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Australian Institute
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ALTERNATIVE DISPUTE RESOLUTION

Edited by Jane Mugford

Seminar.
Proceedings No 15
ISSN 0183-7005

AIC Seminar : Proceedings No. 15
ISSN 0183-7005

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Proceedings

22-24 July 1986

Edited by Jane Mugford

Australian Institute of Criminology
Canberra, A.C.T.

Published and printed by the Australian Institute of Criminology, 10-18 Colbee Court, Phillip, A.C.T. Australia, 2606. December 1986.

Publications resulting from seminars held by the Australian Institute of Criminology are issued in two series AIC Seminar. Report and AIC Seminar. Proceedings. These replace the former series Report on Training Project and Proceedings - Training Project.

The National Library of Australia catalogues this work as follows:

Alternative dispute resolution.

ISBN 0 642 11131 6.

1. Dispute resolution (Law) - Australia - Congresses.
2. Arbitration and award - Australia - Congresses.
3. Mediation - Australia - Congresses. I. Mugford, Jane.
II. Australian Institute of Criminology. (Series: AIC seminar. Proceedings; no. 15).

347.94'09

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OVERVIEW

It is dissatisfaction with certain aspects of the courts system which has been a major precipitating factor in seeking alternative ways to resolve disputes. One source of concern is the inherently conflicting nature of the adversarial system of court adjudication. As Jenny David made clear in her opening paper:

> It ... emphasises conflict since our system of adjudication uses the adversarial approach. This ... means that adjudication is like a contest between opposing parties played according to definite rules with an umpire (the judge or judge with jury) deciding in favour of the 'winner'. Each party is like a side in a game or contest, vying to win with the winner taking all. Hence the saying 'fight it out in court'.

Moreover, emphasis in the courts is placed more upon applying the correct procedure than upon outcome. For example, rules of evidence are strictly applied, to the point where there have been cases where injustice has resulted. As Viscount Haldane said (in Dawsons Ltd v. Bonnin [1922] A.C. at 424), 'Hard cases must not be allowed to make bad law'.

Secondly, although the court system provides the most publicly visible dispute resolution mechanism, in fact it processes only a tiny proportion of all disputes. Of disputes that are litigated, estimates suggest only 5 per cent are actually resolved in court. The remainder are settled or abandoned altogether. Then, of course, there are all the other disputes which do not go to litigation but are resolved through other means, private and public. Many of these can be addressed by alternative means of dispute resolution.

'Alternative' in this sense, then, describes a system which is an alternative to adjudication via the courts. The seminar chose to look at three 'alternative' dispute resolution mechanisms - conciliation, arbitration and mediation with the emphasis on mediation.

The seeking of justice via alternative dispute resolution is being taken very seriously in Australia. Following the success of the Community Justice Centres, established in New South Wales since 1980, several centres have been established to handle neighbourhood and family disputes in particular, and feasibility studies are under way to establish further services.

Thus, there is a relatively sudden proliferation of services, especially those providing dispute resolution by mediation. It should not be forgotten, however, that alternative dispute

resolution is not new (a point made in several papers at this seminar) and that conciliation and arbitration have been part of our justice framework for many years.

The primary goal of the seminar was to share information about the types of alternative dispute resolution being used in Australia and the programs which use them. Secondly, it was felt that alternative dispute resolution is sufficiently far down the track in this country to ask critical questions about its effectiveness as a system of justice, and practical questions relating to the management of programs and to the role of the third party in resolving disputes. Professor Harding referred to these seminar ambitions in greater detail in his welcoming remarks.

Participants were delighted that the Chief Justice of New South Wales, The Honourable Sir Laurence Street, was able to open the seminar. The Chief Justice is a longstanding supporter of the work of the Community Justice Centres. In his address he stressed the 'significant preventive' role of alternative dispute resolution, 'not just in the resolution of the consequence of the historic events that constituted the crime, but more particularly in seeking to identify those areas of stress and strain within our society which are likely to give rise to crimes and in seeking to provide means of resolving those stresses and strains in a peaceable, orderly and structured manner'.

Background information on the concepts and processes relating to alternative dispute resolution was provided in a paper by Dr Martha Gelin and distributed to participants before the seminar. The paper clarified the terms commonly associated with alternative dispute resolution - arbitration, mediation, conciliation and negotiation- and distinguished the processes involved from the formal processes of litigation and adjudication, and from traditional counselling and therapy. (The paper is located in the Appendix to these proceedings.)

Conceptual clarification was considered to be an important goal of the seminar. There is much confusion surrounding the use of terms and an immense diversity of mediation, conciliation and arbitration processes being used. Jenny David took on the difficult task of defining alternative dispute resolution by surveying relevant Australian organisations, to see what they actually do. This expanded and complemented the analysis of the literature in Martha Gelin's background paper.

As an organising framework Ms David located each type of program according to the process involved ('the formal structure of the method used to resolve disputes'), content ('issues that can be discussed during the application of that process'), and outcome ('the final result of the application of the process - be it an agreement or a decision'), and the degree of control over these processes by the disputing parties and by the third party.

Results of the survey indicated a wide range of practices from those where the disputing parties control all except the 'process' (features of mediation) to those where the third party controls everything - the process , the content and the outcome (features of arbitration, the extreme of which can be more authoritarian than court adjudication).

Recognising the impossibility of constructing 'a picture of [these] diverse processes and services that will be universally true for all', Jenny David was nonetheless able to make some generalisations about the services she surveyed, as follows:

- the processes are mostly confidential in that the content cannot be used as court evidence
- consensual, co-operatively produced solutions are the norm
- permissible remedies are wider in scope than those obtained under adjudication
- resolution is usually speedier than in the courts
- for disputants the process is cheaper, as it probably is for governments as well
- entry to the process is usually voluntary, especially for the initiating party
- programs provided by private agencies are increasing, though the majority of programs are government funded and initiated
- especially for the programs using mediation, the causes underlying the dispute can be addressed - this is not possible in court
- the outcome tends to be legally non-binding where the third party (mediator, conciliator or arbitrator) has no control over the outcome and legally binding where the third party can impose the outcome.
- it is claimed that disputants are more likely to adhere to the agreed outcome if they have contributed towards its creation, though further evaluation of this is needed.

Comments following Ms David's presentation emphasised the need to think precisely about concepts, highlighting the dangers of ideological assertions and calling for empirically based models. A second line of questioning was the relationship between informal justice and the law, which was to reappear in different forms throughout the seminar. At this point it was stressed, firstly, that the formal judicial process has considerable

flexibility and informality built into it, which is not always recognised. Secondly, there was a concern that in electing for an alternative, such as conciliation, one's legal rights ('due process') might be jeopardised. The example given was the Australian Press Council, where a request for them to take action in a dispute apparently means giving up one's legal rights to sue. The response by Jenny David indicated that this situation is unusual and that one does not normally abandon legal rights before proceeding to conciliation. She went on to suggest that the closer one gets to 'due process', the more control is taken by the conciliator or third party; however, where decisions are taken by the disputants and not imposed by the third party, there is less need to be concerned with due process.

The following two papers presented evidence that there are many unresolved disputes in the community which for various reasons do not reach the courts, but where the disputants feel that some intervention is desirable. Ms Judith Worrall reported that in a recent phone-in survey conducted by the Legal Services Commission of South Australia, 516 callers described the nature of disputes which they had with neighbours. Seventy per cent of these had already tried to resolve the problem, mostly with no effect at all or with a worsening of neighbour relations. Only four per cent had tried mediation. The complementary paper by Maureen Carter pointed to the capacity of mediation for helping to settle disputes when other agencies have been unable to help. She argued that the successful elements of the mediation process include 'voluntary participation; a free and accessible service using all community languages; sufficient time for active listening skills to be employed; and a neutral, non-judgmental atmosphere where disputants find their own solutions'.

The remainder of the Day One was devoted to descriptions of a representative range of alternative dispute resolution organisations which use the techniques of mediation, conciliation and arbitration. Topics were as follows:

- Community mediation - David Bryson
- The role of the registrar and the court counsellor in the Family Court - Marcus Galanos and Peter Mark
- Private dispute resolution services - Vaughan Massey
- Equal opportunity conciliation - Joan Nelson and Frances Joychild
- Small claims - Michael Levine
- Civil disputes in magistrates courts - Graeme Johnstone and Nerida Wallace

It should be noted that while these topics were designed to be representative of the types of organisations using alternative

dispute resolution, there are undoubtedly others which could have been put on the list. Foremost amongst these is the ombudsman's office. Unfortunately none of the ombudsman's offices was able to accept the invitation to attend the seminar, but several letters were received from these offices which indicated their quite considerable use of mediating or negotiating methods. While the main role of the ombudsmen is to investigate complaints made against the various departments and authorities within their jurisdiction and recommend appropriate action to correct any injustices, it is often found that informal negotiation can play a very useful part in achieving a solution which is mutually satisfactory to both the complainant and the defending party.

The papers listed above contained a wealth of information and the diversity of practices described was quite overwhelming. Jan Cameron addressed this in her concluding comments, remarking that:

> there remains considerable uncertainty regarding the processes used, in particular the consistency of those processes, and the labels which should be applied to them. It is perhaps not surprising that those practitioners who are most certain of what they are doing are those who have well-defined processes of resolution which their mediators, referees or judges follow. In other instances, however, the processes described - in particular those labelled 'mediation' -do not conform to processes similarly labelled by other practitioners.

Jan Cameron felt that there was an evident need to clarify further just what happens during 'mediation', 'conciliation' and 'arbitration'.

The major theme evident in questions and comments on these six papers was, once again, the tension between the goals of the formal justice system and those of the alternative systems. For example, when Peter Mark and Marcus Galanos were asked to what extent the Family Court could adopt alternative forms of dispute resolution, such as mediation, and to what extent should the Family Court be amenable to community needs, the response was that, regardless of what one might <u>like</u> to do, the Court is limited by its status as a court of law and by the legislation under which it acts. The question, in short, was whether the Family Court is a court of law or whether it is a different kind of organisation. That, felt Peter Mark and Mark Galanos, is precisely the kind of topic that this seminar was all about.

Further, the papers by Vaughan Massey and by Nerida Wallace and Graeme Johnstone highlighted the situation of lawyers and courts moving into informal dispute resolution areas. Vaughan Massey described the development of the private dispute resolution

service which he runs independently of his law practice. The main thrust of questions directed at Mr Massey was how he is able to separate the two roles in day-to-day situations, both from an ethical and a practical point of view. On the legal side the situation is more clear-cut, he suggested, and he tries to avoid telling mediation clients what their legal rights are, and abusing his considerable power by virtue of his legal position (such as advising his clients when to proceed to a legal level). He was not so sure, however, what are the limits of his role as mediator, but he felt that the main point was not to prejudice the mediation. There could also be a problem of confidentiality if one found out information during mediation and then one proceeded to act for one of the parties. One of the ways this can be resolved is to send parties to other lawyers, and this is something which Mr Massey felt all lawyers should be prepared to do.

Presentations during the remainder of the seminar, in small workshops and plenary sessions, concentrated on evaluating alternative dispute resolution as a justice model, and raised problematic issues for discussion.

Day Two started with a panel session on the topic of 'evaluating informal justice'. Jan Cameron started the ball rolling by looking at the 'community' and 'justice' attributes of alternative dispute resolution from both theoretical and practical perspectives, drawing in particular on her recent evaluation of the Christchurch Community Mediation Service. The full description in her paper of the methodology and the results will be of considerable benefit to others who may be involved in evaluations of their service.

The research goals of Dr Cameron's evaluations also included an assessment of the 'quality of justice' received at the Christchurch Community Mediation Service. This she operationalised by looking at (1) the 'success' of Christchurch CMS in providing a means of dispute resolution, (2) the extent to which Christchurch CMS represented the community and provided that community with education in conflict management, and (3) attributes relating to access to justice, for example, who has access and why. Many times during the seminar, discussions returned to the question of quality of justice and whether alternative dispute resolution is a second-class form of justice compared with its legal counterpart. Jan Cameron's conclusion was that in time, alternative dispute resolution might have a significant impact that will ensure 'first class justice for all'.

One of the key concepts of Dr Cameron's analysis is that of 'community', also discussed in several other papers at the

seminar, in particular those by Jenny David and David Bryson. The most basic issue of all is 'what is the community?', and it turns out that 'community' is an ideological notion that is not generally reflected in the relatively anonymous urban areas in which most disputants live. Although mediation is often referred to as 'community mediation', it has little to do with 'community' in this sense. For example, the 'community' as such is not involved in the management of programs. In practice, it appears that programs are 'often bureaucratic, have become institutionalised and are probably somewhat limited in the extent to which they can be flexible and responsive without jeopardising funding and legislation'. A second problem is that responsibility for both the creation and the resolution of disputes is placed upon the individuals concerned, so that while those individuals may be empowered by the process, by the same token it does not address the issue of structural inequality in our society. As Jan Cameron said, '[c]ontrary to the community justice philosophy it can be argued that by individualising conflict the programs might undermine the ideology of community, rather than create, preserve or reflect it'.

The latter point was taken up in detail in the paper by Jocelynne Scutt, who was concerned that the individualisation of informal justice, and the confidentiality of the processes involved, combined to privatise the issues in dispute. This, she felt would negate advances in human rights made by disadvantaged groups via public legal processes in the nation's courts. It would also not change the social status quo, she argued as did Dr Cameron, because alternative dispute resolution addresses the relationships of individuals and not the structural inequality between certain groups, for example those of different race, ethnicity or gender. There is thus every likelihood that the more powerful party will not stick to the agreed outcome of any specific dispute unless compelled to do so by legislation, and this could be a particular problem with domestic disputes as distinct from those disputes involving persons of approximately equal status such as neighbours.

Participants agreed that power imbalance is not an easy problem and opinions differed on the ability of alternative dispute resolution agencies to handle disputes such as domestic violence successfully. Nonetheless it was felt that practitioners are aware of the political implications. This point and others were taken up in commentaries by the remaining panel members, Lynda Donnelly and Roger McCarron, who are alternative dispute resolution practitioners in community services. Both commentators were highly supportive of the many issues raised by Jan Cameron and Jocelynne Scutt.

On the topic of power imbalance Roger McCarron agreed that people should not be pushed into hidden meeting rooms but felt that it would be wrong to assume that going through the legal process will of itself redress inequalities in society, because the legal

system is not that objective. He felt that social changes such as equal opportunity legislation have come about because of political pushes, not just because cases have been processed through the courts. Justice is a broad concept, he said - you cannot simply draw a line and say 'justice stops here'. Mediation, in particular, is an enabling process that allows people to see what they think is just and equitable, and to work cooperatively towards a just solution.

Both Lynda Donnelly and Roger McCarron picked up references to the 'community'. Roger McCarron said that when the Norwood Community Mediation Service was first established he sat in his office and wondered himself where the community was. Before long he realised that the community was there and that it did respond to the Service. It may not exist as a neat social or geographical entity, but it is self-defined in some way. People are concerned - about their own locality and the community in general. This supported Jan Cameron's point that '[c]lients claimed to have been helped, in a variety of ways, by their contact with the [Christchurch Mediation] Service'.

Another issue raised by both commentators was the fact that services are being required to justify themselves at a very early stage. Programs tend to be given pilot status and temporary funding until they have 'proved' their value. The irony of such a position is that the very energy which is needed to develop links with the community and provide the service is directed towards preserving the service. Lynda Donnelly stressed that this is a very uncomfortable situation for service providers and it is the community members who suffer most. If we are to develop services, she said, we have an obligation to the community to provide continuity.

Ms Donnelly also reminded participants of the difficulties involved in ensuring informality and accessibility as the real aims of community services. Agreeing with Jan Cameron's point, she said that they run the risk of being formalised and of imposing new and alienating structures upon those they serve. In addition they can too easily be co-opted into the legal service system (for example Legal Aid or the Family Court) as a means of helping that system resolve its own problems.

During questions to the panel, it was asked whether pressures to bring about social change are more important than the needs of the disputing parties. It was indicated, for example, that clients often request private hearings because their dispute is so stressful. Should these be made public in order to bring about change? Dr Scutt answered that the ongoing outcome of the relationship is what is most important. However, she went on to say that some women, in particular, want private hearings and others want their dispute to be public at whatever cost, and therefore it is also important that the 'system' (police, lawyers, etc.) does not make it difficult for women to speak out.

Another comment from the floor added that it is all too easy to neutralise disputes by taking them through 'alternatives'.

The following plenary session examined the relationship between informal justice and the criminal justice system. Panellists' presentations related to the police (Detective Sergeant Stephen Ireland), corrections (Professor John Ekstedt), and the courts (Judge John Bisphan).

As police are often the only 24 hour helping agency available, they are the first calling point for a whole range of problems, whether they are large or small, whether or not the police department is the appropriate agency, and whether or not the police have the skills or resources to deal with the problem. In his paper Stephen Ireland outlined the ways in which police use alternative methods of dispute resolution informally in dealing with requests for assistance, and also for problem solving and grievance resolution in the internal administrative and industrial arena. However, their clear duty to maintain law and order combined with a lack of resources to spend much time on any particular case means that their involvement is usually limited to treating symptoms of disputes rather than underlying causes. Therefore, police preference is to refer cases elsewhere when appropriate, and in 1984/85, 123 cases were referred to the New South Wales Community Justice Centres. The fact that Stephen Ireland is also a mediator with the CJCs raises some complex issues relating to a potential conflict of duty with his role as a police officer.

Professor Ekstedt explained that the informal justice movement has had a considerable impact on the 'formal' justice system, and that 'the influence of this movement can be observed in strategies associated with community policing, prosecution policies, court or judicial administration, and sentence administration'. Looking at sentence administration he focussed on probation and programs such as community service orders, fine options, restitution and family-court counselling, and said that the 'promotion of cooperative rather than coercive methods for the resolution of social conflict is a highly desirable objective'. The state bureaucracies responsible for the sentence administration components of the criminal justice system are both supportive of, and resistant to, this principle. This resistance is attributed to (1) professional response to increased use of community support at the expense of professional/therapeutic skills within the system, (2) difficulties in 'determining and enforcing standards of practice', and (3) 'a difficulty in the public mind concerning the relationship between ADR and the requirement for punishment in criminal matters'.

As a practitioner within the courts system Judge Bisphan thoroughly supported the development of alternatives both inside and outside the formal system. In New Zealand conciliation and

mediation are now an integral part of the statutory procedures of the Family Court and available statistics and personal experience have indicated that the methods are working successfully. It is hoped that the alternatives will help reduce problems with expensive litigation, time delays and the associated stress to the litigant - none of which can be overcome just by increasing the number of judges and introducing new administrative responses such as decriminalising certain lesser offences. Secondly, Judge Bisphan felt that the present adversary system is not intrinsically compatible with the successful introduction of alternatives and he called for a more inquisitorial approach. However, he was not prepared to countenance any new system which would take away basic rights.

The involvement of religious groups was one of the matters raised during question time. Is there a real contribution to be made here? Professor Ekstedt responded that since the 1930s in North America, for example, the state has seen church interests in the offender as a major means by which they may be reintegrated into the community. However, in a three-volume document released by the Canadian Ministry of Justice in 1976 it was recommended that church interest should be sponsored, and the unfortunate consequence of this is that the whole movement is being coopted. This point linked in with a later question on American imperialism and whether we are seeking to establish essentially American programs which are not necessarily transferrable to notions of justice and legal processes in other (for example, Commonwealth) contexts. John Ekstedt felt that we might be doing just this. However, based on the American experience, the biggest danger to avoid is using alternative dispute resolution as a means of getting at the criminal justice system. This would sabotage efforts to provide a decent resolution to a dispute.

A second line of questioning was on net-widening. Stephen Ireland felt that there has been such an effect because if a system is available the police, for example, will use it. They are familiar with the relevant referral agencies and will refer as far as possible at the investigation scene. Set against this, however, he judged that there may be a net-contraction effect and in support of this he cited the juvenile cautioning arrangement in New South Wales which keeps some persons out of the criminal justice system.

The matter of relative cost-effectiveness also arose. Surely mediation cannot be that cost-effective, it was suggested, when each case via mediation is much slower to process than each case via the courts ('the 123 cases referred by police would keep the three Community Justice Centres going for two weeks but wouldn't keep magistrates in Central Court busy past lunchtime on one day').

The answer came that one has to consider the non-financial benefits of mediation, such as the fact that people suffer in the criminal justice process. But even on economic grounds there are greater costs in the criminal justice system than in the courts alone, from police involvement through to lawyers, courts and corrections. Also many disputes are serial in nature so that one client may be processed through the criminal justice system many times over.

In the afternoon of Day Two and the morning of Day Three various problem areas relating to alternative dispute resolution were confronted in workshops on the topics of 'Managing Programs' and 'The Role of the Third Party Neutral'. Wendy Faulkes introduced relevant issues in plenary sessions before the workshops began, and each workshop leader provided a more detailed paper on their designated topic.

In her opening words Ms Faulkes volunteered that alternative dispute resolution seems to be 'flavour of the month', as it finds itself increasingly in the spotlight. It is therefore 'essential that we get our act together, to make sure that ADR programs are based on solid practice, understanding of what we are doing, and respect for human rights'.

The most important starting point in the development and management of every program, and one which Wendy Faulkes could not stress too much, is the underlying philosophy. From this everything flows, and all decisions thereafter should be made on the principle that the 'practice of the program should be consistent with its philosophy'. This is something which 'should be emblazoned on the desk of every ADR manager and ... intoned regularly at management ... meetings'. A considerable portion of Ms Faulkes' paper was devoted to elaboration of the philosophy of ADR, drawing out its central themes and its vital contribution to the setting up and management of programs. The remainder of the paper raised many points on the interrelated topics of setting up programs, legislative and management structures, and quality control and training. The issues are complex and ADR management structures are as varied as ADR techniques, so careful program planning is the key to its future success.

In her second paper Wendy Faulkes discussed the role of the third party neutral. Rarely, she said, is there a 'pure' form of third party role because there is such a range of methods used and such a variation in the degree of decision-making involved, from those who make arbitration awards to those who bring the parties together and leave them to it. Practitioners therefore need to realise the implications of being involved in more than one role. We have already seen examples in the papers by Stephen Ireland and Vaughan Massey, where they described a potential conflict of interests between their role as police officer or lawyer and their involvement as mediators. These are

illustrative of the most usual type of conflict of roles, where a program is 'offering a service for dispute resolution whilst being an advocate for, or protector of, a particular group'. Ms Faulkes posed the questions of whether a confusion of roles or a dual role for practitioners is in anyone's best interest, and whether one agency could fill all roles.

Secondly, she looked at the time of entry to and exit from a dispute. The role of the third party neutral at intake or pre-mediation is most important and also subject to the greatest confusion. At this stage there is a considerable conciliation role in obtaining agreement to participate in dispute resolution, a diagnostic role in determining what is to be included in sessions, and an organisational role in getting everyone together. The timing of exit from a dispute is equally important. At the Community Justice Centres mediation is completed upon agreement between the disputing parties, and it is assumed that they will retain control over the keeping of their agreement. There is no policing of the outcome, though disputants are free to return to the CJCs if there are further problems. Personnel at the CJCs are not convinced that this is a good enough response and it raises philosophical issues about the extent to which the third party neutral can go in attempting to resolve a dispute.

Third, Wendy Faulkes addressed the issue of balance of power and the third party neutral. This was another theme which recurred throughout the three days of the seminar and has already been mentioned in discussing Jocelynne Scutt's presentation. Suffice it to say here that Ms Faulkes considers it a very basic issue; one which is being addressed amongst practitioners; and one which requires much more discussion. 'It is an uncomfortable question' she said, 'and it won't go away'.

Workshop topics were as follows:

- Legislative issues and management structures - Lynda Donnelly
- Quality control and training - Linda Fisher
- Imbalance of power between disputants - Charles Foley
- Matching the dispute to the dispute resolution process - Martha Gelin
- Conflict of roles where more than one resolution method is employed - Lawrie Moloney

Before the seminar closed, several brief presentations fleshed out preceeding discussions by looking at specific Australian contexts where alternative dispute resolution has a particularly useful role. David Bryson and Jenny David looked at the use of

alternative dispute resolution in victim-offender programs; Kayleen Hazlehurst described the potential empowering process that could result from the use of ADR in Aboriginal communities; and Eric Stevenson presented the view that the development of ADR will force marriage counsellors to re-appraise their profession. These presentations are not reproduced here but are available on request from the editor of these proceedings.

Finally, Jan Cameron took on the challenging task of providing a overview of the three-day seminar. In so doing, the following were some of the conclusions which she highlighted:

- there is a need for practitioners to accommodate and/or resolve the enormous variety of values and applications that are reflected in ADR programs;

- there is considerable uncertainty of what actually happens under the labels 'mediation', 'conciliation' and 'arbitration';

- much alternative resolution activity takes place in private settings, which adds to the difficulties of clarifying the processes involved;

- the seminar made a considerable contribution towards this clarification process, but the dialogue needs to continue;

- as an 'institutionalised reaction to the institutionalised nature of the 'formal' legal system', alternative dispute resolution is not a serious challenge to societal inequalities;

- increasingly, state functions are going into the 'community', without asking what this really means in terms of controlling and funding 'community' organisations;

- there is considerable uncertainty about how alternative programs fit with the 'formal' legal system;

- there is also considerable uncertainty about who should practise alternatives and what kind of training is necessary;

- education in conflict management is a worthy initiative toward avoiding disputes which might otherwise be disruptive, but this topic received very little attention at the seminar;

- questions relating to the cost-effectiveness of alternative dispute resolution are numerous, but the bases of comparisons are unclear and conclusions very difficult to reach;

- through evaluations of services it is necessary to challenge the taken-for-granted assumptions that alternatives are necessarily 'good', and to ask key questions such as 'better for whom?' and 'better for what?';

- top quality evaluations are necessary to help practitioners deliver a better service;

- participants at the seminar have given evidence that they are trying to 'practise what they preach';

- there has emerged a concern to establish nationally-recognised systems of training and legislative protection for all ADR practitioners, and a national lobby to gain official recognition of alternative methods of dispute resolution.

Certainly there were more questions raised at the seminar than answers supplied. It seemed, however, that the goals had been met - programs were described and information was shared, and participants went away with a clearer notion of where the problem areas lie, even if they are unable to supply all the remedies. This is a first step. No doubt future seminars will be able to take the issues further and work out firmer answers.

There was also a concurrence that alternative dispute resolution provides a form of justice that is accessible, cheap and appropriate. As Wendy Faulkes expressed it:

> ADR gives people more opportunity to take control over decisions affecting their lives, not less. I believe that ADR now has enough runs on the board to demonstrate that people can and do negotiate and make decisions based on what is right for them, and what is possible, rather than insistence of all their legal rights. What is more, the people are satisfied, the disputes are resolved, civilisation hasn't crumbled, the legal profession remains employed.

Sincere thanks are owed to all who participated in the seminar: especially to Wendy Faulkes who put the idea to the Institute; to Wendy, Jenny David and David Bryson who helped with the conceptual framework; to Jan Cameron who not only contributed a major piece but diligently listened and took notes throughout to provide the concluding commentary; to Institute staff who provided first-rate support as always; and of course to all others who presented papers, led workshops, chaired sessions and generally participated to make the seminar enjoyable and worthwhile.

WELCOMING REMARKS

Professor Richard Harding
Director
Australian Institute of Criminology

Chief Justice, Your Honour, ladies and gentlemen: the issue of alternative methods of dispute resolution is one which has come up in several recent Institute conferences in various forms. For example, the question of alternatives to imprisonment in the form of diversionary programs has itself formed the subject matter of a conference; the broad ranging seminar on justice programs for Aboriginal and other indigenous communities looked in some depth at alternative criminal justice mechanisms which might be made available for particular ethnic groups; and the conference on prosecutorial discretion inevitably canvassed the question of the principles upon which persons who are in apparent breach of the criminal law should not be prosecuted. Comparable questions have come up also in relation to the question of youth, crime and justice and even that of domestic violence.

Quite clearly, the impetus for examining alternative modes of dispute resolution in the context of seminars whose subject matter seems at first sight unmitigatedly legalistic is a growing recognition that existing methods of crime control do not always work. Certain alternatives, it is suggested, might work better in the various contexts covered by these earlier conferences. The Institute now considers that the time is right to try to draw the various strands which we have already seen together into one single conference whose principle theme is that of alternative dispute resolution - an idea which exists in its own right rather than merely as an appendage to other ideas and mechanisms.

The first community justice centre which I myself am aware of started operating in Sydney in 1981 after the passage of the Community Justice Centre (Pilot Project) Act 1980. In mid 1982, in the light of the experience gained, it was decided that community justice centres should become a permanent part of the New South Wales Government's services. Appropriate legislation followed in 1983. It can thus be seen that such centres have now been operating for six years.

