, often such programs derive their credibility and power from the threat of greater sanctions being applied against offenders.

The emphasis upon individuality

Restorative justice advocates often argue that the criminal justice system represents the theft of crime by the state out of the hands of the victim and the offender. They argue that the real issues lie between the victim and the offender and that the state should be kept completely out, or at least in the background. These arguments can be traced back to the seminal article by Nils Christie in 1977.[11] However, the English theorist Tony Marshall recently argued that we would probably regret it if the state did keep out of these matters. Marshall further argued that, in any case, Christie's argument is basically flawed because the state does have a stake in right behaviour and stable social relationships.[12] This is because crime is a product of social processes for which we all collectively bear some responsibility. Any of us could be a victim and we are all victims in some way. If we therefore concentrate too much on the relationship between the individual victim and the individual offender (although it is worth noting that many of the 'victims' are in fact corporations), we may fail to deal with the greater social issues that arise out of these wider relationships among parties, communities and society, and the state.

Community alienation

Further, even though restorative justice may provide a more constructive basis for crime control, it will need to mesh better with public sentiments about crime, and responses to it, if it is

to be widely implemented. The growth of the victim movement in the later part of the 20th century both highlighted and exacerbated this dissonance between public perception and expectations. The victims movements' focus on the rights of victims of crime reinforces traditional, and often punitive, expectations of the justice system. This is then played upon by interested stakeholders and then by political parties to create a regressive cycle emphasising retribution and punishment.

Therefore unless the community comes to learn about and appreciate the value of restorative justice programs, there might in fact be a backlash against them. Alternatively, calls for greater punishment emanating from the community may result in restorative justice programs adding to, rather than reducing, levels of punishment. The traditional criminal justice system provides sanctions for criminal behaviour. The use of mediation and conferencing is not intended to undercut these but to supplement them. The key question is: can the two approaches readily co-exist and provide a constructive response to crime that addresses the needs both of society in general and the individuals concerned?

The jurisdictional jigsaw

Another major hurdle to the implementation of restorative justice programs is the sheer diversity of jurisdictional responses across Australia. While this may indicate some flexibility of approach and responsiveness to local contexts, it more usually reflects the resources governments are willing to provide and the ability of interest groups to have their voices heard. It is surprising that over a decade of development, very few of the various jurisdictions seem to learn from one other. Rather, it is as if they continually seem to be starting from first principles. This can best be seen in Victoria, where small ad hoc non-legislated 'pilot services', delivered by three separate human services agencies, deliver a community conferencing program to part of the population. These are being subjected to a further process of evaluation – the fourth in that State's experimentation with these programs so far.[13] The result across Australia has been, and will continue to be, the fragmented and isolated development of the various programs, which consequently makes them more difficult to evaluate across the various jurisdictions. This also possibly weakens them as credible alternatives and

Table 2: Conferencing programs across the Australian jurisdictions

Victoria	Queensland	New South Wales	ACT Canberra
Anglicare Family Group Conferencing (FGC) Pilot 1995 Young offenders are referred by the Youth Court for pre-sentence FGC. The program is targeted at young people who have had previous convictions. The program is modelled primarily on the New Zealand FGC. Small project. The 2003 program expanded to include two country pilots alongside existing metro service (Jesuit Social Services – Metro; Salvation Army – Goulburn Valley; Anglicare – Gippsland).	*Community Conferencing Department of Justice* Young people are referred by the police (diversionary) or court (pre-sentence or in place of sentencing). Amendments to the *Juvenile Justice Act 1992* were proclaimed early in 1997. Four pilot projects at Ipswich, Logan, Cairns and Palm Island. Also accepts adult referrals from police.	*Young Offenders Act 1997* Juvenile Justice Department, Police, Director of Public Prosecutions (DPP) and courts can request conferencing in pre-sentence reports or use it as a sentencing option in relation to 10-17 year olds. Offenders in custody can also access the service. Sessional convenors are used to assist in intake and run conferences.	*Reintegrative Shaming Experiment (RISE), ACT Police* A police facilitated diversionary conferencing program for juvenile offenders and drink driving offenders. Modelled on the Wagga program, **an initiative of the NSW Police force, which introduced the practice of conferencing into Australia.** Subject to major research and evaluation projects.
Tasmania	**Western Australia**	**South Australia**	**Northern Territory**
Community Conferencing Program: Youth Justice Act 1997. Pre-court diversionary program for offenders aged 10-17. Referral by police and court. Operates alongside formal police cautioning, which has conferencing characteristics.	*Family Group Conferences, Ministry of Justice: Juvenile Justice Teams.* *Young Offenders Act 1994* provides for police and court referred FGCs for juvenile offenders. Modelled primarily on the New Zealand FGC process. Large project with over 1,000 conferences per year.	*Family Group Conferencing, Courts Administration Authority.* The *Young Offenders Act* 1993 provides for both police and court referred FGCs for juvenile offenders, to operate as a diversion from court. Modelled primarily on the New Zealand FGC, however, run by the Justice Department, rather than a welfare department. Large project with over 1,000 referrals per year.	*Pre-court Conferencing Program 2001.* For 10-17 year-olds run by police based upon the Wagga model.