In that time, it has not really been possible to carry out a rigorous evaluation of their effectiveness. Indeed, I am not quite sure what the criteria for evaluation would be. Presumably, it would include avoidance of escalation of disputes, acceptance of the mediated outcome by both sides to the dispute,

speed of resolution, and ability of the system to reach into those parts of the Australian community which are least well equipped to take advantage of traditional legal mechanisms for settlement. Whilst there may not yet have been a rigorous evaluation, there is at least a full description available in the 1983/4 report of the Community Justice Centres. The most interesting aspect to me about the report is the figure which appears on page 11. This indicates that the disputes handled by the centres are almost equally distributed between what is designated the 'light' and the 'heavy' ends of the spectrum. At the heavy end we find threats (7.4 per cent), property damage (22.0 per cent), and violence (22.1 per cent). These are quite remarkable figures, indicating that the centres have moved far away from the relatively trivial matters such as dividing fence disputes or arguments about the noise of neighbours. (Of course, these two matters are precisely the sorts of things which if left unresolved can escalate into quite serious matters; one should not, therefore, appear to be supercilious about them.) In other words a mechanism which I for one am accustomed to think of primarily in terms of civil matters seems inexorably to have moved into the realm of criminal matters. The very fact that police forces have established community relations branches indicates a crucial degree of acceptance for this kind of activity. Police forces generally have recognised that their tasks are far too complex for the traditional responses of arrest and charge necessarily to be adequate in all situations which involve a technical breach of the criminal law. In this respect the Institute welcomes of police participation in this seminar.

This ties in with the whole question of victims' rights and concerns. Last year I was rapporteur at the United Nations Congress on the Prevention of Crime and the Treatment of Offenders of the committee dealing with the question of victims' rights. Most of the discussion, it must be said, revolved around a model whereby the state was intervening against the offender and the problems of the victim were problems which arose out of the failure of the state to communicate effectively what was going on or to protect or advise the victim adequately. However, there was some discussion of how far conciliation or mediation processes of some kind might heighten the understanding of the offender as to how destructive his behaviour was and the acceptance of the victim as to the lot which had befallen him. Of course, part and parcel of this kind of conciliation was perceived to be restitution or compensation, whether by way of monetary contributions or services. At a sentencing level, there seems to be a growing feeling that the particular impact on the victim is a relevant factor in setting a type and level of sentence. In other words, potentially, mediation or conciliation involving the offender and the victim could be in the interests of both parties and thus of the state.

The Congress unanimously passed a declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Clause 7 reads:

> Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilised where appropriate to facilitate conciliation and redress for victims.

The whole declaration has now been adopted by the General Assembly of the United Nations. In this context, it is timely that the Institute's seminar program includes a section on the Thursday afternoon concerned with Victim/Offender Relations.

I have spoken of the criminal justice aspects of alternative dispute resolution because, frankly, those are what most interest me. But it would be foolish not to acknowledge that such approaches are more firmly established in many other areas, for example, consumer affairs, family law problems, equal opportunity matters, and so on. All this is indicative of the fact that some factors of the formal justice system are reassessing their capacity to solve disputes by means of litigation. We shall hear later today in a paper on developments in the Victorian Magistrates' Courts that the use of alternative means of dispute resolution is soon to be taken to the extent of avoiding the use of the court at all except as a last resort.

In summary, ladies and gentlemen, the situation in Australia is complex indeed. In contrast our own ambitions for this seminar are relatively simple.

Firstly, we are attempting to satisfy a basic need for sharing information about the types of alternative dispute resolution methods which are being used, and the programs which use them. Day One will be devoted to this goal.

Secondly, we are aware of the pressing need for evaluation, difficult as this undoubtedly is. We do need, for example, to assess the quality of justice received by clients. Is it cheaper than the traditional forms of justice provided through the courts, or does it add to the justice arena a group of people who would not otherwise be involved, thereby adding to the overall costs of justice? Is there quicker access to justice? Is it more, or less, effective in providing an enduring resolution to a dispute? What is the effect on the individual, who has a greater chance through alternative dispute resolution to find her or his own solution, and that individual's relations with the other, perhaps more powerful, party? What is the relationship between the informal and formal justice systems? And so on. Issues such as these are the focus of plenary sessions on Day Two.

Thirdly, there will be workshop sessions which will examine practical themes and problems relating to the setting up and management of new programs, and to the role of the third party in resolving disputes.

Fourthly, the Institute will be publishing the proceedings of the seminar, and a considerable effort has been made to collect as many relevant contributions as possible. Although the topic of alternative dispute resolution is not new to countries such as the U.S.A., it is still relatively novel here. Some articles have been published in Australian periodicals, but there are no major texts which describe Australian developments in detail. The proceedings, therefore, will be a major by-product of the seminar and we hope that this will be a useful contribution to the literature.

I am pleased to welcome participants from a broad spectrum of backgrounds. Amongst you there are judges, magistrates, lawyers, psychologists, academics, conciliators, mediators, and counsellors, representing organisations such as community justice centres, Family Courts, law reform agencies, consumer affairs, police departments, equal opportunity organisations, and a number of other related government and non-government departments. I believe that we have an excellent forum for productive discussions throughout the next three days.

It is now my pleasure to welcome to the Institute the Honourable Sir Laurence Street, Chief Justice of New South Wales. His Honour has been a Supreme Court Judge for twenty-one years, the last twelve as Chief Justice. There can hardly be a greater tribute to the importance to the whole field of alternative dispute resolution than the fact that a person at the apex of the traditional dispute resolution system regards it as appropriate to agree to open this conference. Speaking for myself, I am particularly delighted that Sir Laurence agreed so readily to come to the Institute to open this seminar. For many years now I have attended from time to time seminars at the Sydney University Institute of Criminology, and indeed occasionally spoken somewhat reluctantly at them. Sir Laurence frequently chairs these seminars and has exercised some fairly firm control over some rather troublesome characters - dispute resolution by force of personality one might say. I welcome you now to the Institute, Sir Laurence, and call upon you with great pleasure to open this conference.

OPENING ADDRESS

The Hon. Sir Laurence Street, KCMG, K StJ
Chief Justice of the Supreme Court
New South Wales

Professor Harding, Ladies and Gentlemen,

Thank you Professor Harding for your welcoming remarks and for paying me the compliment of inviting me to open this seminar. At the outset I should like to congratulate the Institute of Criminology for providing this opportunity for in-depth consideration of the importance of effective dispute resolving mechanisms in the overall peace and good order of both the civil and criminal aspects of our society.

The incidence of disputes and the necessity for resolving them is as old as human nature and is recorded back over the years of history. The earliest reported case that I have been able to find of an adjudication was in fact dealt with by way of summary trial and with an absence of regard to due process which would appal the twentieth century civil libertarians. The proceedings were brief but conclusive. The subject matter of the dispute was, remarkably enough, commercial in character notwithstanding the primitive era of this report. It concerned the inherent quality of foodstuffs.

Two of the accused, whose names incidentally were Adam and Eve, were found guilty and were ordered to be transported. The third accused, one serpent, suffered a forfeiture of status and stature. Not only does it seem that there was no legal representation, but the necessity of distinguishing the role of prosecutor and judge appears to have been overlooked.

Well, Professor Harding, we have come a long way since then but I doubt whether we could claim to have improved either the expedition or the efficiency with which justice was administered in that case.

The common interest that brings us together this morning at this seminar is in the field of alternative dispute resolution. I have long felt it to be regrettable that we do not have, in our society, a mechanism for enabling a substantial volume of civil disputes to be determined at a stage far earlier than the formal hearing of contested litigation. For example, I have wondered why it is that our mechanisms differ so markedly in their servicing of the consequence of a motor vehicle collision giving rise to both substantial vehicle damage and some personal injury.

The vehicle damage is normally recovered simply by filling in and lodging a few forms; a court case is usually the last resort and is encountered in only a minority of instances. The personal injury aspect is not similarly serviced and, instead of the minority, the majority of such claims involve having to seek the intervention of the court, albeit that most of such claims are settled before hearing but only, of course, after money has been wasted on costs on the way through. Although the recovery of compensation for personal injuries is a major aspect of the regulatory mechanism that our society must provide, we have, for a variety of reasons, not been able to modernise effectively the conventional dispute resolving mechanism of formal litigation. The developing recognition of the need for no-fault compensation has created a situation in which this litigious context is being left behind, but we lawyers can probably claim little credit in relation to that reform.

It has always seemed to me that there was room in the field of civil litigation for some such mechanism as has existed for decades in the field of industrial disputation. When an industrial dispute crystallises, or even when it is merely foreseen, there is a properly structured system whose aid can be invoked with a view to preventing or resolving the dispute. Once that entity is notified of the actual or pending dispute it takes positive initiating steps itself by summoning compulsory conferences and forcing the parties to the negotiating table with the aim of preserving or restoring industrial peace.

We cannot, of course, carry the industrial example precisely over into the field of civil disputes as the compulsory conference and the enforced settlement in the context of compulsory arbitration would not readily survive transplantation into the ordinary civil arena. We can, however, provide that mechanism and have it available to the parties on a voluntary basis. That is the philosophy - the voluntary element - that essentially underlies the establishment of the Australian Commercial Dispute Centre in Sydney. It is a Centre established with the primary object of providing for parties with pending or existing commercial disputes a dispute management service. The facilities of the Centre are intended to be available at the request of either party with the intention that the Centre invite other actual or potential disputants to consider how best to resolve the matter. The services of conciliation, mediation and arbitration will be the stock in trade of the Centre. It is hoped that it will be able to fill a real need in the commercial arena and, if it proves itself there, who knows, the concept may be broadened out to serve the requirements of society in other areas of potential conflict.

There is a tendency, when referring to mechanisms for the resolution of disputes to think only of civil matters - and more often than not civil matters involving property. So far as

concerns the criminal law its mechanisms are dominated by the bringing and determination of charges either at the summary level or by indictment. Although essentially criminal proceedings involve the resolution of a dispute between the state and the subject, their accusative and penal character tends to overshadow this basic truth.

In a sense our civil and our criminal mechanisms tend to be backward looking. We look back to the breaking of a contract or the committing of a tort to see what, if any, compensation is appropriate to make good that loss occasioned in the past. On the criminal side we look back to events and activities that have constituted an offence and then determine what the penal consequence should be. In both the civil and the criminal field, the law in this connection is concerned with the identification and classification of the event under consideration in a historic sense. The damages or the penalties are determined with direct reference to the historic event.

Within the broader sweep of our society, however, we are coming to recognise that court orders consequential upon historic events tend to provide little positive contribution to the overall welfare and progress of our society. In the medical world the philosophy of preventive medicine has gained a place of major importance. One can see in stark reality the progress from the days in past centuries when the infected limb was amputated on to the advanced days of identification, treatment, and cure of causes and symptoms and ultimately, in the last few decades, to increasing emphasis on community health generally and the prevention of illness in particular. It may be an old adage that prevention is better than cure, but it is only in comparatively modern times that this approach has achieved the recognition that it deserves - some, indeed, say that we have gone too far in matters of lifestyle, diet and physical fitness. But, regardless of matters of degree the trend is surely evident to all of us.

Within the field of civil law there was comparatively early recognition that remedies must be provided which would diminish the natural human reaction to retaliate in the face of a wrong. The legal historians tell us that the principle upon which exemplary damages was founded was to preclude resort to duelling as a means of obtaining satisfaction for aggravated civil wrongs. We have long recognised that an essential element of the machinery in any organised society is a means for resolving disputes in a more satisfactory and meaningful way than direct face-to-face confrontation between the disputants. That indeed, is the essential justification for our complex court system. But, little has been done until recent times in the structuring of preventive mechanisms within the field of law and order.

On the civil side, it is interesting to observe that the need to provide alternative ways of resolving disputes over historic

events was the immediate cause of the development of alternative mechanisms such as arbitration, mediation and conciliation. Unexpectedly there has grown out of this an appreciation of the use to which the mechanisms of mediation and conciliation can be put in actually preventing a significant dispute from arising. Within the commercial arena, early identification of the seeds of a dispute may enable the situation to be adjusted with the goodwill of both parties before those seeds grow into a historic event in the shape of a thicket standing across the path of the orderly progress of the parties in pursuit of their activities.

We are now coming to realise the enormous social advantages in promoting the policy of prevention on the criminal side of the regulation of our affairs. Of course, preventive considerations have always had a place amongst the principles of sentencing through the deterrent element. But that does not represent prevention in its fullest sense. We are now conscious of the need to strive to construct a society which will be inimical to criminal activities - the provision of social services, of educational and recreational activities for our young people, of proper housing and even of job opportunities - all play a part in preventing a social climate which is conducive to crime. It is here that the element of alternative dispute resolution within the criminological field can play a significant preventive role. Just as mediation and conciliation have been recognised as useful in preventing the seeds of a civil dispute from maturing to a thicket, so can alternative mechanisms capable of dissipating the human factors which lead to crime play a valuable part.

Underlying this three day seminar is recognition of the value of exploring the use that can be made within the field of criminology of alternative dispute mechanisms, not just in the resolution of the consequence of the historic events that constituted the crime, but more particularly in seeking to identify those areas of stress and strain within our society which are likely to give rise to crimes and in seeking to provide means of resolving those stresses and strains in a peaceable, orderly and structured manner.

Perhaps, Professor Harding, there can be no better example of this than the Community Justice Centre. Disputing neighbours are assisted through a mediator or conciliator to resolve their disputes before they get out of hand and escalate to significant violence. I know that these are going to be considered in depth over the next three days, but may I offer my own personal testimony in their support.

In my days of sitting as an equity judge I can recall more than one backyard dispute of the classic form. A minor incident such as a barking dog or a child's ball across the back fence, might lead to the exchange of harsh words. The next step is for one to light a bonfire from which smuts will blow across the fence

on to the washing hanging out in the neighbour's backyard. Not surprisingly that is conventionally followed by the neighbour with the washing directing a hose on to the bonfire. The scene is set for violence. It may be manifest by the throwing of potentially dangerous objects across the fence either at people or at windows. It may be manifest in physical altercation. It may simmer for some hours and become manifest when others return to the respective homes from work, perhaps a little disinhibited by a drink or two on the way home, and are aroused to anger by an account of what has taken place thus producing a strong prospect of ensuing physical violence. At times the chain may be a little less direct but not less infuriating. A car may be parked over the drive so as to bottle up the neighbour's car with a consequential provocation of the offending car being itself attacked and damaged.

I need not go on. These are real and very human problems in an urban context. They may attract a degree of amusement when recounted in a detached clinical atmosphere. But I believe that there is not a man or woman here who would not be infuriated if it were happening to us across our own back fence or across our own driveway. And, I repeat, I have seen these backyard disputes escalate to full dress equity suits which, I am glad to say, have almost always proved amenable to compromise with the aid of an understanding approach - but only, of course, after the expenditure of a great deal more money than either of the disputants could afford.

What a valuable reform has been the introduction of the system of Community Justice Centres - mechanisms for enabling pent-up feelings to be ventilated and the strains and tensions resolved before they escalate to the historic event of an act of violence offending against the constraints of the criminal law. It is my firm belief that the attainment of civil peace in our community, particularly in the field of domestic and neighbourhood violence, will be appreciably assisted by the existence of mechanisms outside the formal court system which will avoid the coming into existence of potentially criminal situations or which will enable those situations to be resolved before the historic event of the crime is committed.

Professor Harding, the Institute, in setting up this seminar, is making a major and perceptive contribution to the better understanding of the whole field of alternative dispute resolution. Over the next three days examination and consideration will range widely across the field of ADR in general. It is both heartening and impressive to look around this room and see the breadth of the fields and the depth of the wisdom from which contributions will be forthcoming. I am confident that in the result the published proceedings of this seminar will be a valuable addition to our perception and

understanding of alternative mechanisms, equally as they will be of great utilitarian worth as part of the permanent material on this topic.

In conclusion may I hark back to the note upon which I commenced - the age old history of dispute resolving mechanisms. In every human community, whether civilised or uncivilised, there exists some form of mechanism for resolving disputes. It may be harsh, it may be simplistic, it may be steeped in superstition such as the old English trials by ordeal or it may be just, fair and democratic. But whatever its nature it is an indispensable part of a group of humans living together. It is, perhaps, not extravagant to say that in some ways the existence of dispute resolving mechanisms is one significant element that differentiates mankind, no matter how primitive and savage he may be, from the animal kingdom. From the tribal chieftains of the uncivilised peoples, on to the great courts and judges of modern western democracies, the process of adjudication and resolution of disputes is an essential part of the operation of the ordinary daily activities of life. The more informed and the more idealised our understanding of society's need for this basic requirement, the better will be our understanding of society itself.

I express my appreciation to all who have come prepared to contribute to, and participate in, this seminar which I now have very much pleasure in formally declaring open.

ALTERNATIVE DISPUTE RESOLUTION - WHAT IS IT?

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It is particularly appropriate in this 1986 International Year of Peace to be holding a conference on the resolution of conflict. Unfortunately it seems inevitable that conflicts will occur when individuals come together to live in groups in society. It would appear it is only in novels that romantically idealised societies exist without conflict. Methods of resolving conflicts have been developed in all societies. By resolution is meant an end to the dispute which the parties regard as final and which is acceptable to *both or all* of them. These methods have been many and various, both formal and informal, private and public. Dispute settlement is one of the fundamental objectives of any legal system. The traditional formal public method of dispute resolution in Australia is that of adjudication in courts using an adversarial approach.

This paper first looks at what are disputes, and argues that ADR is not only an alternative to the formal, public method of adjudication but also to some of the other informal dispute resolution methods used in society which existed long before the ADR movement. Then the various ADR programs now available in Australia are discussed with particular reference to those who answered the questionnaire sent out on 6 June 1986. A copy of that questionnaire is included at the end of this paper. An overview of the ADR processes used in Australia at present is then given. Finally, reasons why the movement has developed, particularly over the last 30 years in North America and over the last 10 years in Australia, are posited.

*The writer gratefully acknowledges the research assistance of Anne Duffield, from the University of Sydney, in the preparation of this paper.

ALTERNATIVE TO WHAT?

Usually, when the term 'alternative dispute resolution' (ADR) is used, it is used to describe dispute resolution methods that are alternative to adjudication (Salem 1985:4; Green:514; Edwards 1985:427). However,it could be said that adjudication is the 'alternative of last resort' since only a 'minuscule proportion of disputes actually are resolved by judges in courts' (Salem 1985:4; Edwards 1986:670). It has been estimated (Salem 1985:4; Edwards 1986:670) that judges only resolve about 5% of disputes that are litigated as most are settled or abandoned and that the vast majority of disputes or potential disputes are never litigated in the first place.

Disputes are not discrete entities or events like a birth or a game (Galanter:1983 who in turn drew on Felstiner, Abel and Sarat:1980). They are composed of the perceptions and understandings of those who participate in the events which give rise to them. A dispute arises when a participant in an event perceives that event as injurious to them and as a violation of some right they have, which violation they also perceive as capable of being remedied. What events each person or institution will regard as injurious will depend on that person's or institution's knowledge of their rights and on their idiosyncratic response to the event - whether they regard it as trivial or major, as their own fault or (say) the government's or the other person's or institution's fault.

If a person or institution does regard the event as injurious and as one that can be remedied, then they may make a claim on that other person or institution for a remedy and if that other person or institution refuses the remedy, in whole or in part, then - and only then - has a dispute arisen.

Now many events that could result in disputes obviously do not - because a large number of events that could be regarded as injurious are just not perceived at all by one of the parties (such as professional or trade malpractice), or because the party who could complain does not know they have a right or entitlement which was infringed. It could be said that these events are potential disputes, but since no claim is made they do not eventuate. ADR would not be an alternative to resolve these potential disputes because they do not eventuate. However, those ADR agencies that have an information giving component (such as the administration services, infra) may enable some of

these potentials to become disputes by informing people or institutions of their rights and then providing an ADR process for their resolution.

The processes used to resolve disputes that do arise can be seen along a continuum from the informal, private processes of avoidance and of negotiation not involving a third party to the most public and formal processes of arbitration and adjudication. That continuum can be represented as follows:

Private	Avoidance	Unilateral action
	Private negotiation	Bi-lateral action
Public	Public negotiation	Unstructured third party intervention
	Mediation	
	Conciliation	Structured third party intervention
	Arbitration	
	Adjudication	

In the following descriptions of the programs that use ADR processes the term 'process' is used to mean the formal structure of the method used to resolve disputes, 'content' to refer to the issues that can be discussed during the application of that process and 'outcome' to refer to the final result of the application of the process - be it an agreement or a decision.

The private processes that do not involve a third party are avoidance and private negotiation between the parties themselves. These processes are called private because only the disputants are aware of them. They do not involve other people or institutions in their search for solutions.

Some parties merely avoid (McGillis and Mullen 1977:6-7; Merry 1979) the dispute by deciding to do nothing

about it because they feel there are no acceptable remedies or because to pursue the remedies is too costly in monetary, time or emotional terms or merely because they wish to avoid the whole event and 'forget about it' - referred to as 'lumping it' (Cain 1985:337). A dispute could also be resolved by the unilateral action of one of the parties remedying the result of the event - such as by repairing defective goods or work performed. Here the dispute is not actually resolved, in the sense that one of the parties is unaware of the solution, but its results are dealt with. In some disputes one party who perceives themselves as injured may undertake a unilateral solution to the dispute and (say) seize the goods they believe should be theirs or respond in some physically violent manner. This may end the original dispute but is almost certain to start another! In each of these reactions to disputes the parties, or party, retain control over the process, content and outcome. They retain the responsibility for the resolution completely. Avoidance can be bad because it may leave the party or parties feeling aggrieved. ADR processes may be an alternative to this avoidance either because they provide more appropriate remedies or because they are faster and/or cheaper or more accessible on other grounds than adjudication. However, if a party chooses avoidance it must be considered whether the welfare state should intervene and exert pressure on the party to take action. Whether people should not just be left avoiding if that is their choice is a consideration that should be given weight since it appears, in our welfare oriented society, paternalistic intervention is too prevalent.

Other disputes do not become public because the parties themselves negotiate their own solution. This is the most common form of dispute resolution in our society. Roberts calls it 'simple bi-lateral negotiation' (Roberts 1983:543). The parties mutually agree, without the intervention of any third party to some remedy or solution. Here again the parties retain control over the process, the content and the outcome. In Roberts' words, 'the essential feature is that control over any solution is retained by the disputants themselves rather than being surrendered entirely or in part to some outsider'. If both parties are really satisfied by the result, it would appear that ADR will not be an alternative to this form of dispute resolution. However, where one of the parties is of much greater power, physical or economic, than the other it may be that some of the forms of ADR could be used as alternatives to this form of dispute resolution.

In the criminal area, corporate private justice is carried out in this area of dispute resolution (Marshall 1985:30; Stenning and Shearing 1984; David 1986). This occurs where employees or clients/customers of companies have disputes with those companies, which involve the companies being the victim of some criminal act by the employee or the client/customer. The companies use sanctions available to them that are not available under the criminal law to 'resolve' the dispute. This purports to be bi-lateral action but it may often be unilateral action since the company will often be a large structure with more financial power than the offender. Thus, whilst the process is 'chosen' by both parties, the offender wanting to ensure that the police are not involved, the content and the outcome may be the decision of only one of them. Some of the remedies that companies utilise are dismissal, refusal of credit, transfer or demotion within the company and refusal of access to the companies' property (Stenning and Shearing 1984). Because of the power imbalance it is possible that there may be no natural justice being accorded to the offender and that no "due process rights" are observed in establishing whether the employee or client/customer committed the criminal act. If ADR is made available in these circumstances it may be able to equalise the power and accord more justice to the offender.

The problems of private policing are enormous and because of its privacy open to severe abuse. This is an area crying out for some form of dispute resolution process to be <u>imposed</u> or made available (such as consumer affairs only this time offender affairs!). Industrial conciliation or arbitration with their concentration on groups of employees and employers is not suitable for disputes between individual employers and employees. It may prove that ADR would be more acceptable to companies than adjudication since the arbitration of commercial disputes between companies in Australia has been accepted of late with the establishing of the two centres for resolving commercial disputes in Victoria and New South Wales.

All the above ways of resolving disputes are in the purely private end of the continuum of dispute resolution. They do not involve third parties. Some of the ADR processes will be alternative to some of these processes that have existed from time immemorial. It has been estimated that from 25% (Galanter 1983:14; Miller and Sarat 1980-81; Ladinsky and Susmilch; King and McEvoy 1976; Ross and Littlefield 1978) to 75%

(Brady and Mitchell 1971:162-3; Stenning and Shearing 1984:41-49; O'Malley 1984) of all events that could result in some form of public dispute processing do not get beyond the purely private end of the continuum. This is where the arguments about the expansion of social control are relevant. Since these informal processes already exist would it not be better to encourage the growth of these processes rather than establish structured ADR processes with the likelihood that as these latter processes become bureaucratised they will become part of the overall social control apparatus and a further limitation on individual freedom? (Cohen 1985; O'Malley 1984)

Once outside third parties are involved, the dispute becomes public. Even here there is a traditional area of dispute processing which is informal in the sense that it is not institutionalised in any way. This is where the third party belongs to the social setting in which the dispute arose, such as in the school, business, government department or church to or in which the disputing parties belong. The third party will either have authority over the two disputants or have their respect and/or friendship. Where the third party has authority over the parties they may share control over the process, content and outcome with the third party or the third party may take control over one or more of these. Where the third party has their respect and/or friendship the parties more than likely retain control over the content and outcome and even over the process, because it is unstructured, but they may share control over the process with the third party. Many disputes are resolved this way and it may be that ADR will be an alternative here, though whether it is needed or appropriate is debatable.

Moving further into the public end of the continuum of dispute resolution to the structured processes of mediation, conciliation and arbitration, these are all closely associated with the ADR movement, though conciliation and arbitration have been used in the formal dispute resolution processes for a long time, particularly in the industrial area under the Conciliation and Arbitration Act 1903 (Comm.). However, since these three forms of dispute resolution (with all their "in house" variants) are most closely associated with the ADR movement, they will be dealt with in detail in that section and only adjudication will be dealt with in this section as that is the traditional formal dispute resolution process in Australia and the one that ADR processes are most often said to be alternative to.

In adjudication the third party (judge or judge and jury) decides the outcome. The disputants surrender their decision making power to the judge. They present their versions of the dispute (which is defined by the law) in accordance with rules of procedure and of evidence. The judge (or jury if there is one) decides which version of the dispute is 'correct' by applying the rules of law. The process is highly structured and rule oriented. It also emphasises conflict since our system of adjudication uses the adversarial approach. This adversarial approach means that adjudication is like a contest between opposing parties played according to definite rules with an umpire (the judge or judge with jury) deciding in favour of the 'winner'. Each party is like a side in a game or contest, vying to win with the winner taking all. Hence the saying 'fight it out in court'. It is not necessary for adjudication to adopt the adversarial approach. The civil law countries of Europe have adopted an inquisitorial approach which emphasises inquiry into the facts by the judiciary who are not confined to the role of umpire.

In this game of adjudication the lawyers are the only ones who know the rules. Judge Jerome Frank said 'It is a wise litigant who knows his own quarrel when he sees it in court' (Marks, Johnson and Szanton 1984). As a result disputants have to hand over their dispute to the lawyers, which renders the disputants virtually powerless. They have no control over the process, the content or the outcome. The rules tend to become paramount to the exclusion of truth and justice which they are supposed to serve. The rules can be used to keep truth from the court and justice cannot be based on half-truths or falsehood. There have been cases in which judges have acknowledged that applying the rules of law to the facts has produced injustice but still have done so on the basis that the rules are more important than justice in the individual case. An example is Viscount Haldane in *Dawsons Ltd v. Bonnin* [1922] A.C. at 424 where he said 'Hard cases must not be allowed to make bad law'. Dissatisfaction with this system and its inadequacies is one of the major causes of the ADR movement which is certainly alternative to this form of dispute processing.

The question the critical legal studies academic writers raise here is, will ADR processes really be an alternative to adjudication or will they merely supplement it and extend the social control apparatus into avoidance and private negotiation, that is into

the private end of the dispute resolution continuum. Cohen (1984 and 1985) and Scull (1984) have demonstrated how community corrections and the decarceration movement have not decreased the number of prisoners but have increased the number of convicted offenders who receive some form of punishment, thus having the effect of being an alternative to the existing lesser forms of punishment. There is a similar danger for the ADR movement.

ADR PROGRAMS IN AUSTRALIA

The programs which exist in Australia at present and use ADR processes represent a five-fold movement, as follows:

a) court based processes,
b) community agencies,
c) administration agencies,
d) private agencies,and
e) other.

Each is a response to different criticisms of adjudication and the existing dispute resolution methods and consequently each has somewhat different ideals and aims.

a) Court based processes

The impetus for this part of the ADR movement came mainly from the backlog of cases which the courts could not handle and from the fact that research had shown that of the vast majority of cases that commence litigation, an estimated 80-90% according to McGillis and Mullen (1977) and 75-80% in criminal cases according to O'Malley (1984), are settled prior to the hearing before the judge. This part of the ADR movement is also alternative to those settlements. The courts have encouraged these early settlements for a long time through the requirement of pre-trial conferences or preliminary hearings. These conferences or hearings can involve the use of conciliation.

In recent years a further range of processes has been implemented within the court system to speed up the settlement process and thereby ease court workloads. Their main basis appears to be cost-efficient resolution of cases. This is largely achieved through the ADR processes of conciliation followed by arbitration. In these court based processes entry into the process is often compulsory, making the process really part of adjudication itself. Where the process

is available the third party is not so rule bound and the parties may have more say in the content.'

Court Annexed Arbitration: This process is available in N.S.W. under the District Court Act 1973 (N.S.W.) s.63A and the Local Courts (Civil Claims) Act 1970 (N.S.W.) s.21H. Whether or not the parties request it or agree to it, the court may refer an action to arbitration under the Arbitration (Civil Actions) Act 1983 (N.S.W.). So entry into the process can be either voluntary or compulsory. The court appoints the arbitrator from a panel of arbitrators who are all lawyers. The decision of the arbitrator is taken as the judgment of the court and is, therefore, binding on the parties. In practice the hearings are formal and treated as an extension of the adjudication process, but there would seem to be scope for the development of less formal hearings freed from some of the procedural rules governing adjudication hearings since arbitrators are free, subject to the Act and any directions of the court, to determine their own procedure. The arbitrator is directed to 'act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms'. However, the arbitrator is bound to make a decision applying legal rules. The arbitrator has a conciliation power but, apparently, the arbitrators take no active part in any negotiations for settlement. Any consensual settlement must be given effect as an award, which is final. The arbitrators thus control the process and it depends on whether conciliation or arbitration is being used whether the arbitrator controls the content and outcome.

Small Claim Court Processes: In order to make adjudication quicker, cheaper and more comprehensible to the average person, some states and the territories have modified the processes of the existing inferior courts when dealing with small claims (See Magistrates Courts Act 1921 (Qld), Local and District Criminal Court Act 1926 (SA), Court of Requests (Small Claims Division) Act 1985 (Tas), Small Claims Act 1974 (NT) and Small Claims Ordinance 1974 (ACT).) The claimant usually enters the process voluntarily by lodging a claim with the court, but some courts may refer the matter. The defendant's entry is compulsory. The legislation emphasises conciliation, but the degree to which the court becomes involved in such conciliation would appear to depend on the individual court officials. The court controls the process of conciliation which is informal, legal representation is not usually allowed and the rules of evidence are to

apply. There is a tendency towards an inquisitorial approach as the court is empowered to inform itself in any manner it thinks fit and in some instances may appoint investigators and conduct its own inquiry. The content is limited to small claims. Such claims are usually for amounts under $2000 and the types of disputes are often also limited. The court controls the outcome. The terms of any settlement reached may be embodied in an order of the court.

Family Court Services: Conciliation in the Family court is provided for by s.16A of the Family Court Act 1975 (Comm.) which states that the Family Court and legal practitioners shall have regard to the need to direct parties to the procedures available for the resolution by conciliation of matters arising in proceedings under the Act. With certain exceptions, conciliation has been made a compulsory step in custody and property proceedings under the Act (s. 64(1) and s. 79(9)). The conciliation service offered by the court can also be used voluntarily, even before a couple decides to separate or divorce. Where the court orders conciliation then obviously the process is non-voluntary.

The Family Court registrars provide conciliation for property disputes and the Court's counsellors provide conciliation for custody and other disputes related to children. It appears that the model of conciliation used by these services differs considerably and for the registrars depends on individual choice. One registrar described the difference as that the counsellor seeks a 'family-based resolution which will lead to a reduction in disputes' whereas a registrar seeks a 'negotiated settlement of matters' where it is the settlement that is important, particularly since the settlement of property disputes is largely a question of interpreting the law and applying it to the facts found. This is closer to the arbitration end of the continuum than to conciliation. Another former court counsellor said that the couples are 'almost invariably represented by the lawyers who tend to play the major role in negotiations' before some registrars, who may not even see the couples themselves. The counsellors, in contrast, ensure 'face to face' discussion with most, if not all, family members present without lawyers.

Each service is provided free by the Court (though if lawyers are present the parties will have to pay their fees) and only one counsellor or registrar is used. The outcome can by turned into a consent order of the court if the parties so desire.

Building Disputes: In Victoria, a County Court judge may appoint a mediator to assist in the resolution of building disputes. The parties must consent to the mediation. They may choose their own mediators or, if they do not, the judge may choose one for them. The mediators are chosen from a panel of lawyers with expertise in building cases and technically qualified persons with experience in arbitration. The aim is to assist the parties to reach a settlement as quickly and cheaply as possible. The County Court Rules allow mediators to set and collect their fees from the parties, but do not regulate the mediation proceedings. The mediator is requested to communicate informally with the parties on a without prejudice basis. He/She may inspect the site and/or conduct the mediation on-site. He/She may make suggestions but the parties do not have to adopt them. If the matter is not settled it proceeds in the normal course in the County Court.

b) Community agencies

These are agencies, either publically or privately funded and established, which are to provide ADR processes for the community for a large range of types of disputes. Usually these agencies offer mediation as their ADR process, however, some also conciliate. Some of the agencies cater for varied types of disputes such as the Community Justice Centres in New South Wales and the various community based agencies. Some cater for only limited types of disputes, such as the Family Conciliation Centre at Noble Park. Because of the range of agencies in this part of the ADR movement, they have been subdivided into three groups for ease of analysis:

i) community service agencies
ii) community based agencies
iii) family dispute agencies (which are also i) or ii) above)

i) Community service agencies

Community service agencies are those agencies set up by governments to provide a dispute resolution process for the community apart from formal adjudication. They use mainly mediation with some conciliation and use non-professional lay mediators drawn from the community who are trained 'in house'. The agencies at present are the Community Justice Centres in NSW (CJC), the Neighbourhood Justice Centres that are about to be

established in Victoria and possibly the new centres that may be established in South Australia and the ACT. The Family Conciliation Centre at Noble Park is also one of these agencies but, because it deals with only one type of dispute, it is dealt with in the section on family dispute agencies.

Although replies were received from both the NSW and Victorian Centres, the analysis of this part of the ADR movement will be based on the NSW CJCs since they have been established since 1980 and are the model upon which the Victorian Centres, and possibly the South Australian Centres, are largely to be based.

The CJCs use the ADR process of mediation to resolve disputes. This is a voluntary process which results in a non-enforceable agreement. There is no fee charged for the mediation sessions. The CJCs arrange to bring the parties together in an informal setting at a time convenient to all of them. Two mediators attend the sessions matched in age, sex and culture, life experiences and language to the disputants as far as is possible. Each party is given time to uninterruptedly state their version of the dispute and how it affects them. The process is not limited to the presenting issue but may range over all matters in dispute between the parties. The parties are encouraged to express their feelings 'as the process aims for mutual understanding, acceptance of responsibility and informed decision making' (CJC Annual Report 1983-4 at 8). The mediators then see each party separately, after which the mediators 'caucus' together and finally the parties and the mediators come together to work out, if possible, an agreement to resolve the issues in dispute.

The mediators do not suggest solutions but facilitate constructive communication between the parties. In fact, the parties control the content and the outcome, the mediator only controls the process. Responsibility for finding the solution to the dispute rests with the parties. A major aim of the process is to ensure the relationship continues after the dispute (rather than in the conflict increasing adversarial model which frequently results in irretrievable breakdown in relationships).

The primary focus of these centres is on disputes between disputants in on-going relationships (of whatever sort!). The disputants can be individuals or companies and institutions though obviously the latter have to appoint an agent with full power to represent

them. The CJCs can mediate stranger disputes where both disputants prefer mediation but do not promote this aspect of their service. The type of disputes the CJCs will mediate range from neighbour and family disputes to work or business related disputes, 'including landlord/tenant, consumer/trader' and 'professional/client' (CJC Annual Report 1983-4 at 12). For these disputes the Centres offer private, cheap (because no fee is charged and there is no lost work time for disputants, no legal representative nor witnesses) and speedy resolution (70% resolved within 20 days of a file being opened for that dispute at the Centre).

The CJCs also conciliate some disputes that come to the Centres. The interviewing officer, Co-ordinator or Director of each Centre carry out this process. It is mostly done by phone and arises out of the intake interview. It is a form of shuttle negotiation during which the conciliator 'acts to bring the principals together for the purpose of dispute settlement and may 'transmit' offers for settlement from one party to the other' (Faulkes 1986:1). Conciliation is offered when it appears a mediation session is unlikely to result but resolution of the dispute is possible. It seems that conciliation here again focuses on the specific presenting issue and does not open up any other areas of dispute between the parties, nor go into underlying causes. It was hard to assess exactly what the position was. Here the parties may control both the content and the outcome. The conciliator controls the process.

It is anticipated that the Neighbourhood Mediation Centres in Victoria will make similar mediation and conciliation processes available in four centres in Victoria within the next twelve months: two metropolitan, one provincial and one country service being contemplated. The Centres are to mediate and conciliate disputes between persons and institutions or companies in ongoing relationships.

ii) Community based agencies

These agencies are ones set up by the community itself, not by government for the community. They are usually either based in legal service centres or sponsored by them. Four such agencies answered the questionnaire. Three of the four agencies were in South Australia (Bowden Brampton Community Legal Service, Norwood

Community Mediation Service and the Neighbourhood Dispute Service) and one in Western Australia (Gosnells Family/Neighbourhood Mediation Service). Two of the centres had been established for three years, the other two were established this year (one being sponsored by the earlier service which now refers all its neighbourhood disputes to that service). Three have been funded by government grants and are managed by committees with representatives of the community. One was a 'wholly private sector body'.

The agencies all offer mediation in the sense that the disputants are brought into direct contact and facilitated to find solutions themselves. The exact model of mediation used is not known except for the Norwood Service which has modeled its process on the NSW CJC's model. Two of the agencies at present use two mediators (matched to the disputants) and a third as an observer. The other two use a single and two mediators respectively. The oldest of the three agencies also offers conciliation in the sense used in the CJCs to resolve disputes. This can be done by letter, phone or through personal communication, but the parties do not meet in this process. One of the agencies has provision for 'on-site inspections' where necessary by the interviewing officer who has the responsibility for initial research into the dispute.

Each of the agencies offers these voluntary processes to people in ongoing relationships, either as neighbours or in families. One agency would not intervene if court proceedings were already underway. No charge is made for the sessions. Mediators ranged from 'in house' trained lay mediators (trained by volunteer lecturers from an institute of technology in a program run by the agencies) to untrained volunteers, to lawyers or social-work trained workers in the centres. Lack of finance was responsible for the lack of training courses for the untrained volunteers. None of the agreements reached are enforceable. Each of the agencies aims to provide processes that allow the neighbours or family to retain, and even enhance, their relationship, that are speedier and cheaper than adjudication. The mediators retain control of the the process whilst the parties control the content and the outcome.

In summary then, all the community agencies, be they community services or based, offer the ADR process of mediation and some of them also offer conciliation. Entry into the processes is voluntary. The agencies cover a wide range of disputes but tend to concentrate

on neighbourhood and family disputes. They use mediators who usually belong to the community and are usually trained in mediation techniques. The outcomes are not binding. The techniques aim to resolve the disputes in a way that allows the parties to retain their ongoing relationship. The parties usually retain control over the content and outcome (in varying degrees) and the mediators control the process.

iii) Family dispute agencies

These consist of the Family Conciliation Centres at Noble Park in Victoria and at Wollongong in New South Wales. The Wollongong Centre was not sent a copy of the questionnaire as apparently that Centre does not make mediation available to resolve family disputes. The Family Conciliation Centre was placed in a separate category as it is a government funded community service project for one type of dispute only.

The Family Conciliation Centre provides mediation as the ADR process to resolve family disputes. 'Family' is taken to include defacto relationships. Disputes are not limited to matters of divorce and separation. The Centre uses two mediators in a single session and the process used is as follows: 'an introduction to the session and its rules; presentation by each party of his or her version of the issues without interruption; compilation of a list of issues for negotiation; negotiation on each issue in turn; writing of the agreement reached in the language of the parties' (Greenwood and Hooper 1986:79). This is a similar model to the CJC model described earlier but usually does not have a component for individual parties talking to the mediators separately. This process does not result in an enforceable agreement. The emphasis is on improving communication between the parties since, even with divorcing and separating couples, the focus is on the continuing relationship between them. The third party simply controls the process to facilitate communication and allows the parties to control the content and the outcome by not giving advice or suggesting options for settlement. The emphasis is on empowering the parties to resolve their own dispute. The parties see the community lawyer and the financial counsellor prior to the mediation session to ensure that they are aware of their rights and of the financial implications of possible resolutions and are also informed that they do not have to be bound by the types of resolution normally imposed by the Family Court.

c) Administration agencies

Administration agencies are those set up under legislation enacting rights for disadvantaged sections of the community, and which are then given the task of ensuring those rights are observed. The method enacted to ensure the observance of that legislation is in each case firstly by the ADR process of conciliation and then by some form of adjudication with an adversarial approach if the conciliation is not successful.

Eight replies were received from agencies falling within this group. They were from the Human Rights Commission (who even made available a training video), the Commissioner for Equal Opportunity in Victoria, the Anti-Discrimination Board in New South Wales, the Residential Tenancies Tribunals of the Department of Public and Consumer Affairs of South Australia, the Merit Protection and Review Agency and from four consumer claims agencies from Victoria, South Australia, Queensland and Tasmania.

Each of these agencies uses conciliation to attempt to resolve complaints made to them of non-observances of their statutes. If conciliation should fail to resolve the complaints, most of the agencies have either specialist tribunals or adjudication in courts available to enforce the statutes. Thus there is an element of coercion attached to the ADR process in most of them. The Human Rights Commission, under the Race Discrimination Act, and the Merit Protection and Review Agency have only the threat of adverse publicity through informing the relevant minister and Parliament if their recommendations are not adequately and appropriately acted upon.

The Victorian Commissioner for Equal Opportunity's Annual Report (1984:36-37) contains perhaps the best summary of what is involved in the ADR processes used by the administration agencies. The process is usually described as conciliation which, as as stated in that Report,

> 'consists not only of resolving disputes by negotiation, but also of obtaining a settlement that conforms to the requirements of the law by removing or stopping discrimination, and by redressing disadvantages resulting from such discrimination'.

The Commissioner went on to give two distinct processes that are involved in practice in the conciliation of such complaints:

> i) investigation of the complaint to see if the law has been breached and whether as a result there is anything that should be conciliated, and
> ii) attempting to negotiate an agreement on the basis of the circumstances revealed by the investigation'.

The conciliation process in the administration agencies may be thus confined to a more specific issue than that of mediation in the community agencies. These agencies have been established to administer legislation governing rights and they are not geared to resolving all issues in dispute between the parties but only those which are relevant to the rights the agency administers.

The Victorian Commissioner went on to give the steps in the conciliation process used. The process is representative of those used by all of these agencies. First the complainant is seen to obtain a full account of the complaint and to canvas possible solutions. Then the respondent is contacted by letter outlining the complaint and arranging a visit by a conciliator. In some agencies this is done by telephone or done first by telephone and then by letter. The respondent is then seen to gain an understanding of their position and perspective and to work out either a settlement proposal and/or to investigate what is an appropriate procedure to be followed. Further shuttle negotiations may take place and sometimes the parties are brought into direct contact. Usually, if settlement is not reached at this stage the parties are referred to the EEO Board for adjudication. The decision to go to the Board or continue conciliation is usually determined by the complainant's preference.

The state agencies all have specialist tribunals but all attempt to conciliate first, though some are faster to refer a dispute to their tribunal than others. Two of the agencies stated that conciliation had a greater potential for attitude change than the more coercive dispute resolution processes (Grabosky and Braithwaite 1986:142). The parties apparently feel more committed to the outcome if it has been reached freely by mutual consent.

Each of these conciliation processes is confidential. The third party is chosen by the agency, not by the parties. The third parties do not have formal qualifications but are trained 'in house'. Only one third party is used in each process. There are leanings to obtaining persons with 'relevant expertise'

in the above agencies and in the consumer affairs agencies dealt with next. This should be avoided if it is an aim of the processes to allow the disputants to find their own solution to the dispute as there is the likelihood, if the third party is an 'expert', that one or both of the disputants will seek to cast the third party in the role of an arbitrator for the dispute. Such a problem could perhaps be overcome by awareness amongst the 'experts' of the problem but this may not be enough if a bureaucratic tendency invades the agencies who become more concerned with 'cost/effective' solutions rather than with the present consensual approach focusing on the parties coming to their own solution for the dispute which appears to be intended by their legislation.

The conciliation processes of the agencies are voluntary for the complainant who can withdraw at any time. They are not voluntary for the respondents who, if they do not participate are threatened with being referred to adjudication or to the tribunals or with adverse publicity. Some of the agencies are empowered to compel respondents to attend conferences and to give information.

Some of these conciliation processes are 'comparatively personalised and expensive in terms of time spent on individual disputes' (Vic. EEO. 1984). This could well lead to an early introduction of the attitude of 'cost/effective' resolution of disputes that has been referred to already.

Any subsequent proceedings at the tribunal level are adjudicative although tribunals are empowered to attempt conciliation. The procedures are more informal than those of the courts, the right to legal representation being restricted and the rules of evidence not binding. Entry to the process is voluntary by the claimant. The tribunal controls the content, process and outcome. Any order made (including an order giving effect to a settlement) is enforceable as a court judgment. The grounds of appeal are usually limited to lack of jurisdiction or denial of natural justice.

d) Private agencies

These private agencies can be divided into the following sub-groups:

i) commercial dispute agencies, and
ii) family dispute agencies.

The latter agencies include agencies established by individuals who are also prepared to handle other types of disputes but who principally handle family disputes at present.

i) Commercial dispute agencies

Two agencies have been established in the last two years, the Australian Centre for International Commercial Arbitration (ACICA) in Melbourne and the Australian Commercial Disputes Centre (ACDC) in Sydney.

The ACICA provides arbitration for commercial disputes of local and international origin. If the parties do not draw up their own rules for the arbitration, the UNCITRAL Rules will apply. It provides facilities for the nomination of arbitrators, arbitration rooms and support facilities including witnesses waiting rooms. The Centre's brochure also indicates that international conciliation and mediation services are available. Talks to the staff at the Centre did not indicate that this facility was used often, if at all. No statistics are available on the work of the Centre as it takes the view that to release any sort of statistics on its operation would jeopardise the confidentiality of the Centre. The Centre is primarily funded by government grant for its first five years of operation.

The ACICA Small Disputes Resolution Service appoints at the request of the parties an 'independent experienced umpire' to 'settle by summary procedure' disputes which do not exceed $5,000. Their brochure states that 'flexible procedure with an emphasis on mediation' would be used. The application form for an umpire states the umpire may determine the dispute and the parties undertake 'promptly to comply with any direction of the umpire'. It is apparent that, though the umpire is expressly stated not to be an arbitrator, the process being used is similar to arbitration. The umpire is 'empowered to investigate the dispute and to inform himself in any manner that he sees fit'. He can carry out his investigations in the absence of the parties and need not inform them of the results. The umpire obviously has total control over the process, the content and the outcome. He is not obliged to comply with the rules of natural justice according to the application form which the parties sign. Apparently the umpire is firstly to see if the parties can reach agreement themselves or 'by the mediation of the umpire'. The impression gained in talks with the staff at the Centre is that it is intended that little time will be spent on each of these disputes (about 2-3

hours each) and that the parties will not normally be seen by the umpire. If the umpire resigns or withdraws at any time prior to his determination provision is made, with the parties consent, for the appointment of an arbitrator. The decision of the umpire is binding on the parties. A fixed fee per dispute is charged. The proceedings are confidential. This is the process that is the most authoritarian of all, even more so than adjudication. The umpire obviously controls the process, the content and the outcome with none of the rules of law which bind judges in adjudication to protect parties from the arbitrary exercise of power.

The ACDC is to offer conciliation and arbitration to resolve commercial disputes other than individual or family disputes. The Centre advised it used the term 'conciliation' to include both mediation and conciliation processes. The Centre is at present drawing up Rules for Conciliation which concentrate on conciliation as defined in this paper and not mediation. These Rules are not published yet so this is only a very brief overview of them. The parties can agree to change the rules in relation to their dispute. The conciliation involves the appointment of a neutral third party who assists in formulating proposals for the resolution of the dispute. The conciliator is entitled to make proposals for settlement of the dispute. In this conciliation there may be shuttle negotiation if the parties prefer, though the Centre states that so far the parties have been brought into direct contact. The parties may submit their case to the conciliator either orally or in writing.

The process is entirely voluntary and the parties will chose their conciliator from a panel provided by the Centre if they so desire. These panel conciliators will be required to meet the Centre's educational and training requirements though a 'very few' people 'eminent in their commercial or business fields' will be granted listing without completing any formal training in conciliation. The decision reached will be binding if the parties have entered into a settlement agreement beforehand, otherwise not. The conciliation process can be followed by arbitration if the parties so agree. The conciliator controls the process and both the parties and the conciliator control the content. It would appear that the conciliator is, or can be, quite directive.

The Centre will also provide arbitration with the parties choosing their own arbitrator, from a panel provided by the Centre if they so desire. The

arbitrator will control the process and his decision is binding on the parties and enforceable in court. The arbitrators must have experience and training in arbitration to be listed by the Centre. How the arbitrators will conduct the arbitration process is not known.

Consideration is being given to conferring upon the Supreme Court jurisdiction to make orders in aid of conciliation and arbitration being conducted by the Centre, such as orders for the production of documents by strangers to the dispute (Street 1986:23). Also, Justice Rogers (1986:28) states the Centre is considering making the ADR mini-trial process available for these commercial disputes. This has been referred to as a 'structured information exchange' where the lawyers and experts from each side give summary presentations of their best cases over a period of a day or two. There is a jointly selected neutral third party who, at the end, provides an incentive to settlement by indicating what would be the likely result in a real trial. The 'decision' is a purely advisory assessment of the strengths and weaknesses of each party's case. The parties are then free to determine how to resolve their dispute. The process is private and confidential. The theory is that parties can resolve a dispute if representatives with authority to settle are educated about the strengths and weaknesses of each side's case (Davis and Omlie 1985; Davis and Green 1985). This is akin to the mediation process, though obviously there are differences. The third party controls the process and the parties the content and the outcome, though with the third party's advice on the outcome.

ii) Family dispute agencies

These services have been set up without government funding to provide the ADR process of mediation to resolve family disputes. The survey questionnaire was sent to four agencies established by individuals and to the Marriage Guidance Council of Victoria. Two of the individual agencies replied, one from Victoria and one from New South Wales. The Marriage Guidance Council was most helpful with information, not only on that agency but on the family dispute area generally.

The individual agencies provide a mediation service which is voluntary and includes direct contact between the parties using one mediator only. The services are available for all family disputes and is not limited to divorcing or separating couples. They had been

established by solicitors who had each received formal training, either in Australia or overseas, in mediation techniques. One indicated that 6-8 sessions would be necessary to resolve most matters in dispute between the parties. Each charges a fixed fee for each mediation session. The agreement reached is written down but is not binding or enforceable in a court. Neither service offered 'counselling' and each stressed that the object of mediation was to enable the parties themselves to reach their own agreement. Each said they would give 'general information' to the parties but would not act as a solicitor for either. Both said that a final resolution of the dispute was the outcome sought for the mediation. In both of these services the solicitors control the process, and the parties control the content and outcome. However, in one of the services it may be that the solicitor has a marked degree of input into the content.

The Council of the Victorian Law Institute has adopted a set of guidelines and standards of practice for lawyers acting as mediators in family disputes. There is also a model agreement to mediate. These are all published in the Institute's Journal (1985:1163-4). No other state has yet followed. The definition of mediation used is that of Folberg and Taylor (1984:7-8). The Family Law Section of the Institute stated that there are many matters involved in family disputes which could require legal expertise on the part of the mediator, instancing issues of corporate or trust structures, superannuation and the division of business assets. The guidelines provide that a lawyer mediator may use his/her expertise to assist the parties in considering '(i)the various legal options available to them to resolve disputes over guardianship, custody, access, maintenance and property settlement and (ii) the legal implications of any arrangement they wish to make in relation to children or financial matters'.

The New South Wales agency stated he was aware of the above guidelines which had 'influenced' his approach. In view of the potential for problems to arise in this area, it would seem urgent for the other states to adopt such guidelines. Since there will be (and already are) mediators who are setting up private services who are not lawyers and, therefore, not subject to the control of the Law Council or its equivalent, it may be necessary to establish guidelines of more general operation. This opens up the vexed debate of whether mediators should be professionalised. It may be that since mediation is voluntary and either party can withdraw at any time, and the agreement is

not enforceable, that the arguments for non-institutionalisation are more persuasive. The policy decisions in this area will have to be made in the foreseeable future. If the process used is more akin to arbitration with the parties feeling obliged to accept the solution, then with such an authoritarian process guidelines may be much more necessary. It is submitted that the more the process involves authoritarian imposition of a decision, the more safeguards are needed.

One of the private mediators raised the vexed questions of (i) confidentiality of the content of the process (which he solved by ensuring the parties signed an agreement stating the mediation proceedings were 'without prejudice' as part of negotiations for settlement and to be the subject of legal professional privilege), and (ii) legal aid being available for mediation sessions as it is, apparently, in the U.S.A. and Canada.

The Marriage Guidance Council of Victoria makes mediation available to resolve divorce and separation disputes. The process is very similar to that used by the individual mediators. The Council stated that parties would be seen separately if there 'are difficulties in controlling emotions or formulating and articulating proposals'. One of the individual mediators stated that whether the parties were seen separately was a 'matter for agreement' at the first mediation session. If the parties were seen separately, each was made fully aware of what the other disclosed unless the parties agreed otherwise. Usually more than one session is involved in mediation in the Council service. The children may attend. The Council stated the goal of the mediation is decided by the clients, and a final resolution may not be desirable even if possible. If that is so, interim or partial agreements would be aimed for. The average number of sessions for resolution of a dispute is four. It appears the mediator controls the process and the parties the outcome and content.

The Council receives just over half of its funding from the federal government. Otherwise charges are made for the mediation sessions (graduated according to the disputant's family income), and it appears the service is 'largely self-funding'.

e) Other

Model legislation entitled the Commercial Arbitration Act has been enacted in New South Wales and Victoria in 1984 and in the Northern Territory and Western Australia in 1985. Queensland has the Arbitration Act 1973. This model legislation allows parties to a dispute which is in existence or which may come into existence in the future (not limited in the body of the statutes to commercial disputes) to agree to submit their dispute to an arbitrator for resolution. The legislation is largely designed to fill in the gaps in the parties' agreement. They can agree that the arbitrator appointed by them is not bound to decide the dispute according to the law but by 'reference to considerations of general justice and fairness'. The arbitrator may seek settlement otherwise than by arbitration and may hold a conference to do so. The arbitrator is to inform himself in such manner as he thinks fit and is not bound by the rules of evidence though he can require evidence to be given on oath. The parties in the arbitration process are not represented by a lawyer unless the arbitrator gives leave. The arbitrator's decision is binding. Parties can appeal to a court from the decision if they all consent or if the court gives leave. The grounds of appeal are limited but the award may be set aside if there has been misconduct which is defined to include 'corruption, fraud, partiality, bias and a breach of the rules of natural justice'. There is a presumption that only one arbitrator is to be appointed though the parties can agree for more. The arbitrator thus controls the process and the outcome and either shares control over the content with the parties or controls the content.

In Victoria the Law Institute has formulated Optional Conciliation Rules providing that a dispute between a solicitor and a client may be subject to settlement by conciliation. The rules provide for a conciliator to be appointed from a panel of senior counsellors appointed by the Institute. The parties supply written statements of their cases with copies of documents and the conciliator tries to negotiate a settlement which if agreed upon is binding upon the solicitor.

OVERVIEW OF ADR IN AUSTRALIA

It is impossible to construct a picture of the above diverse processes and services that will be universally true for all of them. Recognising that that is

impossible, the following are generalisations that can be made about the processes being used in Australia at present, exceptions to all of which can be found!

Private: The processes are private in the sense that they do not take place in a public forum as does adjudication. They are mostly confidential in the sense that the content of the sessions cannot be given as evidence in court at a later date.