supplements to the existing processes.

Table 2 above summarises programs operating in each of the States.

If we look at eight key areas of operation – points of intervention, target groups, participation, responsibility for implementation, monitoring and enforcement, evaluation procedures, legislative basis and participation rates – we find a bewildering array of difference in the various programs. Space here does not permit us to examine these in detail. However, if we look at, say, points of intervention, target groups, participation and legislative basis, some idea of the diversity of these programs can be appreciated.

The programs apply, generally to a wide range of criminal offences. They are often combined with police warnings, cautions and deferred prosecution. They can also occur in parallel with prosecution, prior to sentence, as part of the sentence; or after sentence including pre- and post-release.

The Tasmanian, Australian Capital Territory and South Australian programs are pre-court diversionary programs. Under the Tasmanian and Australian Capital Territory systems, the police make referrals. In South Australia, the police or the court may make referrals. In Queensland, Western Australia and New South Wales, the police or the court may make referrals to programs that may be either pre-court or a sentencing option. In Queensland, referrals may be pre-court, pre-sentence referrals by the courts after a guilty plea and post-sentence referrals to conferencing which are made by the court with accountability requirements attached. In New South Wales, the Director of Public Prosecutions, the police or the court at two points may make referrals in the sentencing process. In Victoria, the program is a pre-sentence diversionary program.

In South Australia, New South Wales, Western Australia, Victoria and Tasmania, programs are exclusively for juvenile offenders. The Queensland pilot programs are for both juveniles and adults. The Australian Capital Territory's diversionary conferences are primarily used for juvenile offenders but can also be used for adult criminal offenders and in drink driving cases. Conferencing is generally not available in relation to serious offences or sexual offences. In New South Wales and Victoria, conferences are not utilised for first time offenders unless the circumstances of the offence warrant such intervention. By contrast, in Western Australia, the process is for first or early offenders, or minor offences. In a number of programs for young offenders (including Victoria, New South Wales, Queensland and South Australia), the young person must admit to the offence.

The offender's voluntary participation appears to be a feature of most of the Australian programs. In New South Wales, participation is voluntary, however, if the offender decides to go to court, the court can still order a conference. In all of the programs, victims are invited, but not compelled, to attend. In the Australian Capital Territory, the victim's voluntary attendance is a pre-requisite for assault cases. In New South Wales, victims have a power of veto over the conference outcome plan. In Queensland, a police officer may only refer a matter to a community conference if the victim consents.

In South Australia, victims have been involved in approximately 50 per cent of cases. In the Australian Capital Territory, victims have participated in the vast majority of cases. In the Australian Capital Territory and South Australia, when the victim chooses not to attend, a community representative attends on the victim's behalf. In New South Wales, the convenor represents the victim's view. Family involvement is a feature of all of the Australian juvenile conferencing programs. The Australian Capital Territory pilot program requires a minimum of four supporters of the offender (family and friends) for the conference, and a minimum of six supporters in the case of drink driving.