Consensual: The processes mostly stress co-operatively arrived at, consensual solutions to disputes rather than the conflict stressing adversarial approach of adjudication.

Remedies: The processes allow a wider range of remedies to be adopted than can be obtained under adjudication. They tend to result in more creative and innovative remedies. The range of remedies that can be adopted are only limited by the perceptions of the disputants. However, the administration agencies must ensure that the remedies adopted conform to the provisions of the Act they administer.

Speedier: The processes usually allow a resolution to be achieved more quickly than adjudication. However, where more than one session is utilised in mediation or conciliation and where investigations must be carried out prior to the process being used, the processes may take longer though most probably not as long as adjudication due to the long delays in many Australian courts.

Cheaper: The processes where they do take longer are most probably not as expensive as adjudication for the government, but would be more expensive than mediation which would appear to be the cheapest process for litigants and for governments at present. For litigants it would appear that all the ADR processes are less expensive than adjudication.

Voluntary: Entry into the process is usually voluntary at least for the initiating party except in the court-based processes. For the responding party, it would appear that it is only in mediation that entry is voluntary as in the other processes refusal to enter results in more coercive processes being employed.

Private agencies or services are beginning to increase noticeably. There have been at least six established so far this year. It appears this will be a considerable growth area in ADR. This may result in

the adjudication agencies deciding to diversify into ADR processes. This would be acceptable for arbitration, but for conciliation and particularly for mediation this could result in the empowering aspect of the process being ignored in favour of 'cost-effective' resolutions. This should be strenuously avoided. This may also result in the professionalising of mediators to ensure standards and to limit entry into the field. This also should be strenuously resisted as there could be a serious tendency for professionals to impose their resolution on the disputants.

Funding: The majority of ADR programs are government funded and government initiated. This may reverse if the rapid growth of the private agencies continues.

Underlying causes: In the programs using mediation, and in some of those involving conciliation, the causes underlying the presenting dispute are included in the content. The content can be widened to include any issue in dispute between the parties. Otherwise the processes appear to be limited to the presenting issue and do not widen the issues in dispute.

Outcome: Where the third party has no control over the outcome the outcome is non-binding, whereas where the third party can impose the outcome it is binding.

Stability of outcome: It is claimed that as disputants are more likely to adhere to an outcome they have helped to create and which takes into account their individual needs, the agreements or decisions reached in ADR processes are more stable than those imposed under adjudication. Very few evaluation studies have been carried out to assess this. The one that was conducted on the CJCs in N.S.W. upheld this claim (Schwartzkoff and Morgan).

For the vexed question of what are the differences between mediation and conciliation a starting point could be the often used definition of the mediation process given by Folberg and Taylor (1984:7-8), recognising those authors combine conciliation and mediation within the one definition, and recognising that both terms defy strict definition:

> Mediation is an alternative to violence, self-help, or litigation that differs from the processes of counselling, negotiation, and arbitration. It can be defined as the

> process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process.

The above is true for Australia though it must be recognised that the conciliators in the administration agencies are only limitedly neutral, in the sense they have to ensure the agreement at the end of the process observes and enforces the particular law they are established to administer.

It must also be recognised that each individual mediator and conciliator can interpret their role in providing the ADR process differently and can range from pure 'scribes' who have no direct input into the meeting of the parties to 'musclers' who are very directive of both the outcome and content. The two processes also merge into each other. However, given all those reservations, in the Australian programs it seems that the terms can be distinguished as follows:
Mediation: Entry into this process is voluntary for all parties in dispute. The mediator controls the process but the parties control the content and the outcome. The parties are brought into direct contact and the process is as much concerned with preserving or enhancing their relationship as with resolving the dispute. The content can readily be widened to include all the issues in dispute between the parties even if the issue included is not relevant to the presenting issue.
Conciliation: Entry into this process may be voluntary for the initiating party but is never voluntary for the responding party and may not be voluntary for the initiating party. The conciliator controls the process and the conciliator *and* the parties control the outcome. The parties are not necessarily brought into direct contact and the process is primarily concerned with the resolution of the dispute. Some of the rights administration agencies are concerned with a change in attitude of the parties and thus place emphasis on the parties' relationship in the future as do the Family Court counsellors but this is not always present in the conciliation process. The content is concerned with

the specific presenting issue and usually will be widened only to issues related to that issue.

Even though exceptions can be found to these uses of the terms 'mediation' and 'conciliation' it is suggested that the above meanings be adopted in Australia as they appear to represent the Australian position. As there is such a wide range of processes at present included within each of these terms, it is suggested that when agencies or individuals use the terms they should also indicate precisely the process being used. Then *both* the third parties and the disputants will be precisely aware of the process of dispute resolution being used. The continuum of dispute resolution processes in Australia can now be represented as:

Process	Who controls process	Who controls content	Who controls outcome	Issues resolved	Entry
Avoidance	Parties	Parties	Parties	none	voluntary
Private Neg.	Parties	Parties	Parties	as many as wish	"
Public Neg.	Parties or Parties and 3rd Party	Parties	Parties	"	"
Mediation	3rd Party	Parties	Parties	"	"
Conciliation	3rd Party	Parties or Parties and 3rd Party	Parties and 3rd Party	specific presenting issue	voluntary or compulsory
Arbitration	3rd Party	3rd Party or Parties and 3rd Party	3rd Party	"	"
Adjudication	3rd Party	3rd Party	3rd Party	"	compulsory

From the results of the survey questionnaire it is obvious that conciliation is the ADR process most made available, principally because it is made available by the administration agencies and in the court based programs, both of which are proliferating. Arbitration is the next most made available ADR process though it is not so available as conciliation as often conciliation is followed by adjudication, not arbitration. Then comes mediation which is used in the community agencies and in most of the private agencies.

From the diagram of ADR processes it can be seen that the more coercive or directive of the third party interventions are being made available more often in Australia rather than mediation or the encouragement of private or public negotiation which are at the least coercive end of the continuum. Yet surely the first stage of government funded community agencies have gained legitimacy? The CJCs in New South Wales, the original pilot community agencies in Australia, have ably demonstrated their viability and ability to give continued high quality service over the six years of their existence. As a result Victoria, and possibly South Australia and the ACT, are now about to establish similar community service agencies. This type of agencies may expand more rapidly now.

An increase in ADR processes at the end of the continuum that gives the most control to the disputing parties themselves is advocated. As the writer sees society as an organic whole constituted by separately and independently constituted individuals who collectively make up the whole, the only way to work true change in society is by changing the people who make it up . As Jung (1977) said:

> This problem cannot be solved collectively, because the masses are not changed unless the individual changes. At the same time, even the best-looking solution cannot be forced upon him, since it is a good solution only when it is combined with a natural process of development. It is therefore a hopeless undertaking to stake everything on collective recipes and procedures. The bettering of a general ill begins with the individual and then only when he makes himself and not others responsible.

Voluntary mediation fulfills these requirements and should be encouraged.

ORIGINS OF THE ADR MOVEMENT

Sandor identifies four partially overlapping and partially conflicting aims given for the ADR movement: (1) to enhance community involvement in the dispute resolution process; (2) to relieve court congestion; (3) to facilitate access to justice; (4) to provide more effective dispute resolution. Other goals posited have been: (5) to relieve governments of the expense and responsibility of social control; (6) to defuse social protest by defusing complaints; (7) a desire to use community values to resolve disputes.

One of the reasons for the growth of the ADR movement has been the rigid adherence of the judges to the already established rules of law, even where to do so works injustice in the individual case. As Viscount Haldane said in *Dawson Ltd* v. *Bonnie* (supra) "Hard cases should not be allowed to make bad law". The reasons given by the judges for this approach are basically three: (a) the courts lack resources to adequately research and evaluate the need for reforms and to ascertain the most appropriate reform to respond to the need; (b) the courts lack ability to implement other related reforms necessary to implement any new laws that are made; and (c) judicial law reform is retrospective in operation and so can produce uncertainty and injustice. These arguments appear in many cases, two of which are *Morgan* v. *Launchbuty* [1973] A.C. 127 and *State Government Insurance Commission* v. *Trigwell* (1979) 142 C.L.R. 617. Other reasons for limiting judicial law reform are that judges are not popularly elected and are not representative of society generally.

Judges, with notable exceptions, have opted for a rigid adherence to the rules of law and have declined to innovate on the basis that only Parliament should change the law. However, Parliament is unable to legislate to provide for every situation, since it makes general rules (which can work injustice in particular cases) and because its capacity to enact legislation is also limited. Parliaments are increasingly enacting legislation but cannot hope to cover all situations of conflict that arise in society. Nor would we want to be so all pervasively bound by rules. There would be no room for spontaneity or innovation if every situation was covered by rules. A

rigid society would result. Thus the formal lawmaking bodies are unable to keep up with the need to make rules to meet new situations and, in any case, would or should not always do so.

Communities tend to exercise control over their members by informal mechanisms such as by condemnation, ostracism and changing of status within the community (Adler 1983). These informal social controls tend to have broken down in our modern vast and alienating societies with the lack of personal relationships with many of the people with whom each person comes in contact. There is thus an increased reliance on more formal third party interventions to settle disputes at a time when these are becoming more rigid and more crowded.

This has happened at a time when there has been increased legislation conferring rights on people (such as the rights now being conferred upon children and the disadvantaged) and when access to adjudication is being extended through the availability of legal aid and through the work of the Legal Service Centres.

The courts (and the law) have also been found wanting in the remedies they make available to disputants. Part of the reason for the ADR movement has been to allow disputants access to remedies not readily available in the courts, such as complete renegotiation of a contract or agreements to regulate the <u>future</u> relationship of the parties.

The emergence of the mainly informal ADR processes has a distinct parallel with the emergence of equity in the Court of Chancery in England in the fifteenth century. The reasons for the emergence of equity were lack of appropriate remedies, lack of access to the courts, cost and rigid adherence by the courts to the legal rules. In *<u>Waberley</u>* v. *<u>Cockerell</u>* (1542) Dyer 51 the court is reported as saying: 'It is better to suffer a mischief to one man than an inconvenience to many which would subvert the law'. This is very similar to Viscount Haldane's comment above. Equity came to fill those gaps in the common law. It was free of the procedural formalities. It could sit anywhere. It dispensed justice according to 'conscience' and the merits of the case. It provided swift and inexpensive justice. This is very similar to the aims of the ADR movement which is why the question 'What is ADR?' is answered by saying it is the second wave or new wave equity. Equity eventually became institutionalised and developed as rigid a set of rules as the common law it

was developed to supplement. This is why the warnings of the critical legal studies people that this new movement will be institutionalised and eventually reduced to a system of rules which will become rigid should be heeded.

As the agencies increase their case loads there may well develop pressure on mediators and conciliators to reduce the time spent on each session and, as a result, there may be a move to a more directive form of mediation or conciliation than at present. This could be aimed at ensuring what one agency termed 'cost efficient settlements'. This could lead to more imposed solutions and less party control over the content and outcome of the processes. A combination of ignorance about what mediation and conciliation really are and the pressure to cut costs can lead to a form of 'cheap, second-rate justice' and a lack of equity.

The writer argues for an increase in voluntary mediation as defined above, where it gives responsibility to the individual disputants to find their own solution to their problem. The emphasis is on empowering the disputants to resolve their own dispute. Because this form of ADR does not impose solutions on the parties it has most ability to withstand bureaucratisation and to remain 'first-rate justice' and retain its non-rigidity and equity as long as lay mediators are used.

As individual people are enabled to find consensual ways to resolve conflicts, then perhaps society, which is after all only made up of individuals, may change and become more able to resolve conflict without violence or wars. Dispute resolution should be taught in both primary and secondary schools. This is being done in North America (American Bar Association 1985) and in Victoria out of the Noble Park Family Conciliation Centre. The Parent Effectiveness Training programs, which concentrate on teaching parents how to consensually handle conflict between children and themselves, and between children, should be encouraged so that an overall approach can be taken. ADR should also be taught to law students in all legal training courses so that the conflict orientation of the present formal dispute resolution processes can be broken down. This is a particularly appropriate aim to implement in this Year of Peace.

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IN REPLY PLEASE QUOTE:

6 June, 1986

Alternative Dispute Resolution Conference,
Canberra, July 1986.

Dear

I have been asked to write a paper on the definitions of the various dispute resolution processes being used at present in Australia for the above conference. In order to do so, I am writing to the various agencies and schemes involved in non-adjudicative dispute resolution who have been contacted about the conference, to ask would you please forward to me a description of what exactly you do!

The terms "alternative dispute resolution" and "mediation, conciliation and arbitration" are being used in Australia (and elsewhere) to describe very diverse processes of dispute resolution. I want to collate the answers I receive, describe what is actually being done in Australia and then attempt to define the various processes that are being used here. It seems to me that to define the terms in the abstract is not of much assistance to anyone.

I have included a list of topics or questions that I would hope your answer would cover but, in view of the short notice or if the list looks too daunting, do please forward any information that you can. If necessary, it may be possible for me to collect more detail at the conference and to write a more definitive paper which can be circulated later. As time is short and I have had to draw up the list of suggested topics very quickly, if I have not included some point you feel should be covered do include it. Also, if you have any written material on the processes used by your agency could you include them, particularly if they are unpublished.

As I need to collate the material at the end of June(!), could you please forward it as soon as possible. I apologise for the short notice which has been unavoidable but ask for your co-operation to allow me to prepare a paper that is useful to all.

Yours with many and grateful thanks in anticipation,

Jenny David,
Lecturer.

ALTERNATIVE DISPUTE RESOLUTION TOPICS

1. What is the name of the dispute resolution process used by your agency?

2. Describe the process as it is carried out by your agency.

3. Who has the authority, and who has the power, to make the final decisions in the process used?

4. Are the disputants brought into direct contact or is a form of "shuttle negotiation" used?

5. Is entry into the process voluntary? If not, what coercion is present?

6. At what stage does entry occur - prior to, during or post court proceedings?

7. What types of disputed does your agency handle? If more than one type, is it possible to indicate the overall proportion of the various types?

8. What type of disputants are catered for - individual, corporate, neighbours, family, tenants, civil, commercial, stranger, other?

9. Who is the third party in your process? Does that person have to possess any qualifications? If so, what? Who trains that person? How are the third parties chosen for individual disputes?

10. Is a final resolution of the dispute the outcome sought?

11. Is the final agreement or decision enforceable in a court?

12. Is the process followed by a more coercive process - such as conciliation followed by arbitration?

13. Is your agency part of a government department, a statutory body funded by the government or a solely private sector body? Other?

14. Does your agency have a governing body? If so, what is its composition?

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UNMET NEED FOR DISPUTE RESOLUTION IN SOUTH AUSTRALIA

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In 1985, the South Australian Government established a committee to investigate the need for an alternative mechanism for handling community disputes. This followed the setting up of two pilot mediation services in South Australia: the Norwood Community Mediation Centre was established with CEP funding in 1984 and sustained by a one-year grant from the South Australian Government, and the Bowden-Brompton Legal Service provided limited mediation services.

I was appointed Chairperson of the Community Dispute Resolution Committee, whose terms of reference were:

1. To investigate and determine the nature and extent of disputes in South Australia currently without a satisfactory means of resolution.

2. To examine the report of the Victorian Legal Aid Commission Committee on Dispute Resolution and the New South Wales Law Foundation Report on Community Justice Centres and report on the appropriateness of reforming and/or adapting existing dispute resolution mechanisms.

3. To determine the need for a separate community-based dispute resolution mechanism and the manner of establishing and funding it.

4. To examine the need for legislation to protect and indemnify mediators and provide status to resolutions.

5. To determine the desirability of establishing a mediation skills training programme for people involved in community-based agencies.

6. To determine the desirability of operating any mediation service/network through the Legal Services Commission.

I am here today to address the first of these in particular. As part of my responsibility at the Legal Services Commission I supervised a phone-in survey on neighbour disputes which was very successful in establishing that there are indeed many disputes in the community which have no satisfactory means of resolution.

There are two aspects of this question which I will briefly speak about. Firstly, as chairperson of the Committee, I want to say a little about the information that the Committee considered. Secondly, I can give some very preliminary results of the neighbourhood dispute phone-in conducted by the Commission on the weekend of 14th June 1986.

But first, some detail of the Committee.

In April 1985, after receiving representations from the Norwood Mediation Centre for the Government to pick up the funding bill of their Centre after their CEP grant ran out, Cabinet decided not only to make a grant to the Norwood Centre but also to establish the Community Dispute Resolution Committee. In typical Government style, it appointed 'experts' from various areas of Government but did not provide research/project support for the Committee - the thinking being that there would be sufficient local knowledge among the group to reach informed conclusions. The committee had representatives of the Attorney-General's, Local Government, Court Services and Community Welfare Departments, from the South Australian Council of Community Legal Services and the Law Society and also from the Norwood Mediation Centre. I am from the Legal Services Commission. The Committee was established and met for the first time in September 1985. The task has not been easy, as the answers to questions about community use of and cost effectiveness of community dispute resolution centres are not self evident. Our research capability was limited and we needed to rely heavily on other committees like ours and evaluation reports from centres which had been established.

WHAT DID THE COMMITTEE DO TO INFORM ITSELF OF UNMET NEED FOR ALTERNATIVE DISPUTE RESOLUTION?

Firstly, the survey done in Victoria by Dr. Jeff Fitzgerald while he was at LaTrobe University was taken as indicative of the South Australian situation. Dr Fitzgerald conducted the Australian Household Dispute Study in 1981/82, in which a random sample of 1019 homes in Victoria were contacted by telephone. They were asked if they had a grievance about any matter in the last three years. A grievance was defined to be 'a trouble where there is a belief that another person is responsible for the situation and that that person has or had it within their power to prevent the trouble from arising and can remove or remedy it'. Thirty per cent of respondents reported a grievance relating to their neighbours and of these 35% had become serious enough to be considered as disputes. That means that about thirteen and a half per cent or more than 1 in 8 people had had a dispute with their neighbour in the three year period, a dispute being a situation where the

respondent has communicated the grievance to the other party and that person has rejected all or part of the responsibility for the dispute and will not act to resolve the grievance. Besides neighbour disputes, there was a small but significant percentage of other grievances which probably involved disagreements which would be difficult to resolve by normal mechanisms, for example:

- Property (building permits, boundaries, other interference with ownership) 7.7%
- Voluntary Associations (clubs, groups, churches) 3.0%
- Schools (attended by respondent's children) 5.0%

The survey found that a variety of agencies had been contacted. In 86% of grievances between neighbours there had been a third party involved but satisfaction with the help received was low. Significantly, no respondent reported that they had used the court to help resolve their neighbour dispute and a lawyer was consulted by only 9% of disputants.

The Committee contacted a wide range of agencies to which people turn for help in a dispute, and Fitzgerald's findings are supported by these sources. We had information from a survey of agencies in the western suburbs of Adelaide of the same types as those which had been contacted by us and which had been used for another investigation. The response from those agencies contacted was almost unanimous in reporting that they are confronted with a stream of neighbourhood type disputes. Local councils particularly and their community information centres seem to be a focal point for disputes and reported between 5 and more than 100 disputes a month. These were mainly to do with fencing, trees, animals, noise, water, privacy, neighbour harrassment, property upkeep, lighting, etc. Table 1 provides a breakdown of the problems mentioned by councils. The people tend to come to the council front counter with their problem and staff from various sections of council provide advice, try to negotiate settlements or in desperation, refer the person elsewhere.

A wide range of government departments, members of parliament and other community groups reported similar experiences.

Members of parliament also handle a significant number of disputes in the neighbour category but in addition deal with disputes relating to employment, discrimination, family matters and pollution. The number of disputes here is less, averaging about one per week. Members of parliament seem to arbitrate

where it is necessary, provide information and advice or refer the person to legal aid or the council.

Several government departments or agencies handle a significant number of disputes of this type. The most significant were:

* Police The response from the S.A. Police Department gives somes indication of the extent of dispute generally in South Australia. They reported that in the month of January 1985, police attended 3,303 disturbances in the Adelaide metropolitan area. Of course not all of these were disputes of the type we are considering, but 304 were classified as domestic disputes, 59 of which were potentially violent. The police attempt to deal with each case as the situation dictates, however, they say:

  In many disputes attended by police, they can do no more than merely 'keep the peace' i.e. ensure no substantive offences are committed by either party. Alternatively, if an offence has already taken place, e.g. an assault, police can take action on those circumstances. However, the original cause of the dispute may remain unresolved thereby allowing the problem to flare up at a later time.

* The Ombudsman also gets involved in 'community' or 'neighbour' disputes. About 20 to 30 complaints of this type are received a month. Although many are between individuals in which they do not get directly involved but refer elsewhere, they do become involved when the comnplaint is against the local council and relate to the council's reluctance or inability to solve such disputes. Similarly, complaints are received about government departments and agencies such as the S.A. Housing Trust and the Noise Abatement Branch of the Department of Environment and Planning.

* Although The S.A. Housing Trust does not keep a record of the number of disputes in which they become involved, they are regularly contacted about disputes, many of wich involve differences between neighbours. Where they involve Trust tenants, they try to resolve the problem, in some cases going as far as to relocate tenants. The Trust sees a mechanism for dispute resolution as useful, although they state that many complaints appear to be of a minor nature.

* The Botanic Gardens deals with approximately 40 disputes a month involving trees: damaged foundations, roots in sewers or gutters etc. Officers of the Gardens try to solve the dispute amicably and if this is not possible, suggest the people seek legal advice.

* The Department of Environment and Planning The Noise Abatement Branch receives about 50 complaints a month. Of these, approximately 50% relate to disputes between neighbours over noise caused by machines such as air conditioners, swimming pool pumps and domestic power tools. The remaining 50% relate to noise from industrial premises. As well as the formal complaints, the Branch provides advice in about 100 cases of existing or potential dispute. The inspectors from the Branch have powers under the Noise Control Act which enable them to help solve the problem, but in many cases, noise is only one symptom of an underlying problem. They often then refer people elsewhere.

  The Air Quality Branch deals with a lesser number of disputes, about 15 per month, particularly in winter where emissions from wood stoves cause a problem.

* The South Australian Ethnic Affairs Commission provided some information on disputes with people from non-English speaking backgrounds. The Commission deals with about 8 disputes a month generally referring them to other appropriate agencies. The disputes involve family, property and neighbours, landlord and tenant, debt, defective goods or services and employment problems.

* The Citizens Advice Bureau reviewed 3960 enquiries received over a three month period in order to respond to our letter. Of these, 168 or 56 a month were identified from their records as involving a dispute. The disputes involved property matter, animals, trees, neighbour disputes, debt, family relations, including parenting and aged people and defacto relationships. The Bureau provides advice but is unable to spend the time to assist in settling the dispute.

It is clear from the responses to the letter that many official agencies and people are requested to help resolve disputes in the community and in total hundreds of disputes arise per month. Although some see it as part of their role to resolve disputes, for example, several members of parliament considered this to be an essential part of their job, many organisations felt that the legislation that empowered them to act was either too heavy handed or unable to solve the real underlying problem between neighbours and the particular complaint was only a symptom. Almost all would use and supported the idea of an alternative dispute resolution mechanism, many already using the Norwood Community Mediation Service.

NEIGHBOUR DISPUTE PHONE-IN

The Neighbourhood Dispute Phone-in was an initiative of the Legal Services Commission's Interviewing Section and Research and Education Section and conceived early in the 1985/86 year. The work was done separately from that of the Dispute Resolution Committee and unfortunately, could not be completed before the Committee reported.

The results of this phone-in are still very preliminary, but I am able to give some indication of the number and types of disputes which people contacted the Commission about.

The phone-in was conducted from 6p.m. to 10p.m. on Friday 13th June and 10a.m. to 4p.m. on Saturday 14th June, 1986. Ten phone lines were in use constantly and 615 calls were taken in the time available. From these 615 calls, 516 questionnaires were completed. Each call took approximately 10 minutes and callers were referred to the Commission's Legal Advice service during the next week if they appeared to require more extensive legal aid.

The extent of the questions can be seen from the questionnaire which is attached. Besides questions on the nature, seriousness and impact of the dispute, the questionnaire covers demographic data on the caller and the other person or people involved in the dispute.

Preliminary results are availabe from about 500 questionnaires. The analysis reveals a quite surprising profile of the caller. Almost half of the callers were men and generally the caller was middle aged, Australian or U.K. born, employed or pensioners and were settled at their place of residence - a much more middle-aged, middle-class picture then many people imagine.

PROFILE OF CALLER

Gender	M : F	45% : 55%
Age	16 - 25	2%
	26 - 40	26%
	41 - 60	39%
	Over 60	30%
Nationality	Australian	72%
	U.K.	15%
Group Structure	Couples (with children)	38%
	Couples (w/o children)	34%

Employment Status	Employed	41%
	Home Duties	13%
	Pensioner	34%
	Unemployed	8%
Ownership of Property	Own	83%
	Rental	4%
	Housing Trust	10%
Period of Occupancy	Less than 4 years	26%
	4 - 10 years	27%
	More than 10 years	44%

Surprisingly to some, the neighbour complained about has a similar profile but tending to be a little younger, more likely to be a migrant and to be single and living in rental accommodation. The neighbour was also likely to have more people occupying the house than the complainant, with 21% of neighbours reported having 5 or more people compared with 7% of the callers.

PROFILE OF NEIGHBOUR

Gender	M : F : Group	44% : 18% : 38%
Age	less than 25	9%
	26 - 40	29%
	41 - 60	27%
	Over 60	15%
	Group	13%
Nationality	Australian	61%
	U.K.	8%
Group Structure	Couples (with children)	39%
	Couples (w/o children)	21%
	Groups/others	19%
Employment Status	Employed	43%
	Home Duties	2%
	Pensioner	15%
	Unemployed	7%
Ownership of Property	Own	69%
	Rental	7%
	Housing Trust	12%
Period of occupancy	Less than 4 years	36%
	4 - 10 years	21%
	More than 10 years	29%

In general, the problems resulting in a dispute are those known to occur between neighbours. Table 2 lists the frequency with which the category on the questionnaire was mentioned. It is a bit surprising that only 42 instances out of 771 had to be classified as 'other'. The most frequently mentioned problem type, and one which all agencies involved in neighbour disputes are very familiar with, was barking dogs, mentioned 92 times by callers.

The other aspect of the phone-in responses that I wish to highlight is the preliminary information available on how people have tried to solve their disputes. A large proportion of people (70%) have tried to talk to their neighbours or have written to them about the problem. Two-thirds of these say this has had no effect and in 23% of cases, the relationship has been damaged or completely broken down by this approach. In addition to approaching the neighbour, many people sought help from outside agencies, and in some cases, a number of agencies had been approached. For example, 20% of people approached the police, 40% the local council, 7% government departments, 7.5% members of parliament and 5% the Housing Trust.

Very few people had involved a third party associated with the legal process. Only 8% had seen a lawyer, and 2.8% had been to court. The Legal Services Commission and Community Legal Centres had been consulted by only 5% and 4% of callers respectively. Four per cent of people had tried mediation. Generally, people had not found any of these approaches had been particularly useful (see Table 3). The Legal Services Commission research staff is still analysing results and in the near future, a more detailed analysis will be available.

Clearly, some bias is introduced by the voluntary process of phoning-in which might enhance the middle class image of the caller, but generally this picture emerging is very similar to that found by the mediation centres and the previous surveys conducted.

TABLE 1
NEIGHBOUR DISPUTES: FREQUENCY WITH WHICH RESPONDENT COUNCILS LISTED DISPUTE AREA

AREA OF DISPUTE	NUMBER OF COUNCILS	N = 24
Fencing - height, condition	23	
Drainage - stormwater	16	
Trees/leaves, branches, roots in drains	18	
Dogs		15
Other animals	11	
Privacy, harrassment	4	
Parking	9	
Incinerator/smoke	10	
Property upkeep	14	
Noise	15	
Nuisance	6	
Objection to planning matters	8	

TABLE 2
NEIGHBOUR DISPUTE PHONE-IN
TYPES OF PROBLEMS

TYPE			NUMBER OF CALLERS MENTIONING PROBLEM	
Animals	-	Cats	19	
Animals	-	Horses	2	
Animals	-	Other	15	36
Dogs	-	Barking	92	
Dogs	-	Escape	11	
Dogs	-	Attacking	10	
Dogs	-	Other	15	128
Fence	-	Damage	13	
Fence	-	No fence	8	
Fence	-	Too low/disrepair/etc	17	
Fence	-	Wrong line	8	
Fence	-	Retaining wall	5	
Fence	-	Other	25	76
Noise	-	Music	46	
Noise	-	Machine	21	
Noise	-	Cars	32	
Noise	-	Parties	10	
Noise	-	People	41	
Noise	-	Other	15	165
Behaviour	-	Language	37	
Behaviour	-	Assault	6	
Behaviour	-	Activities (Games)	11	
Behaviour	-	Things thrown	19	
Behaviour	-	Other	37	110
Garbage/Rubbish			9	9
Smoke (burning off etc.)			38	38
Trees	-	Leaves falling	33	
Trees	-	Roots	24	
Trees	-	Overhanging branches	52	
Trees	-	Dangerous	20	
Trees	-	Other	15	144
Water	-	House	1	
Water	-	Garden	2	
Water	-	Sewerage	7	
Water	-	Other	13	23
Other			42	42
		TOTAL	771	771

TABLE 3
NEIGHBOUR DISPUTE PHONE-IN
METHODS OF RESOLUTION

CATEGORY	USEFUL	NOT USEFUL	DAMAGED RELATIONSHIP	BREAKDOWN	OTHER	TOTAL
Nothing						74
Talked to Neighbour	29	197	42	32	3	303
Written to Neighbour	5	30	4	2	-	41
Police	15	66	7	10	3	101
Council	19	159	12	1	4	195
Legal Services Commission	7	17	-	-	2	26
Community Legal Centre	6	9	-	3	2	20
Lawyer	12	22	3	2	-	39
Court with Lawyer	-	2	1	3	2	8
Court without Lawyer	1	4	-	-	1	6
Govt. Dept.	6	26	-	1	1	34
M.P.	10	25	-	-	1	36
Housing Trust	3	16	2	1	1	23
Landlord	1	6	-	-	-	7
Mediation	4	15	1	-	1	21
Other	7	30	2	1	1	41

CALLER NO:

NEIGHBOURS QUESTIONNAIRE

THANK YOU FOR TELEPHONING THE LEGAL AID NEIGHBOURHOOD PHONE-IN.
WE WOULD LIKE TO ASK YOU SOME QUESTIONS FIRST THAT WILL TAKE TEN MINUTES OR SO, AND THEN IF YOU HAVE SOME QUESTIONS WE WILL PUT YOU THROUGH TO A LEGAL ADVISER WHO CAN HELP YOU.

1.Q. CAN YOU BRIEFLY DESCRIBE THE PROBLEM YOU HAVE WITH YOUR NEIGHBOUR?

(Circle the appropriate number).

11	ANIMALS	CATS
12		HORSE
13		OTHER
21	DOGS	BARKING
22		ESCAPE
23		ATTACKING
24		OTHER
31	FENCE	DAMAGE
32		NO FENCE
33		FENCE TOO LOW, DISREPAIR,ETC.,
34		WRONG LINE
35		RETAINING WALL
36		OTHER
41	NOISE	MUSIC
42		MACHINE
43		CARS
44		PARTIES
45		NOISY PEOPLE
46		OTHER
51	BEHAVIOUR	LANGUAGE
52		ASSAULT
53		ACTIVITIES (GAMES)
54		THINGS THROWN
55		OTHER

60	GARBAGE/RUBBISH	
70	SMOKE (Burning off etc.)	
81	TREES	LEAVES FALLING
82		ROOTS
83		OVERHANGING BRANCHES
84		DANGEROUS TREES
85		OTHER
91	WATER	HOUSE
92		GARDEN
93		SEWERAGE
94		OTHER

2.Q WHICH PROBLEM WOULD YOU SAY IS THE MAJOR PROBLEM?

ENTER CODE NO:.....

BRIEFLY SUMMARIZE THE PROBLEM:.....

.....

.....

PLEASE NOTE QUESTIONS BELOW ONLY RELATE TO THE MAJOR PROBLEM NOTED BY THE CALLER:

3.Q. WHEN DID THE PROBLEM FIRST OCCUR?

1	this year
2	last year
3	2 or 3 years ago
4	4 or 5 years ago
5	more than 5 years ago

4.Q. IS IT A PROBLEM WITH STRATA TITLE UNITS?

1	YES
2	NO

5.Q. HOW OFTEN DOES THE PROBLEM OCCUR:

1	EVERYDAY
2	SEVERAL TIMES A WEEK
3	ONCE A WEEK
4	SEVERAL TIMES A MONTH
5	ONCE A MONTH
6	LESS FREQUENTLY (more than once)
7	ONCE ONLY

6.Q.WOULD YOU DESCRIBE THE DISPUTE AS

1	SIMPLE
2	NOT TOO BAD
3	SERIOUS
4	VERY SERIOUS
5	NOT SURE

7.Q. WHO IN YOUR HOUSEHOLD IS HAVING THE PROBLEM (if appropriate)

1	SELF
2	SPOUSE
3	CHILDREN
4	WHOLE FAMILY/GROUP
5	OTHER

8.Q. WHICH ONE OF YOUR NEIGHBOURS ARE YOU HAVING THE PROBLEM WITH?

1	ADULT MALE
2	ADULT FEMALE
3	CHILDREN
4	WHOLE FAMILY/GROUP
5	OTHER

9.Q. IS THIS PROBLEM COSTING YOU MONEY OR WILL IT.

11	YES	(under $100)
12	YES	($100-$1,000)
13	YES	(over $1,000)
20	NO	
30	DON'T KNOW	

10Q. WHAT EFFECT HAS THIS PROBLEM HAD ON

YOU	YOUR N'BOUR	
01	07	WORRYING
02	08	VIOLENCE
03	09	LOSS OF PROPERTY
04	10	TIME WASTED
05	11	NO EFFECT
06	12	OTHER

11.Q. WHICH OF THESE METHODS HAVE BEEN USED BY EITHER YOU OR YOUR NEIGHBOUR TO TRY TO RESOLVE THE DISPUTE? (Note each method attempted & the result)

		Useful	No Effect	Damaged Rel'ship	Complete Breakdown	Other
(a)	NOTHING	011	012	013	014	015
(b)	TALKED TO NEIGHBOUR	021	022	023	024	025
(c)	WRITTEN TO NEIGHBOUR	031	032	033	034	035
(d)	POLICE	041	042	043	044	045
(e)	COUNCIL	051	052	053	054	055
(f)	LEGAL SERVICES COMMISSION	061	062	063	064	065
(g)	COMMUNITY LEGAL SERVICE	071	072	073	074	075
(h)	SEEN LAWYER	081	082	083	084	085
(i)	COURT (WITH SOL.)	091	092	093	094	095
(j)	(WITHOUT SOL.)	101	102	103	104	105
(k)	GOVERNMENT DEPARTMENT	111	112	113	114	115
(l)	M.P.	121	122	123	124	125
(m)	HOUSING TRUST	131	132	133	134	135
(n)	LANDLORD	141	142	143	144	145
(o)	MEDIATION	151	152	153	154	155
(p)	OTHER	161	162	163	164	165

12.Q. IS THE PROBLEM OVER?

11 YES, AGREEMENT REACHED
12 NO ONE DOING ANYTHING
20 NO
30 DON'T KNOW

13.Q. IF PROBLEM OVER, WHEN DID IT FINISH?

1 This year
2 Last year
3 2 or 3 years ago
4 4 or 5 years ago
5 5 or more years ago

14Q. DID YOU EVER GET ON WELL WITH NEIGHBOUR?

1 YES
2 NO

15Q. DO YOU DISAGREE ON OTHER ISSUES?

1 YES
2 NO

16.Q.HAS ANYONE GIVEN GROUND TO SETTLE OR TRY TO SETTLE THE DIFFERENCES?

YOU	N'BOUR	
1	3	YES
2	4	NO

17.Q.WHO DO YOU THINK WAS REALLY AT FAULT?

1 SELF/FAMILY
2 NEIGHBOUR/FAMILY
3 BOTH SELF AND NEIGHBOUR
4 NO-ONE
5 DON'T KNOW
6 GOVERNMENT/LOCAL COUNCIL
7 OTHER

18.Q.HOW WOULD YOU DESCRIBE SITUATION YOU ARE IN NOW?

1 A WIN FOR YOU OR YOUR FAMILY
2 A LOSS FOR YOU/FAMILY
3 A COMPROMISE
4 A STALEMATE
5 A LOSS FOR BOTH YOU AND NEIGHBOUR
6 DON'T KNOW
7 OTHER

19.Q.DO YOU KNOW WHETHER THERE IS A LAW THAT COVERS YOUR PARTICULAR PROBLEM?

1 YES
2 NO
3 UNSURE

20.Q.WHO DO YOU THINK WOULD BE BEST ABLE TO SOLVE YOUR PROBLEM?

1	COURT
2	COURT WITH NO LAWYERS
3	MEDIATOR
4	LAWYER
5	SPECIALLY TRAINED PERSON
6	DON'T KNOW
7	OTHER Specify .....

DEMOGRAPHICS

ANSWER FOR THE CALLER AND FOR INDIVIDUAL NEIGHBOUR WHO IS THE MAIN PROBLEM, UNLESS THE NEIGHBOUR IS CLEARLY A GROUP OF PEOPLE.

21.Q.WHAT IS YOUR POSTCODE? 5.....

IF YOU DON'T KNOW, WHAT IS THE SUBURB.....

22.Q.SEX

YOU	N'BOUR	
1	3	MALE
2	4	FEMALE
	5	GROUP

23.Q.HOW OLD ARE YOU?

YOU	N'BOUR	
01	08	UNDER 15
02	09	16 - 25 YEARS
03	10	26 - 40 YEARS
04	11	41 - 60 YEARS
05	12	OVER 60 YEARS
06	13	DON'T KNOW
07	14	GROUP

24.Q.OCCUPATION

YOU	N'BOUR	
01	12	PROFESSIONAL
02	13	WHITE COLLAR
03	14	BLUE COLLAR
04	15	FARMER
05	16	HOME DUTIES
06	17	PENSIONER
07	18	UNEMPLOYED
08	19	STUDENT
09	20	GROUP
10	21	DON'T KNOW
11	22	OTHER

25.Q.ETHNIC GROUP

YOU	N'BOUR	
01	11	ABORIGINAL
02	12	AUSTRALIAN
03	13	U.K.
04	14	ITALIAN
05	15	GREEK
06	16	OTHER ANGLO SAXONS (eg: NZ,USA,Sth.Africa)
07	17	SLAVIC
08	18	OTHER EUROPEANS
09	19	ASIAN
10	20	OTHER

26.Q.OCCUPIER TYPE

YOU	N'BOUR	
01	07	COUPLE
02	08	COUPLE WITH CHILD(REN)
03	09	SINGLE WITH CHILD(REN)
04	10	SINGLE
05	11	GROUP
06	12	OTHER

27.Q.NO. OF INHABITANTS

YOU	N'BOUR	
1	5	1 Person
2	6	2 People
3	7	3-4 People
4	8	5 or more

28.Q.TYPE OF PROPERTIES

YOU	N'BOUR	
01	06	HOUSE
02	07	FLAT/UNIT
03	08	FARM
04	09	BUSINESS
05	10	OTHER

29.Q.OWNERSHIP

YOU	N'BOUR	
01	07	OWN
02	08	PRIVATE RENTAL
03	09	HOUSING TRUST
04	10	BUSINESS/COMPANY
05	11	GOVERNMENT DEPARTMENT
06	12	OTHER

30.Q.HOW LONG HAVE YOU LIVED THERE?

YOU	N'BOUR	
01	07	Less than 6 months
02	08	6 months to 2 yrs.
03	09	2-4 years
04	10	4-10 years
05	11	10 years or more
06	12	Don't know

31.Q.DOES YOUR NEIGHBOUR LIVE

1 NEXT DOOR
2 BACK FENCE
3 ACROSS ROAD
4 NEAR VICINITY
5 ABSENTEE OWNER
6 OTHER

32.Q.FINALLY CAN YOU TELL ME HOW YOU FOUND OUT ABOUT THIS PHONE-IN?

1 RADIO
2 T.V. NEWS
3 NEWSPAPER AD.
4 NEWSPAPER ARTICLE
5 WELFARE AGENCY
6 POLITICIANS OFFICE
7 OTHER

33.Q.ARE THERE ANY OTHER COMMENTS THAT YOU WOULD LIKE TO MAKE?

.....
.....
.....

THANK YOU FOR TELLING US ABOUT YOUR NEIGHBOUR PROBLEM.

CJC's - ACHIEVING THEIR GOAL

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INTRODUCTION

This paper illustrates how Community Justice Centres achieve a satisfactory resolution rate to disputes when other agencies, especially those in the legal domain, demonstrate that they are unable to meet the needs of those in dispute. Mediation successes are due to the willingness of the parties to participate in the mediation process and to the burgeoning skills of the lay mediators.

Recently research in South Australia (Worrall, 1986) has pointed to a need to establish a scheme where people can settle a dispute when other agencies have been unable to help.

The successful elements of the process employed by CJC mediators, which are not always available to, or used by, professional helpers, includes: voluntary participation; a free and accessible service using all community languages; sufficient time for active listening skills to be employed; and a neutral, non-judgmental atmosphere where disputants find their own solutions, thus avoiding escalation of their problems.

Unlike the legal system, no loser emerges at the end of a mediation session, rather, both parties will have preserved their integrity and will have formulated practical plans for future behaviour.

CJC mediators are chosen for their personal qualities from the local community, they work on a sessional basis and many of them give freely of their time in developing the mediation process and attending training workshops. Special mention must be made of several Bankstown mediators who assisted in preparing this paper - Silvana Gruber, Janice Williams, Andrew Marcaros, Colleen Norris, Jenni Behringer, Andrew Gavrielatos and Peter Houlahan.

The objectives adopted by the first Co-ordinating Committee for the Community Justice Centres pilot project in 1980 remains valid today, (Schwartzkoff & Morgan, 1982), that is:

To establish a community mechanism to meet the need for relatively inexpensive, expeditious and fair resolution of disputes between parties involved in ongoing relationships.

VOLUNTARY PARTICIPATION

The voluntary nature of attendance at a mediation session is recognised in the Community Justice Centre Act, 1983, Sec. 23 (1). Disputants are informed at the initial interview, and are reminded during the first phase of the mediation session, that under Section 23(2) of the Act they may withdraw from the mediation session at any time.

The fact that CJC agreements are entered into voluntarily and are "not enforceable in any Court, tribunal or body" (Sec. 23 (3)), is a plus for the Centre's clients, even though they may not fully appreciate this at the outset. Evaluations of alternative dispute resolution methods have shown that when people are actively involved in solving their problems and when they make their own decisions, they are more likely to keep those agreements. Mediators never impose decisions on parties or even suggest alternatives. The mere fact that parties formulate their own agreement means they have a vested interest in making that agreement last.

Disputants coming together voluntarily to settle their differences will accept that they can resolve their conflict, partly because the mediators expect it of them. When confronted with this fact disputing parties often work harder at finding their own solution.

Many people are referred from local courts and they are aware that decisions as to their future behaviour may be made for them by a magistrate.

The apparent paradox of court coercion and voluntary mediation is only superficial as the voluntary nature of attendance is constantly stressed. The offender is informed by both CJC staff and mediators that if he prefers to accept the magistrate's decision rather than attend a mediation session that is his prerogative. Similarly, the plaintiff who believes that justice can only be achieved in a court room, or does not want to sit in an informal setting with his adversary, is referred back to the court for adjudication. However, both parties are advised that a mediation session does not preclude their legal remedy. Many who approach the mediation table with some reservations conclude the session by shaking hands, embracing or adjourning to the nearest hotel to celebrate their joint victory.

The voluntary nature of attendance at a mediation session ensures that participants have already shown a certain amount of good faith by being prepared to work at a solution. If an agreement is reached it will be a bona fide agreement, where the parties have determined the content without coercion, therefore, the chances of its success are far greater than if a decision is imposed upon them. The provision of neutral mediators and a service that is expeditious can de-fuse a potentially explosive situation.

ACCESSIBILITY

When CJC's were inaugurated the Committee was particularly conscious of the community's need to use the service outside normal working hours. Very few agencies offer to help people at night and on weekends and CJC's are probably unique in matching workers to clients with regard to sex, age and ethnicity. These circumstances create a high level of credibility from the outset and the trust engendered can quickly alleviate any earlier misgivings amongst the parties.

CJC mediators are drawn from all levels of the community taking into account their ethnic background, age, and life experience. Due to careful selection procedures, a rigorous training course and the mediators' innate dedication, there is a distinct lack of ego striving, power tripping or attempts to control the clients. Mediators possess a high degree of self-awareness and are eager to attend on-going training workshops such as multi-cultural seminars.

CJC mediators currently speak a total of 23 community languages and all mediators are aware of the differences that make up Australia's multicultural society. Very often cultural misunderstandings are at the root of longstanding and distressing neighbour disputes which can result in disastrous consequences.

Many disputes arise following noisy and unfamiliar celebrations. Neighbours with different cultural backhgrounds may not understand the significance of the celebrations, and misunderstandings can be compounded by lack of a common language. Abuse, harassment and assault may follow.

REFERRAL SOURCES

The CJC is often the last resort for someone who has spent months dragging themselves and their problems from one agency to another. Typically a neighbour dispute escalates from relatively minor harassment between adults or children to a violent situation where both parties eventually appear before the bench magistrate.

CJC's receive referrals from many Government agencies including the Police; the Chamber Magistrate at the local court house; the Housing Department regarding public tenants; local Councils concerning noise or pet problems; the Department of Youth and Community Services regarding child neglect or misbehaviour; and many non-Government agencies regarding a wide range of problems. Both legal aid and many private solicitors suggest their clients try mediation before litigation. A significant proportion of people contacting the CJC's are self-referred.

The court, unfortunately, does not provide the ultimate solution. The lengthy process of finding justice has only just begun. A series of adjournments usually ensues, due to the availability of witnesses, and because time must be set aside for hearing a defended matter. No one wins in the court room. Even if the defendant is found guilty and the informant is totally innocent the neighbours will not go home and live in harmony because the "guilty" party will usually show their resentment by further harassment. If the case is dismissed and both parties are bound over to keep the peace, the dispute will not be quelled but will continue to simmer because the underlying causes have not been addressed.

When such neighbour disputes are referred to the CJC they afford the disputants the opportunity to resolve the matter before it reaches a level of violence requiring legal intervention.

A typical neighbour dispute may involve many government agencies or departments ranging from Complaints to the Housing Department concerning children's behaviour through to prolonged treatment for a nervous disorder which is exacerbated by the dispute. CJC's are able to fulfil the need to resolve the dispute and thus end the search for the most appropriate aid.

At a mediation session, each party has an opportunity to carefully consider what is to be gained or lost by continuing the dispute through litigation. Few people have the emotional and monetary resources to pursue a "matter of principle" to its ultimate legal end.

It is a fairly common scenario where both parties admit to each other that they are not coping with life in general, but, as the mediators noted after one such dispute:
"Both parties benefited from listening to each other and gained insight and understanding of each others problems." A simple but workable agreement in such cases often includes the clause:
"A and B agree to communicate with each other if any problems arise with the children in the future."

However, it is not only the poor who feel powerless before the law. Wealthy, articulate individuals also fear that they have

no control over the course of events once they enter the legal system. This latter group are more likely to be aware of the existence of CJC's, are willing to try mediation and are impressed that they will have the opportunity to make decisions which influence the outcome of their dispute. At recent mediation sessions divorcing couples have agreed on the basis for settlement of property disputes amounting to more than a million dollars.

As CJC's are not fully understood, many people in dispute have already tried every other avenue before being directed towards the CJC. CJC's will certainly accept these difficult referrals as another attempt to resolve a dispute. Although the mediators are aware that the CJC has been approached as a last resort, they still maintain their enthusiasm, partly because they are not suffering the worker "burn-out" which afflicts professionals facing these cases every day, and partly because the variety of disputes they deal with provide a continuing challenge.

Complex family problems include matters where the local Children's Court refers parents and their "uncontrollable" teenagers. The mediation process encourages both parties to make a practical achievable agreement where the young person is involved in formulating the agreement.

Child welfare authorities have been pleased with the results of mediation sessions involving children and continue to refer difficult disputes involving communication and neighbour problems between children and adults.

MEDIATING WITH CHILDREN

In mediation sessions involving children or young people, the ability of the mediators to remain impartial provides the young person with opportunity to feel that their point of view is important. The positive effect of this is that the level of input from all parties is on an equal basis.

Where harassment before, after and during school hours is a major issue, the traditional disciplinary measures of school, police and other authorities has been shown to be ineffective. Overworked police and other officials are likely to make judgments about who are the culprits and victims, and thus risk instigating an inappropriate course of action.

Mediation provides a more effective alternative; the relaxed atmosphere, the lack of time pressures and the determination of the mediators to listen to and encourage the children results in more constructive communication between the generations.

In disputes between young that have escalated to involve parents, it is quite commonplace for young teenagers to attend a mediation

session with their parents. Their feelings are explored, they decide what their future behaviour will be and the wording of the agreement is left with them. Usually the adults involved are surprised that -

(a) the young people are allowed to have their say and

(b) that once the children have resolved their conflict the changed atmosphere allows the parents to also reach an agreement for the future.

TIME FACTOR

CJC's do allow as much time as necessary for disputing parties to build up trust in each other so that they will naturally divulge their fears and hopes for the future. In the dynamics of the mediation a psychological state is gradually built up whereby they become willing to work constructively on solving their problems. Once emotional frustration and anger has been expressed many complaints lose their level of importance and the parties can focus on possible remedies and the practicalities of finding their own solution.

The criticism has been expressed that CJC's can dampen down a dispute and only alleviate the current conflict, not the problem. However, mediators have noted that once anger is expressed the parties realise nothing terrible happens to them at the CJC and they are in a suitable frame of mind to formulate plans for the future.

NEUTRALITY

If one party does appear to be overly submissive the mediators will always test the agreement for workability and will convene individual private sessions with each party for that purpose.

When separating husbands and wives mediate in issues such as access, maintenance and property arrangements there is the added safeguard that they must have their agreement endorsed by a lawyer in the proper form, which is then examined by a judge of the Family Court. By settling these issues at the CJC they not only save money but the acrimony and stress which accompany drawn out divorce proceedings.

Chamber magistrates refer people involved in neighbour disputes to the Community Justice Centre, recognising that they would be better served by trying mediation rather than embarking on a course of litigation and its resulting bitterness. The whole matter may even be cleared up over the telephone by the CJC conciliating between both parties; a satisfactory result may be

achieved at a mediation session or the problem may subside once the other party receives a letter from the CJC. For example, where disputes over a sum of money are concerned an offer to repay the debt is often successfully conciliated, or mediated, thus avoiding court costs and any further anxiety.

LONGSTANDING DISPUTES

Public housing authorities and the police lose patience with the kind of recurring dispute that may involve half a street in a continual war exacerbated by gossip. Instead of offering a ready solution such as: "All of you on this side of the street avoid contact with those opposite", mediators have the luxury of time and the flexibility of holding several sessions with different combinations of parties if necessary, so that all factions are catered for.

Housing officers and police officers do not have the time to cope with such complicated jigsaw puzzles and they may find the problems tedious and repetitive. As their role is to solve the problem, and not to be a mediator, the focus of their efforts is generally on fact finding, and subsequent decision on what official action should follow.

Community Justice Centre mediators have a different approach to the facts. Clients are advised that feelings are important and the emphasis is laid not on the bare facts of how the situation arose but rather on encouraging the parties to make plans to avoid conflict in the future. From the agenda that is formulated by the mediators, after both parties have explained their grievances, it may appear that all the problems boil down to one or two major items of concern.

A misinterpreted snub of the woman next door by a busy new neighbour can cause years of imagined harassment. Children are often the centre of disputes and can set up situations for their parents to battle out whilst they sit back and enjoy the fire-works.

Although seemingly small but lingering matters may not be taken seriously by other busy professionals, these disputes are very upsetting to the people who are emotionally involved in them. Mediators listen carefully and reflect back to the parties the problem as they have heard it. This often puts a different perspective on problems and disputants often recognise for the first time, in the calm and comfortable atmosphere of the mediation room, how relatively minor their dispute is and how easily they can resolve it.

NON-JUDGMENTAL ATMOSPHERE

Because mediators come from many different fields and have no professional axe to grind they have no pre-conceived ideas about how to "treat" a case. They are not likely to encounter as mediators other workers who may also be helping the client in another professional capacity and therefore total confidentiality would be preserved.

Disputants seem to be more prepared to disclose their feelings readily to lay mediators than to professionals, as they realise they are speaking to ordinary people who may also suffer neighbour or family problems. Disputants may perceive professionals as being able to avoid such conflicts in their life and therefore not possessing an understanding of how it feels to be abused and harassed. Often a small amount of self-disclosure by a mediator is helpful in putting the parties at ease and thereby identifying with the client.

Mediators lack any pre-conceived ideas about the disputants because they are not given any information on the parties' background. Beforehand they are merely given a short summary of the dispute, such as, "This dispute was referred by the Bench magistrate and involves an assault, which occurred during a dispute concerning the behaviour of A's and B's children." The dispute as it presents to the intake officer may be quite different to the matters brought to the mediation table because the hidden agendas come to the surface and a whole new dimension is added to the ostensible dispute.

Many agencies will make a swift assessment of a problem and direct poeple to yet another agency without allowing sufficient time for a full explanation. Those attending an initial interview at the CJC often show gratitude that they have been listened to without being stereotyped or categorised.

DOMESTIC PROBLEMS

Mediation sessions do not always end in an agreement. Sometimes, when no agreement is reached the parties will go home feeling relieved that they have had the opportunity to get something off their chest. It may happen, as in the case of a downtrodden wife, that she will feel that for the first time in many years her husband has actually listened to her point of view. Even though the intricacies of fifteen years of marital problems have not been unravelled in front of the mediators and everybody knows many of their past problems will recur, at least they can try to handle their disputes differently in future because the wife feels so much better now that she has been heard and her complaints have been taken seriously by the mediators, and, hopefully, her husband. In the happier endings he will say

"but I never knew you were so upset about that" and she will say "but you never listened to me before, I've been trying to tell you for years".

Some domestic problems involving physical and/or mental cruelty have been referred to mediation. However, CJC's will not intervene in domestic violence situations in order to provide a man a "soft option" to avoid the legal consequences of illtreating his wife. Many of these matters are referred by bench magistrates, legal centres and women's refuges or they are self referred. However, both parties are clearly informed that they must return to the court on the adjourned date for the adjudication of the magistrate.

The mediation session can provide an opportunity for both parties to discuss matters concerning their children and property and they often make workable agreements on these issues. However, the mediators will not sanction an unconscionable agreement and will become agents of reality if they suspect a party is being manipulated or taken advantage of.

FAMILY DISPUTES

During mediator training courses, trainees are made fully aware of the importance of not taking sides in any disputes. In particular, in family disputes the mediators must demonstrate their impartiality.

In the case of an elderly lady who feels unfairly treated by her children, she is given the same assistance as her son and daughter, who may very quickly tell the mediators "mother is getting senile". Her grievances have nothing to do with her advancing age and she will eventually acknowledge her occasional forgetfulness, but, because she feels that she has been listened to she will feel comfortable enough to voice some of her fears to the mediators during her private discussion with them. When all parties reconvene, after both sides have been heard in private, the underlying issues will begin to surface and can be dealt with accordingly. Everyone concerned can go home feeling pleased that previously unspoken concerns, such as who inherits what when mother dies, have been fairly dealt with and will no longer cause animosity and tension in the family.

Other family matters mediated have included mediations between intellectually disabled young adults and their families. The process followed by the mediators allows all concerned the opportunity to be heard no matter how trivial the problem may appear on the surface.

Although modern social work practice discourages labelling of clients or their problem we still find that a worker is allocated a client at a case conference and that client is labelled in the early stage of help as e.g., "paranoid" or "retarded", with all the associated implications for their future treatment. CJC mediators are given minimal details about the parties and hence do not prejudge them.

Other agencies who had tried to help these people may be hampered by lack of time; inability to effectively listen to both sides; and a protective but patronising attitude towards their clients.

CJC AGREEMENTS

An agreement which has been made when two parties have made an attempt to listen to each other and to accept how the other person is feeling about a set of circumstances has a far greater chance of success than a court order. Even if an agreement is not reached, many people have informed the Centres that they did learn how to deal with conflict following the session.

Sometimes parties have left a session without an agreement but have telephoned days later to say that they subsequently met with their neighbour and had been able to work out a satisfactory solution to the problem. The mediators had not only been able to facilitate their communication at the Centre but the parties had learnt how to approach each other in a less threatening way for the future.

The fact that Community Justice Centre agreements are not enforceable and not admissible in court as evidence, does not deter the parties from wanting to take something tangible away with them from the mediation session. Both parties feel that they have been winners because the mediators ensure that the agreements are balanced and specific as to what will happen in the future. The agreements are not imposed on the parties by the mediators and are formulated in the words of the disputants not couched in legal jargon. Both parties participate in writing the agreement which may be written in English and another language. Generally, whatever the parties want is included in the agreement, for example, one clause of an agreement read: "From now on there will be no spitting". This satisfied everyone concerned as no blame was imputed and everyone was happy that the spitting issue had been acknowledged and dealt with.