The programs offered in Victoria, Tasmania and the Australian Capital Territory are not legislatively based and operate within existing frameworks. In contrast, the programs conducted in South Australia, Western Australia and Queensland have legislative backing.[14]

The encouraging thing about this development is that at least it is occurring, even if it is in ad hoc and

Table 3: Typology of restorative justice

Parties	Programs
Victim–Offender	Victim–offender mediation and/or reparation.
Victim–Community	Community group support for victims.
Offender–Community	Community programs that support offenders. For example, jobs, retraining, literacy, education, relationship counselling, drug/alcohol counselling, accommodation, support for isolated, activities to release energy and integrate people, and family support.
Victim–Offender–Community	Community involvement in victim-offender mediation.
Justice agency–Victim	The justice agency takes a pro-active role with respect to victims.
Justice agency–Offender	The justice agency actively tries to reintegrate the offender.
Justice agency–Community	The justice agency is integrated into the community. Examples may include probation services and opportunities for volunteering in relation to the criminal justice agencies.

incremental ways. It may also indicate a wider acceptance of some of the principles underlying restorative justice. The emphasis of this essay, and of many commentators, is upon conferencing and mediation programs. However, as Marshall points out, there are many ways in which these principles can be incorporated into programs.[15] He provides a useful typology of the types of restorative programs that may be developed using the various parties involved as the point of reference (see Table 3 below).

When one looks at the various programs one is struck by their differences. It is time now for some coordinated policy development and liaison across the various jurisdictions. It is a time for politicians, policy makers, bureaucrats and program providers to consider the costs of these differences across the various States. I do not think these differences can be necessarily justified upon the basis of regional variation and need, especially when they entail the provision of well-resourced and universal coverage in some jurisdictions but haphazard or little in others. As the ancient Roman jurist and orator Cicero said, 'Justice to be done must reach to the lowest.' ●

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Endnotes

1. Some of this article is based upon an earlier one by the author called 'The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants', *Australasian Dispute Resolution Journal*, No 2, May 1998. It represents an update and some additional comments upon recent developments.

2. See, for example, Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: First Report, Foundation for Reform* (1993); *The Cost of Justice: Second Report, Checks and Imbalances* (1993); Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994); Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (Report No 75, 1995); Australian Law Reform Commission, *Review of Adversarial System of Litigation: Rethinking the Federal Civil Litigation System* (Issues Paper 20, April 1997).

3. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *A Matter of Priority: Children and the Legal Process*, Draft Recommendations Paper, May 1997.

4. See for example, Marshall T, *The Evolution of Restorative Justice in Britain*, paper prepared for European Committee of Experts on Mediation in Penal Matters, November 1996.

5. Palk G, *The Evolution of Conferencing in New Zealand and Australia*, unpublished paper, March 1997, Department of Justice.

6. Brown B J and McElrea F W, *The Youth Court in New Zealand*, Auckland Legal Research Foundation, 1993; Palk, above note 5.

7. Zehr H, 'Retributive Justice, Restorative Justice', in *New Perspectives on Crime and Justice*, occasional papers of the Mennonite Central Committee (MCC) Canada Victim Offender Ministry Program and the MCC US Office of Criminal Justice, September, Issue 4 1985.

8. See, for example, Department of Human Services (Vic) *Framework for the Delivery of Metropolitan Juvenile Justice Group Conferencing*, June, 2002.

9. Minor K and Morrison J T, *A Theoretical Study and Critique of Restorative Justice* in *Restorative Justice: International Perspectives*, Galloway B and Hudson J, eds, The Criminal Justice Press, Monsey, New York, 1996.

10. Foucault M, *Discipline and Punish: the Birth of the Prison*, Vintage, New York, 1979.

11. Christie N, 'Conflicts as Property' *British Journal of Criminology* (1977) Vol 17 pp 1-15.

12. Marshall, above note 4, p 21.

13. Markiewicz A (1997) *Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program, Phase 2*, report for Anglicare Victoria and the Steering Committee; Markiewicz A with Lagay B, Murray H, Campbell L (1997) *Juvenile Justice Group Conferencing in Victoria: An Evaluation of a pilot program*, report for the Mission of St James and St John and the Steering Committee.

14. *Young Offenders Act 1993* (SA); *Young Offenders Act 1994* (WA); *Juvenile Justice Amendment Act 1996* (Qld); *Young Offenders Act 1997* (NSW).

15. Marshall T, *Restorative Justice: an Overview*, report by the Home Office Research Development and Statistics Directorate, UK, 1999.