Mediators are not expected to go along with agreements that are clearly illegal, or grossly out of step with community standards.

The intention in formulating an agreement is that the disputants put aside past problems and concentrate on their future behaviour. The signing of the agreement, is carried out as a gesture of good will between the parties. However, some agreements are verbal with all concerned shaking hands.

CJC's are not equipped to ameliorate all of society's ills, but can probe deeply enough into problems to unearth many misunderstandings which parties have consciously or unconsciously allowed to remain dormant or to simmer. The mediators encourage the parties to face these underlying issues. If a dispute does uncover deep psychological problems, or parties are obviously in need of specialised help, such as counselling, they are immediately referred to the most appropriate agency.

SECOND-CLASS JUSTICE ?

Too often alternative forms of dispute resolution are branded as second-class justice. Several infant schemes are presently being evaluated and critics will be eager to prove that mediation has not substantially reduced pressure on the judiciary. However, the success of the various projects should depend on the quality of service offered to the public not the quantity of matters that are processed.

The Community Justice Centres Second Annual Report 1984/85 (p.15) shows that 38.6% of people approached either do not respond to correspondence or decline mediation or conciliation. It is important that people have the choice to mediate or not. However, CJC's are often contacted by the original complainants who express their thanks that the problem has been resolved since the CJC intervened, even though mediation or conciliation did not take place.

If mediation or conciliation are not effective and adjudication subsequently takes place, some people concerned have reported to the CJC that even though they did not reach agreement at the mediation they had gained better understanding of their conflict, and this had been an advantage in further contact with the other party.

Many lawyers now advise their clients to try mediation before litigation, especially as statistics show that 83% of matters are resolved at mediation. It is usually the less informed lawyers who accuse CJC's of dispensing second class justice, as they set out to enthusiastically safeguard their clients' interests and protect their practices from the ravages of those they view as para-legal interlopers.

Far from foisting a second class system of dispute resolution onto the community, CJC's actually empower people, both

mediators and disputants, to handle problems once thought to be the province of professionals. As individuals and helping agencies continue to entrust disputes to community mediation, these Centres which are recognised as a valuable and viable dispute resolution mechanism, will become a vehicle for social change in the long term.

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COMMUNITY MEDIATION

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INTRODUCTION

I want to approach the area of community mediation in Australia by investigating the question of what effect a community's social, cultural and legal life has on the way the mediation process operates within that community. I hope that such a discussion will give us an understanding of why mediation at the community level has developed as it has in Australia and provide a challenge to how we can use the full potential of the mediation process. Part of my paper will be concerned with describing what is happening in Australia in this field, but I have set out to place it in some conceptual framework.

The phrase 'community mediation' requires some definition. What I am meaning by the phrase 'community mediation' is any mediation scheme which uses a broad range of local people trained as mediators. (This definition is consistent with Jenny David's use of the phrase.) Such schemes can be further sub-divided into those which are established by a local community and controlled by the members of that community, and those schemes which are service or agency orientated and seek as their primary aim to provide a mediation service for the community. For my definition, the focus of either scheme may be neighbourhood or family disputes (or both). Such a definition excludes therefore schemes which may use the title mediation or conciliation with a stated aim of community service, but do not use community people as mediators. By this exclusion I am not making any assessment of which approach is 'better'; merely trying to define my area of study.

Within this paper I also use the phrase 'community development'. This concept has a number of elements including: communities having greater control over the important decisions made in their own community; encouragement from this experience for collective social change and reform; human services within the community being made responsive to local needs; and services complementing and contributing to existing community networks of information and mutual support. A dispute resolution service such as community mediation touches many areas of personal and social life in the community and therefore either assists in the development of these elements of a community's social life, or

reinforces existing (and largely inadequate) social patterns of interaction and dispute resolution (cf. Dispute Resolution Project Committee 1985, pp.1-6).

The term 'community' is harder to define in a meaningful way and yet it would seem crucial to do so before we can understand the community mediation movement, let alone its community development potential. I shall approach it in a rather roundabout way by surveying briefly the Chinese mediation system. This may have some intrinsic value of its own, and for my purpose it will demonstrate the connection between community and mediation, and provide a comparative starting point for discussion of community mediation in Australia.

CHINESE MEDIATION

The mediation system in present day China operates under the direction of the rules and regulations of the provincial government supported and assisted by the provincial Bureau of Justice. In the cities mediation committees are set up as neighbourhood committees. In the countryside they function as units of production brigades which are usually organised on the basis of villages.

The sheer scale of Chinese community mediation is staggering. In 1980 China had at least 810,000 mediation committees comprising 3-7 members. The bulk of these (63%) were in the country while institutions (19%) and urban neighbourhood and factories accounted for the rest. In 1980 there were approximately 5.75 million voluntary mediators who handled 6.12 million cases, about 11.3 times the number of cases handled in formal court proceedings during the same year.

The mediation committee system has three tiers: 'leading groups' at the level of a town, large street, big state enterprise or sizeable factory; 'peoples mediation committees' at the level of neighbourhood, country commune or smaller factory; and 'mediation groups' which are local citizen groups in the countryside or in a production team in factory workshops.

The work of all committees is linked together. An attempt is made to have a mediation committee in every district so that if a dispute arises there is one available to resolve the matter on the spot. The committee at the grass roots level would intervene first (mediation group), but can ask for help from the next level of peoples mediation committees if there is difficulty in resolving the dispute. A dispute may then be referred to the leading group where, if it is not resolved, the matter can be referred to the courts (Australian Delegation to China on Criminal Law and Procedures 1983, p.61).

The process of mediation carried out by the committee members usually entails:

1. Discussions with each party involved and other people directly associated with them.

2. A full investigation into the claims made by both parties. Such an investigation may entail lengthy discussions with many people.

3. A meeting of all concerned where the results of a committee's investigation are disclosed and there is a chance for discussion.

4. An invitation from the committee for the parties to reconcile. If the mediators consider that a party needs to change their behaviour and attitude, they advise the person to make this change.

The Chinese maintain that mediation is not an inevitable or required procedure for persons involved in disputes. It cannot be used to impede people's attempts to get cases tried in formal courts. Those whose claims are rejected by mediation committees still retain the right to seek redress in formal court hearings and in cases where committees make incorrect judgements, their decisions can be overturned by the courts. Nevertheless, today in China mediation committees alleviate the courts of 95% of civil disputes.

The Chinese see the role of committee members as solving civil disputes and preventing disputes by improving unity among the people. Unity has an educational component: education in socialist morality is coupled with education in the knowledge of the legal system.

> Because local people know what is happening in their neighbourhood, and because the committee is made up of people drawn from the locality which it serves, the committee is a very convenient vehicle to deal with civil disputes when they arise especially as whatever happens in the neighbourhood comes quickly to the knowledge of a member of the committee and so the committee is able to act immediately..... As the local committee usually enjoys a high prestige in its community, people tend to obey what the local committee decides and abide by its decision. (Australian Delegation to China on Criminal Law and Procedures 1983, p. 62)

The members of the mediation committees consider they are successful in their work of preventing disputes escalating and helping industrial production because:

> ..... First, there exists equality between people, no one is allowed to surprise or bully another; secondly, the committee is elected by local people and its decisions are made according to ... truth and ... [impartiality]. (Australian Delegation to China on Criminal Law and Procedures, p.66)

COMMUNITY AND MEDIATION

Community in the Chinese sense governs the operation of mediation in many ways. For example, the concentration of the community results in a process which commences immediately after an incident and which is surrounded by a number of witnesses (kin, friends and neighbours). The need for such a community to live in harmony is a powerful cohesive force in interpersonal disputes. The simple fact that the telephone is still uncommon in many Chinese communities means that a person's social interactions are observed and noted and that investigations and discussions during a dispute resolution process are held in the public forum.

Secondly, there is a broad basis of commonly held values in Chinese society. Aged members of the community are traditionally respected and influential because of their life experience and knowledge of the local community. As mediators they become couriers of social and moral values (eg the value of 'not losing face') in the process of dispute resolution.

> Mediators represent the norms and values of their communities, often attaining their positions by virtue of their experise in moral issues. They advocate a settlement that accords with commonly accepted notions of justice, couched in terms of custom, virtue, and fairness, and reflecting community judgements about appropriate behaviour. To flout such a settlement is to defy the order of the community. Mediators often deliver moral lectures to one or both disputants. ..... they are experts in ..... social relationships in genealogy, bringing to the conflict a vast store of knowledge about how individuals are expected to behave toward one another in general as well as about the reputations and social identities of the particular disputants. Mediators build upon their past

> experience with similar cases and their knowledge of local customs regarding such disputes ... Mediators are generally neutral, but they are rarely disinterested; nor are they complete strangers to the disputants. (Merry 1982a, pp. 30-31)

Thirdly, the legal culture of China generally subordinates the individual's legal rights to the family, group, class, or state. The court structure is distinct and inaccessible (at times unpredictable) so that the mediation system is the primary source of dispute resolution for most people. Compared to the West, 'Chinese [legal] culture places much less emphasis on the individual's possession of legal rights, which can be asserted and defended in a court' (Merry 1982b, p. 176).

A final aspect of the Chinese community which impinges on mediation is that mediated agreements are backed by a social and moral authority. The mediation process establishes the truth by discussion and investigation and delivers it to the disputing parties who are expected to be considerably influenced by the collective wisdom of the community mediators. Although the mediators have remained neutral, influence and social position weigh heavily on the disputing parties who confront gossip, social ostracism and loss of face or reputation for failing to behave in a conciliatory manner.

If we now transfer our attention from the Chinese community and mediation in that context to a country like Australia, we are challenged immediately by the problem of defining 'community'. The cohesion, common interests and shared or imposed values of Chinese society are clearly not apparent in Australian social life in general, especially in main centres of urban population. Most uses of the word are not convincing. We have become sceptical in Australia of many political uses of the word 'community', seeing it as 'spray-on solution' (Bryson and Mowbray 1981) to an underlying lack of real community involvement and devolution of control. When used in other contexts it 'evokes a sense of lost values' (Basten and Lansdowne 1980) (rather than values that are present) and therefore aspires to something to be created.

There are urban social systems that exist in Australia that are certainly not identifiable in terms of the broad cohesive elements of Chinese society, but nevertheless represent a complex network of social relationships. In urban Australia these networks offer enduring relationships which may be restricted to a local area or extend further afield and include few neighbour relationships. The networks are not static either

and possess potential for development.

Generally though, community at the local level in Australia provides many escapes from any local social system and the responsibility of facing neighbours in resolving disputes. This has serious problems for the implementation of community mediation:

> The more close-knit the social networks joining two disputing parties, the greater the pressure they feel to resolve their quarrel rather than to continue the battle .... the extent and condition of on-going relationships, the role of consensus and shared values, the need to settle, and the availability of avoidance and court as a culturally acceptable and socially possible alternative solution to conflict seriously influence the way mediation functions. (Merry 1982b, p. 177)

The differences in community between China and Australia therefore gives rise to a number of questions. Firstly, is mediation transferable from a society like China to that of Australia? I think there has been a lot of unproductive debate on this question in the literature, stemming from the first proponents of mediation in the US who referred to village moots and dispute resolution procedures in non-industrial and socialist societies (cf. Danzig 1973 and Sander 1976). After more than 10 years of mediation experience in the US the question of transferability is rather an academic one since mediation has developed a distinct form of dispute resolution which cannot easily be compared with mediation in non-Western societies. The more important questions I think are: What elements of (say) the Chinese mediation system have more universal significance and have been used in the West? And given that mediation in the West has become a distinct dispute resolution process (although sharing some common elements with other non-Western societies), what is the nature of community mediation in the West?

Chinese mediation has a number of elements that can be found in Western mediation schemes. For example:

- the disputes mediated are between people with a continuing relationship of some kind
- the disputes mediated are not easily remedied by existing guidelines or laws but rather the dispute is lodged in the realm of interpersonal differences between people
- the disputes mediated are concrete and require a problem-solving approach oriented to the future
- the parties involved in the dispute have much to lose by not

resolving their differences because of the costly and inaccessible alternative forms of dispute resolution
- the balance of negotiating power between the parties in dispute is seen as an important prerequisite for mediation
- the need for some form of authoritative influence (eg the court) seems to be required as a backdrop to a mediation system.

If these aspects (as opposed to others) of China's mediation system are found in the West, then what is striking about them is the way that the items generally reflect an individualistic approach to the use of mediation. If other characteristics of Western mediation are included, the contrast to China's mediation system is seen even more clearly:

- the anonymity of mediators
- the voluntary attendance at mediation sessions
- the confidentiality of proceedings
- the non-enforceability of agreements
- the need to concentrate on caseload figures due to central government funding.

These and other characteristics of community mediation in the West have arisen because of the nature of community in the West, its social, political and legal aspects. Given the individualised emphasis, can we therefore speak in any meaningful way about 'community mediation'? There is a body of criticism about mediation schemes which describes them as agencies for resolving individual disputes rather than as a source of social action in the community (Dunne 1985; cf. also Bryson 1985). Other criticisms stem from the claim that, contrary to their stated aims, mediation schemes in the West are not community agencies in any real sense because the establishment of mediation schemes has replicated a bureaucratic service model of operation. Such criticism has doubts too about how successful mediation schemes are in creating a sense of community (cf. Tomasic and Feeley 1982, p. 230).

One Western model of community mediation which is usually presented as tackling seriously the problem of community control, management and involvement is the Community Boards program in San Francisco. This scheme aims to combine a problem-solving service with one that is concerned to integrate conflict resolution into the community. The first function requires community education about the mediation service, contact with disputing parties, a pool of volunteer panelists who mediate (sometimes in the presence of members of the public), and a follow up worker who contacts the parties involved at a later stage. The second function of integrating conflict resolution skills into the community is based on these tasks being co-ordinated by a series of committees run by the people involved. Comparatively large

numbers of community members are trained for the tasks each year. A small full-time staff provides co-ordination and support for the structure which covers a number of neighbourhood blocks in San Francisco.

The Community Boards program is best understood as community development, rather than as an adjunct to the legal system. Panelists and other volunteers are moved through the system each year to be replaced by other panelists so that greater involvement of local residents is assured. The caseload is small (100 mediations in 1983) with emphasis being on the promotion and training of community members (cf. Faulkes 1982, pp.66-70). It should be noted that the funding of Community Boards is private and is over $1/2 million US. This model of community mediation (where only 3% of referrals come from police and the courts) contrasts radically with court-based mediation at the other end of the mediation spectrum. The rationale for the establishment of the latter programs is predominantly the efficient reduction of court load, and removal of certain types of disputes from the court lists.

As far as I know there has been no thorough evaluation of the success of the Community Boards program in community development in San Francisco and attempts to replicate the system elsewhere have faced some problems; especially in the resistence of many people to the problem of being mediated by a panel of their neighbours (`Peacemaking by 'Go-Betweens'' 1986, p.25). Community Boards represents an archetypal community mediation program and one which has provided many of the philosophical underpinnings for what can broadly be described as community-based mediation. Needless to say, what all Western community mediation schemes have in common is the problem of introducing new cultural values of compromise and conciliation in a legal culture of asserting legal rights and 'winning'. The Community Boards program represents in theory the most radical response to this cultural milieu.

It is time now to turn to specific Australian responses to similar issues, concentrating on the community side of their mediation program. Although the community mediation movement in Australia is very much in its infancy, the criticisms of community mediation need to be taken seriously if they apply to how community mediation is developing in this country. Otherwise, I believe, mediation at the local level will not fulfill its full potential.

COMMUNITY MEDIATION IN AUSTRALIA

New South Wales

(i) The Community Justice Centres in NSW decided at an early stage in their development not to have management of the three centres in the hands of locally-elected committees. Apart from the fear of 'token' community involvement in the management committees the origins of the scheme within the Attorney-General's Department meant that the emphasis of the service was at least initially on providing an alternative to existing legal forms of dispute resolution. Instead of community-based management a program of consultation prior to the establishment of the centres was undertaken with local involvement in specific aspects of the project. Informal consultation has continued since but there is an awareness that this aspect of the NSW service could be developed (Schwartzkoff and Morgan 1982, pp.161-162). Apart from consultation the Community Justice Centres believe that a significant advance in community involvement has been achieved through their panel of mediators selected from the community in two ways: (a) the mediators make a significant contribution to the development of mediation theory and practice, to the CJC's awareness of local issues, and to the training of other mediators, and (b) the mediators are generally involved in other community groups and their knowledge of conflict resolution is taken with them into other contexts. This aspect is still secondary to the service delivery function of the Community Justice Centres; that is, that the community can best be served and educated in the field of conflict resolution by an effective and high quality mediation service.

(ii) Coincidental to the establishment of the Community Justice Centres the Fairfield Mediator Centre was established in the outer Western suburb of Sydney in response to local interest in having a dispute service available. The Centre operates from a community resource centre and as such provides a range of information services along with mediation. They have a small panel of five mediators, take the vast majority of their cases from Chamber Magistrates or the police and concentrate on neighbour-related disputes. The source of funding for the Centre includes a number of departmental grants. There has been no systematic collection of data in the centre and no evaluation of the 30 to 90 mediations conducted each year or the effectiveness of the service in its local community.

Victoria

(i) The Family Conciliation Centre at Noble Park in Victoria has been operating for approximately 18 months and is the first mediation service in Australia to be managed by an elected committee from the community. It was established as a pilot project with the aims of (1) preventing the escalation of family disputes and contributing to the prevention of family breakdown and (2) providing an alternative to litigation for the resolution of family disputes. An Implementation Committee was formed in the Springvale/Dandenong area with membership drawn from a number of community services, and where legal and ethnic organisations were located in the area.

The committee arranged incorporation, secured premises, established budgetary procedures and selected and appointed staff. It also developed policy and direction for the project. A central policy was a commitment to mediation by community people. Similar to the Community Justice Centres in NSW, a panel of 30 or so mediators drawn from the local community are used on a sessional basis and paid a small out-of-pocket expense rate per hour. The full-time staff includes a coordinator, a lawyer, a financial counsellor as well as workers skilled in intake assessment and program development. The employment of a community education worker highlights a general commitment of the centre to community development by the provision of a broad range of services, education in conflict resolution methods, and involvement in family law reform.

Since the implementation phase the Centre has been managed by a community-based management committee with members of the local community and other persons who were selected as being able to offer a particular contribution to the work of the Centre. The Centre would be the first to say that broad community involvement in management has still to be developed to a level that is consistent with the aims of the Centre. The pressures of the pilot phase have contributed to the limitations of community involvement to date.

(ii) In April of this year the Victorian Attorney-General announced the government's intention to implement four Neighbourhood Mediation Service Centres on a pilot basis. The Dispute Resolution Project Committee which formulated the Neighbourhood Mediation Service proposal was encouraged by the Noble Park experience to push the community development and community involvement aspects of the mediation proposal further than in the NSW Community Justice Centres. The service to be implemented will have some

differences to NSW:

- the service will be co-ordinated from an existing service agency eg. local government office, community service centre or regional Legal Aid Commission office
- the centres will be managed by community-based management committees elected from the local community
- the funding source will be principally the Legal Aid Commission of Victoria during the pilot phase but it is hoped that significant contributions in establishing the centres will be made by local government and community groups
- it is hoped that the mediator training course will also comprise a general conflict resolution component which will be available to community groups, schools, management and union members, and interested persons from the community.

The Victorian proposal has been developed in the context of general reforms of the Magistrates' Courts. A recent committee report on reform of the Magistrates' Courts in Victoria recommended that the Neighbourhood Mediation Service once established should be used for informal pre-summons procedures for minor civil disputes.

Both NSW and Victorian mediation programs have a referral link with the courts, are substantially government funded (albeit through a statutory body in Victoria) and yet both espouse to some extent a community development model. How successful Victoria community mediation will be in locating and using community networks and developing new patterns of community dispute resolution remains to be seen. If it does gain a measure of success this will be in no small degree due to the standards accomplished by the NSW Community Justice Centres in establishing the first mediation scheme in Australia.

South Australia

(i) In Adelaide the Community Mediation Service based at Norwood has been operating for two years. It began as a Community Employment Scheme initiative but due to its general success the State Attorney-General has supported the scheme and enabled it to continue to this point on a pilot basis. It has been modeled on the Community Justice Centres in NSW, employing two people who arrange mediations and 20 volunteer mediators who are trained in the process of chairing disputes.

I think it is true to say that the Norwood service has seen its role as essentially service directed rather in any

specific sense community development, but it has deliberately chosen to broaden the types of cases accepted for mediation (eg. to include disputes between local authorities and citizens) which has meant the widening of its sphere of community influence.

(ii) An independent development in Adelaide is the Mile End Neighbour Dispute Service which is closely linked with the Parks and Boden/Brompton Legal Services. The service had its origins in the Report of the Community Justice Centre Project which was sponsored by the Parks Legal Service. It has been in operation for almost two months now and has CEP funding to December 1986. It has three full-time staff only, a co-ordinator, an intake officer who also mediates, and a secretary. It is envisaged that in time mediators from the Norwood centre may be used in the Mile End service.

(iii) Early in 1985 the SA Government established a Cabinet committee to investigate the need for a mechanism for the resolution of disputes between people in the community. The first of its terms of reference was to investigate and determine the nature and extent of disputes in SA currently without a satisfactory means of resolution. The report of that committee is due very shortly and is awaited with much interest and not only in SA. Indications are that it will recommend a system of community mediation similar to that developed in NSW and Victoria, with strong links to the current justice system.

Western Australia

(i) Western Australia's Family/Neighbourhood Mediation Service was established by the Gosnells District Information Centre with a Community Employment Programme grant in March 1986. The model developed is again similar to NSW although the 30 mediators are voluntary. Intake work is performed by a program supervisor whose tasks include initial assessment, contacting the second party, arranging separate legal advice whenever necessary, and arranging the mediation session. No follow-up work is done after agreements are reached. The Family/Neighbourhood Mediation Service is an extension of the services provided by the Gosnells District Information Centre. This Centre is a private sector body controlled by an elected committee of management. In this way the Gosnells Mediation Service has some similarities with the Victorian proposals to place mediation in the surroundings of existing community services and with some community involvement in the management of the service.

(ii) A Community Justice Centre (Pilot Project) Bill was also

tabled in the WA Parliament as a Private Members Bill in 1985. It bears close resemblance to the Community Justice Centres Bill in NSW. There has been no action on this WA bill to date.

COMMON ELEMENTS IN AUSTRALIAN COMMUNITY MEDIATION

I want to conclude by listing some of the common elements in Australian community mediation, beginning with the central question of community and mediation.

(a) The operation of the community mediation centres reflects the perceived limitations in 'community' as a meaningful social force in Australia. They are therefore essentially service orientated although the rhetoric speaks of a community commitment. Control of the overall process however generally rests in the hands of the agency staff or (as in the Noble Park centre) a community committee that faces the challenge of real community input. The experience in the United States indicates that agency models, although evolving from a community philosophy, are generally never built from the bottom-up, with community people involved in generating, creating and maintaining the entire program.

> Agencies, even ones that try to be sensitive to community needs, fall prey to the inevitable pressures of cost efficiency, maintaining high enough case-loads to justify funding, and the like. (Wahrhaftig 1986, p. 26)

If this danger is to be avoided in community mediation in Australia in the future then we need to begin to discuss openly and practically how this philosophical base to mediation can be kept alive.

A recently formed 'National Association for Community Justice' in the US is a new nationwide network of people interested in community-based conciliation program who will attempt to keep the American field of conflict resolution from becoming an exclusive province of professionals. Some of the suggestions as to how community mediation can halt that trend are rather challenging and threatening: for example, the policy that all volunteers mediators and staff be required to resign after three years and thus force the program to constantly bring in fresh new people who will require training and involvement.

What I believe we should endeavour to do is to foster all forms of approaches to community involvement and

development. Community-based management is one approach to community involvement but there may be other less formal mechanisms which can achieve the same results, perhaps more effectively. Committee structures can frighten off local people who are not familiar with them. The same people could contribute in other ways if given the opportunity. Similarly, the success of general community development entails a broader conception of community mediation than just solving disputes; education and training of community people in conflict resolution skills, and some follow-up capacity in the provision of a mediation service are important complementary functions of community mediation.

(b) Community mediation in Australia has until now been in the capital cities or satellite cities. The Victorian proposal plans a centre in a large provincial city as well as a mobile mediation service in a country region. Considering the elements of Chinese community mediation, particularly the shared values and cohesive social arrangements which are well suited to the Chinese method of mediation as a form of dispute resolution, the country experiments in Victoria should be watched with real interest.

(c) Unlike the impression given by the Chinese mediation system, Australian community mediation has had to come to grips with a fundamental social diversity and plurality. In this respect I believe that community mediation in Australia has been highly successful, showing a new respect for diversity and tolerance of differences, within the justice system in particular. This is a fundamental difference in mediation in the West as opposed to non-Western societies and one which I applaud. However caseloads have been dependent on the authority of law departments and the legal system in general and I am not sure this is something that should be entirely accepted as beneficial or inevitable. There are many agencies, government and non-government, which could refer people to mediation centres if they could be convinced of the profound contribution mediation could make in an increasingly multicultural Australia.

(d) Alongside community mediation is the rapid development of mediation by professionals in the Family Law area (in particular) and also in the arbitration of minor commercial disputes (cf. 'Family Mediation Report', 1986). There is, of course, room and value in having many forms of mediation service in the community. But if community mediation is to preserve its distinctive community development potential, it has to hold on to the central principle of control in the hands of the people served, however that is interpreted. The experience in the US shows

how community mediation can lose this vision in the pursuit of professional skill development.

(e) It is important that evaluations of community mediation schemes focus more attention on the processes of mediation (e.g. what makes good mediation?) and the nature of the community within which it occurs, especially the impact of a mediation centre on community development. Evaluators have traditionally concentrated on caseload data and client satisfaction, both of which have predictable statistical results (Merry 1982b, p.182). To measure social impact is difficult but it needs to be done. To date we have little applicable research and evaluation to make an assessment in this area.

(f) At present all community mediation programs in Australia have the need to exchange information in a systematic way, to co-ordinate common data collection, to encourage each other in the quality of the mediation product given, and to help each other meet the growing demands from other organisations for skills in dispute resolution. There is a need for the exchange of information on selection and training of mediators and the way mediators can be most effectively used, assessed and supported. For those of us particularly interested and committed to community mediation in Australia, this seminar should be an ideal opportunity to commence such an exchange of information and ideas. Perhaps in the not too distant future we shall need an Association similar to the newly formed Mediation Association of Victoria which will act as a clearing house for information. The aims of the Association are to promote mediation, encourage and provide for the exchange of ideas and experience in mediation, develop and maintain mediation standards, provide and support education in the theory and practices of mediation, and co-operate with other organisations in order to achieve these aims.

POSTSCRIPT

During the ideological Cultural Revolution in China (1966-1976) mediation committees were banned because they were seen as being 'tools of class reconciliation' - ie. good in practice, rotten in theory! (Beijing Review 1981, p.24). Not being an advocate of social change through violent class struggle, this episode is to me an example of the enormous potential of community mediation, standing as it does between the ideologies of the Right and the Left, to provide one of the very few enlightened ways forward in an increasingly combative social environment. Being such a new community movement in Australia, I hope community mediation holds on to the potential it has to reinforce

community values of tolerance, cooperation and mutual responsibility where they exist and develop such community values where they are fractured. Only in this way will mediation become a vehicle for social change.

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THE REGISTRAR AND COURT COUNSELLOR'S ROLE IN CONFLICT RESOLUTION

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The counselling and legal staff of the Family Court attempt to reduce the disruptive effects of family breakdown and to provide an alternative to the adversarial process by promoting conciliation in the management of disputes involving children and the management of property and financial matters.

The Family Court deals with the breakdown of marriage including:
- the guardianship, custody and welfare of children;
- the dissolution of legal marriages;
- spouse and child maintenance;
- division of the property of the marriage.

The Family Court attempts to provide the means whereby these issues can be resolved justly, humanely, efficiently, economically and with dignity.

The Court aims:
(i) to provide its conciliation services, as soon as possible to give clients the opportunity to achieve a lasting resolution to their problems:
(ii) to promote an alternative to the adversarial system in the management of disputes under the Family Law Act;
(iii) to reduce the disruptive effect of marital and family breakdown;
(iv) to gather and disseminate information on the problems of family breakdown and its consequences and promote healthier alternative ways of dealing with separation and divorce.

Conflict resulting from disagreement promotes competition and implies opposing goals which are perceived as incompatible. The anger and frustration which results divisions and can prevent purposeful goal directed activity.

The adversary system stimulates the view that the best solution is the type which is imposed on one party by the other. Hence a win/lose situation develops, reinforcing the idea of the superiority of one over the other, resulting in a power struggle which perpetuates conflict.

The Family Court staff, in order to help people in conflict have had to develop specialised skills. These include:
- encouraging a collective approach to problem solving;
- enabling parties to test out ideas and suggest compromises;
- providing information to make responsible choices;

Note: The seminar presentation was by Mr Peter Mark and Mr Marcus Galanos, Deputy Registrar, Family Court of Australia, Sydney.

- *expanding parents' view of possible solutions and generating a realistic view of what is possible;*
- *assisting parties to achieve relationship closure;*
- *providing a structured approach to problem solving;*
- *reinforcing commonly held views and agreements reached;*
- *defining what is reasonable;*
- *encouraging each party to understand the other's motivation;*
- *exploring the effect of making concessions and accommodations;*
- *focusing on the basis for an ongoing relationship;*
- *checking proposals in terms of how it will effect the parents of the children;*
- *assisting parents to achieve the best ways of sharing parental authority and meeting the needs of the children;*
- *encouraging the parents to identify the underlying relationship problems;*
- *increasing commitment to decisions made mutually, rather than those imposed from above;*
- *dealing with feelings and fears which prevent resolution;*
- *opening up alternative options;*
- *de-escalating conflict;*
- *reinforcing straightforward honest statements;*
- *banning blaming and manipulation;*
- *challenging discrepancies, distortions and game-playing;*
- *encouraging risk taking;*
- *focusing on joint problem solving;*
- *emphasising solutions that work;*
- *developing problem solving skills;*
- *dealing with power imbalances;*
- *promoting appreciation of the grieving process;*
- *assisting parties to come to terms with their sadness and losses;*
- *dealing with recriminations and punishing behaviour;*
- *modifying negative attitudes;*
- *dealing with coersion and manipulation;*
- *protecting the children as far as possible;*
- *dealing with unfinished business from the marriage;*
- *assisting parents to be aware of the consequences of conflict;*
- *helping parents to respond to the children's needs;*
- *assisting parents to deal with differences;*
- *enhancing the parents capacity to work co-operatively;*
- *identifying shared aims;*
- *clarifying problems and issues between the parties.*

We are constantly expanding our repertoire of strategies and alternative means of dealing with our clients. Case management procedures, introduced on 1/7/85, have formalised joint information sessions, pre-trial and joint conferences. This is in addition to procedures to ensure clients are not disadvantaged and cases do not get lost in the so-called 'black hole'. It has necessitated a closer working relationship between registrars and counsellors to maximise the opportunities for parties to settle out of court.

Conciliation is not appropriate in all disputes. It does not rule out the use of traditional legal intervention. We acknowledge we are in a powerful position to help shape clients into conciliatory rather than adversary positions. Our aim is to be accessible and to provide an alternative to the formal justice system. We believe it is important for people to maintain control over their own lives rather than abdicating responsibility to the Court or the legal system. Conflict at the point of separation is normal. A dispute is the result of conflict not being effectively managed.

The aim is to resolve problems and achieve agreement between parties who want to terminate their affairs with respect to property but who have an ongoing relationship in respect of their children. Most are motivated to achieve a negotiated settlement, because failure to agree will result in expensive litigation.

Children are fought over more passionately than property. Intense feelings get in the way of resolution. Dealing with the complexity of emotionally coming to terms with the end of the marriage and managing and rebuilding a new life is chiefly left to counsellors. The negotiation and management of property and financial matters is chiefly the province of registrars. There is considerable overlap and reciprocation with registrars referring clients where feelings are blocking resolution and counsellors calling on legal assistance in the provision of guidelines and solutions when property issues produce conflict over childrens' issues.

The registrars are under considerable work pressures because of heavy workloads and low staff numbers. They have only limited availability for joint conferencing. For this reason, some registrars do not regard joint conferencing as cost efficient. The normal practice is for them to hold only one conference; unlike the counsellors who have the capacity to provide ongoing assistance and support. The registrars prefer to work independently and refer to counselling when appropriate.

The registrar's intervention has traditionally occurred post-filing. In the main they do not see parties until some time after the separation, while counsellors devote the majority of their energies to seeing clients prior to an application to the Court when feelings are still at their height. The registrar's role is prescribed by legislation. They more often use rational argument in order to achieve resolution. Conflict resolution for registrars involved smoothing, forcing, compromising and confronting. Although registrars recognise deeper psychological problems they do not attempt to deal with them, they avoid dealing with intense feelings and discourage their expression.

Registrars adopt a structured legalistic approach, putting forward specific options, giving advice, discussing probably outcomes and proposing solutions when appropriate. Because registrars usually

see parties in the presence of their solicitors interaction between the parties is more controlled which allows for only limited ventilation of feelings and is characterised by appeals to be more reasonable and realistic.

Counsellors operate more informally. The parties participate more actively in the process. They see the parents alone and actively facilitate and encourage communication. The counsellors encourage them to devise solutions to meet their needs. They actively promote strategies for relieving conflict and assisting parties to separate as painlessly as possible. Counsellors confront strong feelings such as anger and despair and assist the parties to develop alternative strategies for coping with destructive and revengeful impulses.

Although low intensity disputes allow counsellors to be more open and responsive, the more intense the dispute the more control is exercised. In order to reduce conflict and provocation it is often necessary for the counsellor to direct communication through him/ herself and take the lead in managing and settling limits.

Collaboration of lawyers and counsellors allows emotional as well as legal and financial issues to be dealt with. Working co-operatively expands the range of options and solutions. It may be more appropriate to some clients' needs. For some relationships counselling does not work because they may require a concrete legal approach to assist them to modify their position. In my experience it identifies and attempts todeal with relationship issues, assists in correcting inaccurate perceptions, explores underlying sources of conflict and reassures the parents; hopefully promoting a greater sense of security about the decisions reached. This increases the likelihood of more informed negotiation and bargaining.

In my opinion, joint intervention assists in recording, organising and accurately reflecting the decisions reached. This assists acceptance of agreements reached and the resulting reduction in interpersonal tension assists in ensuring that arrangements are less volatile; especially when coupled with counselling that attempts to deal with some of the problems which can undermine agreements in the future.

Where agreement cannot be achieved, both professionals are able to declare an impasse or assist them to come to terms with an option they can live with, even if it isn't what they originally wanted.

The parents may still need to seek a solution from the Court or to consult experts such as real estate agents, accountants, pension, welfare and counselling agencies. Clients are referred to these organisations as a matter of course.

Where case responsibility is shared, it assists in the development of greater co-operation and increases their repertoire of problem solving strategies. There is a greater convergence of concepts and language. The exchange of techniques and capacities results in lawyers expanding the ability to clarify goals and monitor what goes on in the interview, while counsellors develop a greater understanding of the principles operating in property and financial matters and as a result are in a better position to help parents to come to terms with proposed property settlements or decisions made by the Court.

The involvement of both lawyers and counsellors in devising terms of settlement insures clients' legal rights are more fully protected. This is especially so when so-called agreements are the result of the weakness of guilt of one party, unequal bargaining and/or for the sake of expediency.

Joint involvement increases both the clients' and the Court staff's awareness of how settlement in Family Law disputes can be most effectively achieved. There is a need for lawyers and counsellors to further explore the interior of their interviews via case conferences and training programs. It enables them to monitor and review their interview behaviour and, as previously stated, expand their client management skills. This is, I believe, preferable to working in isolation. It has the added benefit of increasing the status and professionalism of the whole service and increases awareness of how settlement in Family Law disputes can be most effectively achieved.

Alternative dispute resolution services provided by the Family Court assist in lessening the trauma of separation and reducing costs and delays. It is based on the recognition of the need for 'individualised' solutions and that parties have a greater commitment to solutions arrived at jointly. There is an educational component which, hopefully, enables parties to be able to solve their own problems and increases the likelihood of agreements working in the long term.

ALTERNATIVE DISPUTE RESOLUTION - A PRIVATE CENTRE

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Many of you have probably heard of the reasonable man. He travels about on the Clapham Omnibus and if strife finds him out he deals with it in a most reasonable way.

However the reasonable man does not have access to an informal inexpensive way out of the strife in which he finds himself.

Unless he chooses to ignore the slings and arrows he has recourse to the adversary system. This costs him time and money. It means that he becomes involved in a process that is outside his experience and control. So much time elapses between the date that the wrong is visited upon him and the day that our reasonable man finds himself in court that he has all but forgotten why he is there. He often feels that the remedy he is given is totally inadequate - too little too late.

Of course the real reason why he and his opponent were in court was that each wanted to win, but only in a rare case does this happen.

You will all be aware that there is a vast range of issues for which the adversary system is just not cost effective. There are issues left unresolved because one party did not want to go to court. Other matters are litigated to a result, but not to the satisfaction of one or both parties.

There are several initiatives designed to relieve some of these frustrations:

* The Community Justice Centres have done much towards this but are limited by their geographical locations.

* The Consumer Affairs Bureau and the Ombudsman are but two of the government initiatives which assist in resolving a number of disputes.

* The counsellors and the registrars of the Family Court use mediation, the latter to great effect at Order 24 conferences.

* A pilot scheme has been established on the joint initiative of the Marriage Guidance Council of Victoria and the Legal Aid Commission of Victoria.

* There are Family Conciliation Centres at Noble Park in Victoria and at Wollongong in New South Wales established as initiatives of the Family Law Council.

My brief, however, is to discuss developments in private mediation services.

PRIVATE MEDIATION SERVICES

I can discern three approaches; lawyer/mediator; multidiscipline mediation; private mediation centres.

Mr E. Woolf of Messrs Cohen, Woolf & Opat, Barristers and Solicitors, Melbourne offers mediation as one of the services available to clients of his legal practice.

Family Solutions established at Carlton in Victoria has a solicitor/counsellor team available to mediate disputes. I have sought further advice from that Centre, and I believe that a multidisciplinary centre has a lot to offer in terms of expertise.

I also believe that my Centre is the only one of its type so far established in New South Wales.

I have established a Mediation Centre which is separate from the legal practice with which I am associated. I offer mediation with the bonus, which stems from my legal training, of a knowledge of the legal parameters within which my clients have to work.

The area of law in which I am most interested is family law. My interest is not only in Family Law Act matters but also in matters involving de-facto couples, parent/child disputes etc. The referrals which I have had to mediate have been in this field.

MEDIATION PROCEDURES

I have adopted the following procedure:

1. I arrange the first joint meeting as soon as is mutually convenient after the initial enquiry is made.
2. At the first meeting I aim to:

(a) assess the parties as to their suitability for mediation
(b) outline the mediation process
(c) establish my credibility
(d) arrange a timetable for an agreed number of future meetings.
3. During the next 4-6 consultations I apply mediation/counselling techniques to assist the parties to devise their own solutions to the matters in dispute between them. We continually review progress.
4. From time to time during mediation I will, as appropriate, suggest that the parties or either of them seek independent legal advice or counselling.

I undertake mediation as a seven-stage conflict resolution process. This approach is described in detail in Folberg and Taylor (1984, pp. 38-71):
1. introduction - creating trust and structure
2. fact finding and isolation of issues
3. creation of options and alternatives
4. negotiation and decision making
5. clarification and writing a plan
6. legal review and processing
7. implementation, review and revision.

It is my view that a mediator should endeavour to:
* provide a neutral environment for the disputants in which they can express their feelings and emotions
* collect information so as to identify the components and dynamics of the dispute
* analyse that information
* make both procedural and substantive suggestions
* maintain impartiality towards all disputants.

The objectives of mediation have been described as:
* production of a plan (agreement) for the future with which the participants can accept and comply
* preparation of the participants to accept the consequences of their own decisions
* reduction of the anxiety and other negative effects of the conflict by helping the participants devise a consensual resolution. Folberg & Taylor (1984, p. 8)

I would like to describe how I seek to achieve those objectives.

ACHIEVING MEDIATION OBJECTIVES

Mediation has for me the twin goals of problem solving and future conflict management.

Persons seeking mediation will not always present with a concise statement of the particular problem they wish to resolve. The first task in such a case is to elicit the problem. There are various techniques for this. I have found reflective listening to be the most effective.

Having identified the problem we work towards a solution devised by the parties. I suggest and explore options based on my knowledge and experience. I continually emphasise that the decision must be that of the parties. Whatever the solution, they are responsible for devising it and carrying it through.

The adoption of interest based bargaining, creation of options for mutual gain and insistence on objective criteria using the techniques described by Fisher and Ury (1981) always assist settlement negotiations.

The parties may have ongoing relationships as neighbours, relatives, former spouses etc. The seeds of future conflict may already have been sown. It is important that they develop conflict management skills. If the objective of conflict management is achieved the parties will have the skills to better cope with future conflict.

If a decision is imposed on the parties they are less likely to be able to interact for their mutual benefit in future dealings with each other.

What I am aiming for is a decision by consent.

Both parties must be willing participants or mediation will fail. Frequently the initial enquiry will come from one of the disputants. It is important to make early contact with both parties and to secure from them a commitment to mediate.

The parties must remain in control throughout the mediation process. As they reach agreement on an issue, 'closure' on that issue is noted and we move onto the next issue to be resolved.

During the first session I ensure that the participants realise that I am not there in the role of conciliator or arbitrator. The parties must accept right from the

start that I have no power to make an award or decision. I may offer legal information from time to time but my prime function is to assist the parties to reach their own decision. I do not give legal advice to either or both parties during mediation.

The mediation process is not reviewed or monitored by any outside body or authority. The agreement may of course be subject to scrutiny if the parties seek its ratification or to make it enforceable. If either or both parties become dissatisfied with mediation then the process is at an end. Here again the fact that both parties are in control is reinforced. They are both empowered by this joint and several control.

Neither party can be coerced into mediation. The agreement to mediate rather than litigate may not be reached until during the first session. This agreement is vital. Without it there is the risk that one of the parties or both will abuse mediation. They may agree to participate so as to use it:

* as a fishing exercise - how much can I learn;
* as a crutch - here is a shoulder I can cry on and thus postpone the hard decisions that have to be made;
* as a means whereby they can maintain contact with the other party - at least I will see my ex once a week for a while.

No doubt there are other illegitimate reasons for becoming involved in mediation.

OUTCOME

The parties themselves control the outcome in mediation. One or both may decide to discontinue. This fact is not reportable to the decision making body to which the parties are then forced to turn. The fact that they tried mediation is not relevant.

When they reach agreement the heads of agreement are noted down in written form. They then decide upon the extent to which their agreement will be made enforcable by the appropriate court process. For this purpose the parties will take the agreement to their respective solicitors to follow through.

However, the parties may decide that they do not need the coercive force of a court order and the matter rests with the document they have drawn up during mediation.

BENEFITS OF MEDIATION

I suggest that in Family Law matters the following benefits flow from mediation:

(1) To the parties:
(a) objective legal advice based on joint instructions;
(b) a safe environment to express their anger and hurt;
(c) a solution which they have devised to meet their individual needs and expectations.

It is my view that much of the bitterness, stress and frustration felt by people in conflict is ignored. For example, we have seen this stress explode into violence directed at the Family Court or at the former spouse or the children or all three.
The commitment to mediation will overcome any suggestion of favouring one of the parties; they will be more content with their agreement than with an order made by a court; and mediation will give back to the parties the power to negotiate their own agreement.

(2) To third parties:
Children too are stressed while their parents are involved in adversary proceedings. They then find it difficult to accept a decision made by a judge whom they never see, never have a chance to speak to and whose name they may never even know. Children will be more accepting of the arrangements which their parents have negotiated, and these arrangements are less likely to require review or enforcement than those imposed by a court. The children may even participate in mediation.

(3) To society in general:
The Institute of Family Studies estimates that 40% of Australian marriages will eventually end in divorce. The courts cannot cope adequately with the disputes thus generated. Mediation will:
(a) materially assist the parties to defended matters by reducing delays
(b) lead to the settlement of a large number of defended matters
(c) resolve maintenance and property matters quickly leading to a drop in the number in receipt of supporting parent pensions.

It is my view that mediation is a viable alternative to the adversary system, particularly in family law matters.

While I would like to see mediation as a first step alternative in family law matters I would not wish to see it as a mandatory first step.

AREAS FOR FUTURE RESEARCH

Let me address some of the problems I have encountered in establishing a mediation service.

Standards of Conduct

The rulings of the Council of the Law Society of New South Wales on matters of practice and conduct regulate my professional conduct as a solicitor. To the best of my knowledge the Council has not adopted any guidelines for lawyer/mediators in New South Wales.

I have read the Standards of Practice for Lawyer Mediators in Family Disputes and the Agreement to Mediate in Family Dispute which have been adopted by the Council of the Law Institute of Victoria. The only argument that I have with those documents is the recital in the Agreement that 'the mediator has advised each of the parties that they may achieve a more favourable settlement in financial matters,.....,' by use of negotiation or the adversary system'. I am not prepared to accept the subjective value judgment implied by the use of the word 'favourable'. But then that is my bias showing of course. We need in New South Wales some ruling from our Law Society as a necessary step in gaining acceptance for lawyer/mediators in New South Wales.

Mediation - A Threat To Legal Practice

Solicitors are all in private practice to make a living - perhaps some more agressively than others. One criticism of mediation from my solicitor colleagues is to the effect that mediation will not be a satisfactory fee earner - and further - why should they refer clients to a mediator to have the client come back with an agreement to be implemented at the basic composite fee, when they can make more money out of going to court?

These views fail to recognise that the solicitor, with appropriate referral to a mediator, is going to be able to deal effectively with a greater number of files with

a higher client satisfaction rating if he is not involved in a tactical battle to 'win'. The client will have a greater understanding of what is happening because the client conducts the negotiations. The solicitor will not lose clients by this type of interfirm referral. The clients who mediate disputes will recognise the value of the referral given by their solicitor. I submit that they are more likely to refer future instructions to the solicitor who handled their matter so efficiently and effectively last time.

In fact the implementation of the mediated agreement will be a significant fee earner anyway. For example, a property deed put to the Family Court for approval requires a great deal of investigation. The mediator will have sought information but not carried out an investigation. To do so would demonstrate a lack of faith in the bona fides of one or both of the parties. No lawyer worth his salt is going to present a property settlement deed to the Family Court for approval unless and until he has satisfied himself that it is fair in all the circumstances. This investigation will not undo the mediation if the parties have entered into the true spirit of disclosure demanded by mediation. The enquiry will confirm the efficacy of mediation.

Confidentiality

I think that it is difficult to guarantee that discussion during mediation will remain confidential. I think the difficulty could arise in two ways:

> (a) if the mediation breaks down, evidence could be adduced in later proceedings of things said and admissions made during mediation; and
> (b) evidence could be given in those same later proceedings of the results of a line of enquiry based on something said during mediation.

I suggest that the cure for the first problem can be incorporated into the mediation agreement. The parties can agree not to disclose anything said during mediation. They can agree not to call the mediator to give evidence in the event that there are future proceedings. I believe that the negotiations may be the subject of legal professional privilege where future disclosure by the mediator is concerned. I think it can also be argued that the discussions attract the 'without prejudice' cloak.

In any event a failure to take notes and a poor memory may be the most effective ways for a mediator to deal with this aspect of confidentiality.

The second way in which confidentiality could be breached by an unscrupulous party cannot be solved or protected against by the agreement as far as I can see. I suggest that the problems in this second area will be avoided by careful screening of the parties at the initial interview as suitable for mediation.

Legal Aid

Over 90% of my clients are in receipt of assistance with payment of their legal costs from the Australian Legal Aid Office. Legal aid is not presently available for mediation. The mediator does not act for either of the parties and cannot act for them both, with the result that mediation does not fit into any of the categories for which costs are paid by a relevant authority under the Family Law Act. Accordingly many people who are in receipt of legal aid are forced to become involved in the adversary system by commencing proceedings that they would prefer to avoid. I recognise that the Australian Legal Aid Office pays legal cost for negotiations in the course of the conduct of the proceedings. In many cases those negotiations start shortly after the proceedings have been commenced. But by then, at the very least, the damage is done in terms of the ongoing conflict management skills of the disputants. Mediation will not be a real option for the majority of people until some form of funding the cost of mediation is available.

Involvement of Children

In any family dispute where there are children the mediator has to consider the extent to which the children should be involved, if at all. My own approach is to work from the premise that parents should make decisions for their children. At the same time I recognise that the feelings and needs of the children have to be taken into account. The parties have to approach disputes involving children from the perspective of parents and not the perspective of spouses.

CONCLUSION

Mediation is not going to gain widespread acceptance unless and until there is a wholesale re-education of

lawyers to assist them in understanding the value of mediation to a majority of their clients who are about to embark on adversary proceedings. Mediation is not a panacea for all litigation. It should become another of the skills lawyers can use in appropriate cases in the interests of their clients.

In fact I believe that many solicitors use some mediation techniques every day, perhaps even without realising the extent to which they do so. The ability to objectively appreciate the legal position of the other party in any adversary situation is of great assistance in advising a client particularly if you can open your clients eyes to the perspective of their opponent.

The lawyer's role is to use his or her skills to advance the interests of the client in accordance with the client's instructions. If your client wants to go to court you are in there to win. Lateral thinking and appropriate advice to the client at the start may advance the clients interests to a greater degree, particularly where there is an ongoing relationship of some nature with their opponent, rather than drafting a summons at the first interview.

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THE USE OF CONCILIATION IN AUSTRALIA TO RESOLVE COMPLAINTS OF DISCRIMINATION MADE UNDER FEDERAL AND STATE LEGISLATION

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Commission for Equal Opportunity
Victoria

> Within an anti-discrimination framework, conciliation consists not only of resolving disputes by negotiation, but also of obtaining a settlement that conforms to the requirements of the law by removing or stopping discrimination, and by redressing disadvantage resulting from such discrimination.

This statement by the Victorian Commissioner for Equal Opportunity, Mrs Fay Marles, sets out the objects of conciliation in both federal and state anti-discrimination legislation.

While conciliation is the preferred method for dealing with complaints of discrimination, it has been recognised that there is a need for a more formal adversarial process to consider matters which cannot be conciliated. Equal opportunity boards and tribunals have been set up by state acts and the Human Rights Commission hears complaints made under the federal Sex Discrimination Act. When conciliation is unsuccessful in resolving a complaint under the Racial Discrimination Act, the Federal Court hears the matter.

This resort to more 'formal' justice takes conciliation in anti-discrimination matters outside many alternative dispute resoltuion mechanisms such as Community Justice Centres which rely on the voluntary participation of disputants and which have no powers of enforcement.

FEDERAL LEGISLATION

Racial Discrimination Act

In 1975, Parliament adopted the Racial Discrimination Act embodying the International Convention on the Elimination of all Forms of Racial Discrimination and establishing a Commissioner for Community Relations with the power to settle complaints.

NOTE: The seminar presentation was by Ms Joan Nelson, Senior Conciliator at the Victorian Commission for Equal Opportunity and Ms Frances Joychild, Senior Mediator at the New Zealand Human Rights Commission.

During parliamentary debate on the Bill introducing the Act, there was disagreement about whether conciliation was the proper avenue to combat racial discrimination. Arguments were advanced to the effect that legislation without 'teeth' would not deter offenders and that, therefore, the Commissioner should be given wide powers of sanction.

The Act, when adopted, struck a compromise. It emphasized conciliation as the means of settling disputes but it also gave the Commissioner power to call a compulsory conference of all parties to a dispute in an endeavour to settle it. Such a conference is a pre-condition to formal proceedings being taken by a complainant in the Federal Court. Failure to attend a compulsory conference, without reasonable excuse, is liable to a monetary penalty.

Sex Discrimination Act

The Sex Discrimination Act was adopted in 1984 to give effect to certain provisions contained in the International Convention on the Elimination of All Forms of Discrimination against Women.

Conciliation efforts are a necessary requirement of the Act and the Sex Discrimination Commissioner has been given the same power as the Commissioner for Community Relations to call a compulsory conference to attempt to resolve a complaint. If there is no resolution, then the Commissioner may refer it to the Human Rights Commission for a full hearing. A determination by the Commission, however, is not binding on the parties. A complainant must institute proceedings in the Federal Court for an enforcement order which will be granted provided the court is satisfied that the respondent had engaged in conduct or committed an act which is unlawful under the Sex Discrimination Act.

Human Rights Commission Act

The Human Rights Commission was established under the Human Rights Commission Act 1981 as an independent statutory authority which receives and inquires into complaints of infringements of any human right set out in other United Nations agreements ratified by Australia. Those are the International Covenant on Civil and Political Rights and the Declarations on the Rights of the Child, of Disabled Persons and of Mentally Retarded Persons. The Commission also provides support staff to the Commissioner for Community Relations.

There is some concern that the Human Rights Commission will cease to function after 10 December 1986 when the 'sunset clause' in the Act takes effect. The Government had contemplated that the proposed Bill of Rights with a new Human Rights and Equal Opportunity Commission which would administer it would have been passed by parliament and have replaced the Human Rights

Commission when it lapsed in December of this year. However, it now appears that the Bill of Rights will be considered by a consititutional commission rather than continue to be debated by parliament.

While it is anticipated that prior to the December cut-off date some form of Human Rights Commission will be established, if, for some reason, it was not replaced, the effect on the Sex Discrimination Act will be to reduce its effectiveness by withdrawing its enforcement powers.

Compulsory Conferences

Provision for a compulsory conference is contained in both federal anti-discrimination acts. It is viewed as the final step in an attempt to conciliate a complaint, and as a prerequisite to further proceedings being taken.

On 2 June 1986, in Koppen v The Commissioner for Community Relations (Federal Court of Australia, Queensland District Registry General Division), a question arose whether the rules of natural justice applied to the holding of such conferences under the Racial Discrimination Act. Spender J., in the Federal Court in Brisbane, held that natural justice did apply because the holding of a conference is a pre-condition to a respondent being exposed to civil proceedings. This view would, no doubt, apply to compulsory conferences held under the Sex Discrimination Act and it is arguable that non-compulsory conferences such as those held to resolve complaints under the various state anti-discrimination acts are also bound by the rules of natural justice.

The Committees On Discrimination In Employment And Occupation

In 1973, Australia ratified the International Labour Organization Convention III dealing with discrimination in employment and occupation. In order to implement its obligations under the Convention, the Government established national and state committees to receive, investigate and endeavour to resolve discrimination complaints. This was in line with the recommendations of the Convention which said that where an anti-discrimination policy is not being followed in the employment area, it should be corrected, 'if necessary by conciliation'.

The committees still exist but have no enforcement powers. A large portion of their work now is covered by state and federal anti-discrimination legislation but there are still areas which are considered to fall within the terms of Convention III but which are not grounds of discrimination under any anti-discrimination statutes. They include age, criminal records and sexual preference.

As there is no legislation, when conciliation fails, the committees refer the matter to the National Committee which, if it cannot resolve the differences between the parties, can request the Minister to table a report on the case in parliament, provided the complainant agrees. Had the Bill of Rights been adopted, the ILO Convention would have joined the other international agreements ratified by Australia and would have been covered by statute.

STATE LEGISLATION

All states, except Queensland and Tasmania, have enacted anti-discrimination legislation. The South Australian Sex Discrimination Act came into operation in 1976 followed closely in 1977 by the New South Wales Anti-Discrimination Act and Victoria's Equal Opportunity Act. Western Australia introduced an Equal Opportunity Act in 1984.

Also in 1984, a new Victorian Equal Opportunity Act came into force which expanded the grounds of discrimination to include (in addition to sex, marital status and disability) race and private life which covers religious and political beliefs. There is also a provision for indirect discrimination defined as imposing on a person a condition or requirement with which that person does not or cannot comply but with which a substantially higher proportion of persons of another status or with a different private life can comply, and the condition or requirement is not reasonable. Similar grounds of discrimination now are contained in all state acts. New South Wales and South Australia, however, are the only states to have included discrimination on the basis of homosexuality.

In addition to investigating complaints of discrimination under their own acts, states have delegated authority to deal with complaints made under federal legislation. Queensland, Tasmania, the Northern Territory and the ACT, however, are covered only by the Commonwealth Racial Discrimination Act, the Sex Discrimination Act and the Human Rights Commission Act.

The common element in all State legislation is the recognition that disputes involving complaints of discrimination should, where possible and appropriate, be resolved other than by a formal adversarial hearing. However, no legislation defines conciliation or contains the process or procedures to be followed by a conciliator.

The Victorian Equal Opportunity Act requires the Commissioner for Equal Opportunity to form an opinion as to whether a complaint may be resolved by conciliation and then to attempt to do so.

Where a matter cannot be resolved, provision is made for the referral of the complaint to the Equal Opportunity Board for a full hearing. Confidentiality is considered most important in conciliation and the Act contains a provision (Section 42(3)) to the effect that anything occuring in the course of conciliation cannot be used at the Board hearing.

The Equal Opportunity Board, like many other anti-discrimination tribunals, is more flexible and informal than traditional courts. The rules of evidence are relaxed and the Board can function without legal representation of the parties. However, either or both parties can seek permission to be represented.

When a complaint is made, the first step is to determine whether it is within the jurisdiction of either state or federal legislation and to ascertain how a complainant sees the matter being resolved. Many complainants do not know what options are open to them and it is helpful if a conciliator explains what has been achieved in similar circumstances by conciliation or by Board decision.

In Victoria, once a complaint has been registered under an act, the respondent is notified by letter which gives some details of the allegations made and asks for an appointment to discuss the matter. This procedure varies from state to state. In some, full details of the complaint are set out and a request is made for specific responses; others set out sections of the act under which the complaint was made, give full explanations as to responsibilities and legal obligations, and ask to meet with the respondent.

Depending upon the legislation, a complaint can either be by an individual or a group of persons. Complaints can be about a specific act of discrimination, or about the practice of discrimination and the respondent can be the individual who did the act and/or the company or organisation who employed the individual.

While some respondents are reluctant participants, most reply quickly to the letter. It is the practice in Victoria for a conciliator to visit the respondent, while other states either require the respondent to attend at the office of the conciliator or to reply in writing.

The procedure followed by a conciliator involves both investigation and conciliation and it is therefore important that a respondent is assured that the conciliator is not the advocate of the complainant, and has not formed an opinion about the matter before investigation. The respondent is also informed that if conciliation is not possible or appropriate, the

complainant still has the right under the State Act to request the matter be referred to the Equal Opportunity Board.

The respondent may refuse to conciliate or settle a matter and, of course, neither the conciliator who investigates the complaint nor the Commissioner can direct or order a settlement.

However, under the the Victorian Equal Opportunity Act, the Commissioner must form an opinion as to whether a matter can be conciliated, and this is not possible without seeing the respondent. Section 45(3) of the Act therefore gives the Commissioner power to require a respondent to attend at her office for the purpose of discussing the subject-matter of the complaint and to produce any necessary documents. Failure to comply is an offence carrying a penalty not exceeding $1,000.

All anti-discrimination offices have wide powers to facilitate investigation, including, in some cases, subpoena powers over people and material. Some offices can put people on oath, and some can contact people well beyond the original parties, speaking to anyone who may be considered able to assist the investigation.

Once all the relevant information obtained from the parties and other available sources has been considered, the conciliator forms an opinion as to whether there is any evidence to support the view expressed by the complainant that there has been discrimination and may suggest an informal conference between the parties in an effort to clarify issues and to seek some agreement. However, as there is no power in the Victorian Act to call a compulsory conference, either party can decline to attend.

Conciliation of discrimination has come under the same criticism as other alternative dispute resolution mechanisms. It has been viewed by some as a form of 'second-rate' justice available to minority groups while others who can afford 'real' justice pursue their causes through the courts. Perhaps the most disturbing criticism expressed is that somehow the confidential nature of conciliation, which is required by all anti-discrimination statutes, helps perpetuate the very thing it seeks to eliminate - discrimination. In her paper presented to this seminar, The Privatisation of Justice: Power Differentials, Inquality and the Palliative of Counselling and Mediation, Dr Jocelynne Scutt expressed such views and argued that publicising a case by tribunal hearings would have both educational and deterrent effects on potential discriminators. However, attempts to resolve disputes without recourse to the formal hearing process is not solely the province of alternative dispute resolution methods. Lawyers have always recognised the 'out of court settlement'.

> ... conciliation, negotiation and compromise ... are part of the office lawyer's work, for he also serves as a private judge. ...[I]t is not necessary to invoke the machinery of the state to resolve conflicts in a rational manner. Indeed, the elements of wise dispute settlement, conciliation, negotiation and compromise, are better carried on in the lawyer's office around the conference table than in the courtroom. (Patterson and Cheatham 1971, p.131)

No conciliator and no legal adviser has the right to sacrifice the interest of a complainant or a client for what is perceived as a 'greater good' - the possible deterrence of future offences by an open tribunal hearing.

Those who advocate a public hearing of a discrimination complaint frequently cite the 1979 Victoria case of Deborah Wardley who was refused a position as a pilot with Ansett Airlines solely because of her sex. Hearings of the case by the Equal Opportunity Board and the High Court, no doubt, had a significant deterrent effect on possible discriminators. However, the Victorian Commissioner for Equal Opportunity also noted that there were some less positive effects of the publicity about the difficulties Deborah Wardley encountered in pursuing her complaint.

Commissioner Marles said that not one complaint was referred to the Equal Opportunity Board for hearing for 18 months after the Wardley case and that there was also a drop in the number of complaints received by her office during that period. Thus both complainants and respondents were reluctant to pursue matters.

Conciliation of complaints of discrimination remains the primary function of the Commissioner's Office, and confidentiality continues to be seen as the basic requirement for successful conciliation.

The value of such conciliation as a means of resolving disputes perhaps can best be summed up by Commissioner Marles who stated in her 3rd Annaul Report:

> Basic to the area of conciliation is creating a situation from which both parties can emerge with their self-respect intact and their public image untarnished. This entails a minimum of accusation and recrimination combined with a recognition by both parties that the conciliator has a grasp of the situation as it actually is. When both sides accept the interpretation of the conciliator as to what actually occurred and its significance under the legislation, a settlement is relatively

straightforward. However, the issue becomes far more complex when the information could become public. It can then become relevant to either party to show how they have fended their position. Then the focal point is almost invariably the apportionment of blame and when that occurs, the likelihood of amicable agreement is correspondingly reduced.

REFERENCE

Patterson, L. and Cheatham, E. (1971), The Profession of Law, Foundation Press, US.

DISPUTE RESOLUTION IN SMALL CLAIMS TRIBUNALS

Mr Michael Levine
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Chairman, Residential Tenancies Tribunal, Victoria

The theme of this seminar is to share information about the use of alternative dispute resolution systems. The Tribunals of which I am Chairman and Senior Referee, started in Victoria with the Small Claims Tribunal in 1974. It arose out of the 'consumerism' push of the late 60s and early 70s - and was a response to the lead set by Queensland in 1973.

It was obvious to the Director of Consumer Affairs in Queensland that despite attempts to pursuade the traders to settle consumer claims, little could be done to resolve matters where traders, often quite properly, felt that they were not responsible for any losses suffered by a consumer according to the law.

Accordingly, after some research, the Queensland Small Claims Tribunal was set up to deal with disputes between consumers and traders.

The most important features of the small claims systems that were introduced firstly in Queensland and then in Victoria, New South Wales and Western Australia were that there:

1. is no right of legal representation allowed - the parties having to present their cases themselves;

2. is no right of appeal and limited rights of review;

3. are no costs awarded;

4. are no requirements to follow the rules of evidence;

5. is imposed upon the adjudicator a requirement to attempt to settle the case prior to actually making a binding decision.

There are a number of differences between acts in each State and to some extent that has been reflected in the community acceptance and expansion of the role of the tribunals.

Victoria and Western Australia require referees of the tribunal to be legally qualified and observe the law whereas New South Wales and Queensland do not. In Queensland and New South Wales decisions are to be made according to fairness and equity.

Accordingly, Victoria has been in the unique position of finding itself not only dealing with disputes between consumers and traders but also between landlords and tenants in all their relationships under the Residential Tenancies Act and consumers and credit providers under the Credit Act.

Briefly, the three Tribunals deal with different matters. The Small Claims Tribunal deals with disputes arising between consumers and traders as defined in the Act for goods and services to the value of $3,000. The value is that of the dispute and not the contract.

The Residential Tenancies Tribunal deals with all disputes ranging from failure to provide locks to eviction, compensation for failure to observe the Act to construction of tenancy agreements. The Residential Tenancies Tribunal has far ranging equitable powers to compel and restrain parties to do or not to do something. It gives limited rights of legal representation.

The Credit Division of the Small Claims Tribunal is divided into two parts. The first part under $3,000 deals with all matters arising out of the provision of credit in a manner similar to the ordinary jurisdiction of the Small Claims Tribunal. It also has a jurisdiction between $3,000 and $20,000 in all other credit related matters under the Act and unlimited sums of money in relation to commercial vehicles and farm machinery. The jurisdiction above $3,000 is considerably more formal in operation than that below $3,000, as it is subject to rights of appeal.

The role of the referee, as the adjudicator is called, is complex. Firstly, the referee must establish the ground rules for unrepresented parties to whom the dispute in which they are involved is quite possibly the first and perhaps the only time that they will be involved in legal proceedings. There are no legal representatives to assist and explain the role played by the referee and essentially that the referee is independent and does not take sides.

Parties often take matters to the Tribunals 'as a matter of principle' and passions are aroused, in respect of which the only controlling factor is the skill of the referee.

It should always be remembered that supervising the Tribunal's system is the Supreme Court of Victoria (and as appropriate in each other state) and challenges may be made if there are denials of natural justice or the Tribunal exceeds its jurisdiction. (Briefly, natural justice means that which ensures a lack of bias on the part of the Referee and a fair hearing to both sides.)

If the referee oversteps the bounds in trying to settle a case, the question of bias can arise. Accordingly, the Victorian referees have developed and followed a stylised and careful form of settlement.

Information is given to the unrepresented parties as to :

- statistical chances of success (50/50 in defended cases);
- lack of rights of appeal;
- the benefit in settling without some third party imposing orders;
- the risks inherent in any proposed litigation; and
- other matters relevant to a possible settlement.

Suggestions for possible settlement in terms of dollars and cents are sometimes stated with an explanation that the parties may totally ignore the suggestion, make a higher or lower or counter offer or do nothing. At all times the parties are reassured they do not have to take any notice of the suggestions and may proceed to hearing if they wish. A dollar amount is only stated to ensure that the parties talk to each other, as in many cases the parties will not be the first to mention settlement in a monetary sum unless a starting point is given.

Generally, the seeds having been sown, the parties are left by themselves to effect settlement. It is to some extent misleading to call the process conciliation. It is really a mixture of processes with limited involvement of the adjudicator, perhaps leaning more towards mediation. It is clear that parties cannot be forced to mediate, conciliate or settle. It is indeed interesting to contrast the settlement process in New South Wales with that of the Victorian Small Claims Tribunal. The New South Wales Tribunals take a much more interventionist role and generally do not leave the parties to their own devices.

If settlement is reached the referee will make sure that the parties understand the agreement and that the agreement is binding. It is then recorded as an order of the Tribunal.

If settlement does not take place further attempts to settle may be made during the case and prior to a decision being given. In some cases such as building disputes, an on site hearing is held for the purpose of each party being at liberty to point out their complaints and argue their respective cases. Generally, this system of on site hearings allows for a quick two or three hour case that probably would take some days in the courts.

I acknowledge the difficulties involved in settlement attempts being conducted by the adjudicator. However, I believe that the stylised form does succeed in avoiding most of the perceived problems. In fact, there are no complaints from the litigants about such a process, although there have been complaints concerning the adjudicators' failure to vigorously attempt to settle cases.

The personnel required for adjudication in the Tribunals area have to be chosen carefully. They must be prepared to play a role which is substantially different from that which is to be found in the normal adjudicating process in the courts. They must be lawyers who know the law, the principles of natural justice and conflicts which might result from over-stepping the bounds of the accepted norm of separation of the settlement role from the adjudicating role. Members must also be capable of falling back to their strict training as lawyers when required. Members must also be able to write detailed factual and legal judgments. I suggest the same capabilities be evident in all alternative dispute resolution personnel.

The background paper by Dr Martha Gelin (see Appendix) contained some interesting material. I particularly refer you to the tables in that paper which describe the various dispute resolution processes. I thought it appropriate to attempt to categorise the ordinary jurisdiction of the Small Claims Tribunal within the three headings provided in that table, namely Adjudication/Litigation, Arbitration and Mediation/Conciliation.

1. With respect to the question of formal process it is clear that the Small Claims Tribunal would fall under the same heading as mediation and conciliation as rules of evidence are not applied to the proceedings.

2. With respect to confidentiality, the proceedings are open unless ruled otherwise by the referee and therefore follow the adjudication role. However, the immediate parties may be joined by what is known as a Sufficiently Interested Party named by the Registrar of the Tribunal as having a sufficient interest in the outcome of the disputes, such parties not necessarily being in direct contractual relationships with the consumer or trader.

3. Witnesses and documents are presented to prove or disprove ones position to the referee as in the adjudication and arbitration roles.

4. An agreement to settle is worked out by the parties after an introductory talk by the referee and is therefore similar to the mediation/conciliation role if settlement takes place. The referee will make the settlement a legally binding agreement which is enforceable. However, if agreement is not reached, the process is the same as adjudication/litigation - a decision imposed by the court which is enforceable. This combined role is a unique distinguishing feature of the small claims systems.

5. A) With respect to time, it is clear that the Small Claims Tribunal follows the arbitration role in that it is quicker than litigation and is conducted at set times.

B) The actual money cost is similar to the mediation/conciliation role in that in most cases there is no cost to the parties involved other than their time.

C) Where settlement takes place, inter-personal relationships often improve. But I would venture to suggest that where such settlement does not take place, the relationship seldom improves due to the winner/loser factor - but may improve in some cases as in the arbitration role.

6. The decision where required is provided by the referee of the Tribunal and follows the adjudication/litigation role.

7. The process sequence, as previously described, is an introduction with attempts to settle and establish roles and reasons for attendances. It therefore follows the mediation role to a large extent.

However, if the parties do not settle then generally the role followed is that of adjudication/litigation with the one exception that there is a great deal of involvement by the referee in the process of running the cases. The referee interrogates rather than allows presentation of evidence.

The referee will often not require parties to follow the normal process of court. If you can imagine for one moment, that the normal process in court is that the complaining party gives evidence and is then subject to questioning (cross-examination) by the other party. The complaining party then produces his witnesses and leads them through their evidence which is again subject to questioning by the other party. The other party then does exactly the same with his case. In contrast, the Tribunals allow parties to deal with each separate issue in a presentation, question by referee, response by other side etc. until that issue is clear.

Accordingly, the Small Claims Tribunal follows the mediation example substantially in that it finds out the issues and helps to isolate them, then explores and helps create options for settlement and guides negotiation or the negotiation process. As previously stated, it will also clarify the legal agreement between parties. However, if settlement does not take place it follows the adjudication/litigation role based upon pre-determined criteria being the law of the State and Commonwealth.

Proposals have been made in Victoria for a system similar to the Tribunals to be appended to the Magistrates' Court and, in fact, it has also been suggested that the Tribunals merge with the Magistrates' Court (see Civil Justice Project). Currently, that is in abeyance pending reform of the court to better facilitate settlement procedures in association with other normal adjudication features. (See The Hill Committee Report; see also the following paper by Graeme Johnstone and Nerida Wallace).

The first suggested change is that prior to issuing a summons, a compulsory letter of claim together with an offer to conciliate, either at a neighbourhood mediation service or before a clerk of courts, should be sent to the opposing party.

Secondly, an arbitration procedure will be introduced for all claims less than $3000 to be conducted by a magistrate. Rules of evidence would be waived but rights to representation would remain and costs would be limited in claims under $500. A pre-trial conference will be conducted in appropriate cases where ordered by the court but conducted by the clerk of courts.

Currently, the proposals are receiving consideration and it is expected that some may be introduced in the next session of Parliament.

It should be noted that the Tribunals in Victoria are probably unique in that they are the only judicial bodies that insist upon training prior to any judicial officer commencing to hear disputes. Training continues throughout the appointment of the referee and there are conferences every six weeks to ensure that any problems are discussed and resolved and that there is some consistency in operation.

To categorise the role of the referee as a conciliator would be incorrect. In fact, it is probably difficult to categorise the manner in which the settlement process takes place - is it mediation, facilitation, conciliation? Because of the 'big stick' at the end of the proceedings - the making of a final and binding order - there is a degree of coercion involved. Indeed, the parties are made well aware of the fact that inevitably there must be a winner and a loser should settlement not take place.

The success or otherwise of the system can be measured in its usage and currently, the Victorian Tribunals are running at 22,000 lodgments per year.

The Tribunals are an unusual experiment in the merger of two roles that usually conflict. As seen by traditional legal thinkers, the entry into the settlement process by the referee as a judicial authority would of itself constitute a basic violation of the rules of natural justice. In fact, despite all the dire predictions, the Tribunals have shown that they can exist and merge roles that were previously thought to be mutually exclusive. The way is no doubt open for experimentation with other systems in other areas.

ALTERNATIVE DISPUTE RESOLUTION IN THE COURT SYSTEM

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PART A: CHANGE IN THE VICTORIAN COURTS

(Ms Nerida Wallace)

The Victorian Courts are undergoing a period of major change. Delay problems are being resolved, computers are being introduced and the jurisdictional limits of each of the three Courts in the system, the Supreme Court, the County Court and the Magistrates' Courts are altering.

This follows the introduction of a reform strategy by the Cain Labour Government in 1983. That strategy's key objectives were to make the Courts more relevant and accessible to the people of Victoria. It included two important initiatives which were significant contributory factors to the establishment of the Lou Hill Committee referred to below. These were the Report of the Civil Justice Committee, which made recommendations designed to reduce delays in the Supreme and County Courts and recommended the merger of the Magistrates' Courts and the Small Claims and Residential Tribunals; and the appointment of Mr John King to a newly created position of Deputy Secretary for Courts. Mr King developed a long term court reform strategy known as the Courts Management Change Program. Reports were produced on the Courts' organisational structure, the possible uses of modern technology, the welfare role of courts and the building needs for courtrooms across the state. These reports formed the basis of a major public consultation during 1985.

Amongst the issues identified during the consultation was a need for more informal dispute resolution mechanisms in the Magistrates' Courts (see Part B). In the previous year, the Victorian Attorney-General, appointed Mr Lou Hill, MP to chair a committee to examine the role of Magistrates' Courts in the civil dispute area. Magistrates were constrained to making monetary awards and high costs limited the range of claims which could be dealt with. The Committee's task was to devise a system whereby the Magistrates' Courts could offer a cheaper, speedier and more accessible dispute resolution process.

The Committee's report (Attorney-General's Advisory Committee, Victoria, 1986) recommended the introduction of: equitable remedies to allow magistrates to order injunctions, return of goods and performance of services; pre-summons procedures to enable parties to resolve claims themselves or in conciliation conferences with Clerks of Courts; arbitration procedures to be conducted by Magistrates in all claims under $3,000 allowing legal representation but with restricted costs; and pre-hearing conferences similar to the successful pre-trial conferences in the County and Supreme Courts, to be conducted between solicitors and Court personnel, in order to reduce courtroom delays.

The recommendations are the subject of a limited consultation process at the present time and it is expected that legislation will be introduced later this year. They represent a major implementation challenge both for the Law Department and for the Magistracy of Victoria.

(Postscript: Since the presentation of this paper, the Courts Amendment Act 1986 has been proclaimed introducing equitable remedies. The Court Further Amendment Bill is presently before Parliament and it makes provision for arbitration and pre-hearing conferences. The Pre-Summons procedure is in abeyance pending further consultations and the introduction of Neighbourhood Mediation Centres by the Legal Aid Commission of Victoria. It is hoped that Victoria will eventually have an integrated dispute resolution network dealing with all manner of disputes through adjudication, arbitration, conciliation and mediation procedures.)

PART B: INFORMALITY - A DECISION MAKER'S VIEW

(Mr Graeme Johnstone)

I intend to discuss informality in the hearing process in a court substitute environment. I hope to indicate some of the problems relating to an informal process and some of the considerations to be borne in mind in overcoming those problems.

There has been a tendency in Australia since the early 1970s to find a more cost effective method of determining both minor and major civil disputes especially in the administrative tribunal arena. As Geoffrey Flick wrote:

> The informality of legal proceedings can be intimidating to the layman and the success of the administrative process depends upon the extent to which it can be made acceptable to the average man (1979, p.7).

In fact the trend towards alternative dispute resolution has been principally as a result of the dissatisfaction with the manner in which the traditional court system has dealt with particular

types of claim (Attorney-General's Advisory Committee, Victoria 1986, p.13). The 'Common Theme' it is said, 'has been an expressed desire to avoid perceived formality, expense and inflexibility of traditional court proceedings which have been regarded as a significant barrier to access' (p.13).

In addressing the perceived problems in the court system both the legislators and the community have adopted informality in the proceedings as the key to success and have pointed to the small claims tribunals established throughout Australia since 1973 as indicative of that success. In fact the Small Claims Tribunals in Victoria were established as being:

> A shaft of light which cuts through the mumbo-jumbo of legal proceedings and allows people to sit down and discuss their problems in an amicable way (Victorian Parliament Debates 1973 vol. 315, p. 2435 Legislative Council).

Whilst the Victorian Small Claims Tribunal and the more recently established Residential Tenancies Tribunal are perceived as operating informally, nowhere in the legislation establishing the Tribunals is there a requirement that the Tribunals in fact operate informally save to say that both Tribunals are not bound by the rules of evidence (Small Claims Tribunals Act (Victoria) 1973, s.31(3) and Residential Tenancies Act (Victoria) 1980, s.32(4)) and may regulate their own procedures (s.34 and s.30(1)(6) respectively). The requirements of regulation of the Tribunals' own procedure has been interpreted by the Tribunals as a requirement to act informally. However, there is still a requirement in both Tribunals that evidence may be given on oath (31(2)(10) and 32(1) respectively). The requirement for legislative informality has also not been extended to the Credit-Division of the Small Claims Tribunal; however, its procedures are to be in its discretion (Credit (Administration) Act 1984 (Victoria), s.75).

In other legislation in Victoria relating to court substitute tribunals Parliament has seen fit to embody 'informality' into the legislation. Under the Administrative Appeals Tribunal Act 1984 the Tribunal's objectives are defined as being to review administrative decisions upon their merits in an informal and expeditious manner (s.4). The Accident Compensation Tribunal is also 'not required to conduct the proceedings in a formal manner' (Accident Compensation Act 1985 (Victoria), s.57 (1)(e)) and 'without regard to technicalities or legal forms' (s.57(1)(a)).

The Oxford Dictionary defines 'informality' as not formal, not done or made according to a regular or prescribed form; not according to order, irregular, unofficial, disorderly. Nowhere in my reading have I been able to find a judicial definition of informality; however, the Hill Report does indicate that:

> Informal hearings are distinguished by lack of procedural formalities and the absence of any requirement to comply with traditional rules of evidence and procedures (Attorney-General's Advisory Committee, Victoria 1986, p.212).

Informality in the hearing process is characterised by the Tribunal as fact not being bound by the rules of evidence and having the ability to regulate its own procedures. There is usually an indication of informality from the legislature either in the preamble as in the case of the Residential Tenancies Act or as in the Accident Compensation Act by specific legislative requirement.

Whilst there are many advantages in an informal hearing process for both the decision maker and the community it would be a mistake to consider that it is the panacea for the problems in the more traditional court system.

The specific advantages of an informal system are to limit the parties to the real issues and thereby enable the tribunal to deal with a large volume of work. Accordingly where the parties are unrepresented the submissions tend to be less complex and a greater reliance is placed upon the weight of evidence in the decision making process.

From the parties' point of view the informal process gives them the ability to present their own argument and thereby minimise the costs of normal court process with its attendant requirement for legal representation. Because of the perceived simplicity of proceedings the parties have a greater access to and participation in the process.

The difficulties in the more formal process for the decision maker depend very much on the nature of the parties and of the dispute. Informality as a process has a tendency to lead to aggression and it would be a mistake to believe that the vast majority of disputes 'arrive at an amicable solution' and that informal procedures 'allow people to sit down and discuss their problems in an amicable way' (Victorian Parliamentary Debates 1973, vol.315, p.2435). Accordingly there are difficulties with control which will also depend upon the environment in which the dispute is being heard and the ability of the decision maker. For example it is often difficult to hear a case involving unrepresented parties in the home of one of the parties (where an inspection is necessary).

Because of these problems and the virtual impossibility of gauging them beforehand, in my view it is necessary for the decision maker to be able to move to a 'more formal Court-Style hearing' (Attorney-General's Advisory Committee, Victoria 1986,

p.212) where appropriate. Therefore it is submitted that the traditional small court room is the appropriate venue enabling the decision maker to move between the informal and more formal style of hearing.

Most of the new style tribunals have a specific power to deal with persons in contempt in the face of the tribunal (Small Claims, s.35; Credit (Administration), s.80; Residential Tenancies, s.46; Accident Compensation, s.63; Administrative Appeals, s.60). Where a person insults a tribunal member or creates a disturbance, the member concerned lays an information in the magistrates' court. In some cases it is specified that the information may be withdrawn in the event of an apology (Small Claims; Residential Tenancies). It may be that the effectiveness of the power is somewhat limited by the decision in Lewis v. Judge Ogden (1984) 53 ALR, 53. It is essential for the effective administration of informal tribunals that the tribunal has adequate and effective powers of contempt and adequate security.

As yet most of the 'informal' style tribunals still have not been able to come to grips with the problem of legal representation. In the Victorian Small Claims Tribunal legal representation is specifically excluded unless the parties agree and the Tribunal considers representation appropriate (Small Claims, s.30). Under the Small Claims Act there is no power to award costs even where there is representation whereas in the Residential Tenancies Tribunal there is limited power to award costs where parties are represented (Residential Tenancies, s.45). Under that legislation parties as of right are entitled to legal representation in cases involving possession of rented premises and in other matters representation is generally excluded (Residential Tenancies, s.44) unless the parties agree. Limited costs are fixed for legal representation at $20.00 per hour for hearing time and up to $200.00 for disbursements. Under both the Accident Compensation Act (s.59 and s.64) and the Administrative Appeals Tribunal Act (s.34 and s.50) legal representation is permitted and costs are discretionary.

The Hill Committee (p.45) indicates that the position it reached was a compromise between representation and non representation. In fact it states that the greatest difficulty was reconciling the two views. In my view informality and representation do not necessarily go hand in hand as it appears an unhappy marriage of two concepts. The effectiveness of representation in informal procedures depends upon the nature of the particular practitioner or practitioners involved. Sometimes the imposition of practitioners helps to control proceedings and therefore assists the decision maker, and on other occasions it may have the effect of not getting to the issues and protracting proceedings. Legal representation whilst having the general effect of extending the hearing process when the proceedings are to be heard in an

'expeditious manner' (Accident Compensation, s.4) or where the legislation is to 'promote quick and inexpensive resolution of disputes' (Residential Tenancies) assists the decision maker in the knowledge that he has all the relevant information and that all the necessary evidence has been called or canvassed before a decision is made.

The major difficulty in allowing legal representation where there is a general encouragement towards informality and the parties presenting their own case is the perceived lack of balance in the proceedings where the other side is represented. Lord Denning M.R. said of an unrepresented party:

> He cannot bring out the points in his own favour or the weaknesses in the otherwise. He may be tongue-tied or nervous, confused or wanting in intelligence (Flick 1979, p.145).

Whilst I cannot necessarily agree with this statement applying in minor disputes where both parties are unrepresented it may well apply where a party is encouraged to appear by himself and is faced with the other side being represented.

In fact Lord Denning resiled from the above position in Enderby Town Football Club Ltd v. Football Association Ltd (1971) Ch.591 where he indicated that a party appearing before a domestic tribunal did not have the right to legal representation. Lord Justice Cairns said in that case at p.606 that considerations of speed and cheapness of decision making justified the making of a rule that banned legal representation. It seems to me therefore to follow that in minor civil disputes we must be prepared to grasp the nettle in the interests of effective and cheap decision making and dispose of legal representation in all but exceptional circumstances. I must remark that I do have my reservations in view of my earlier comments about the assistance that an understanding practitioner can give to the decision making process.

I have earlier in this paper referred to the exclusion of the rules of evidence and whilst it has the effect of assisting the unrepresented party in the presentation of his case it invariably makes the decision making process more difficult. The tribunal is required to sift all the evidence according to its proper weight and it is often difficult to exclude prejudicial evidence from one's mind.

The requirement to act informally must be necessarily limited as all tribunals are bound by the rules of natural justice (see for example Residential Tenancies, s.30(1)(a); Small Claims, s.34; and Accident Compensation, s.57(1)(b)) and must act judicially, fairly and without bias. Parties must be given the opportunity to call evidence and ask questions of each other and make

submissions to the tribunal. Therefore to prevent proceedings reverting to a free-for-all there must be some formal structure. Generally, that structure has been tending towards a court style hearing.

As mentioned, the decision maker is required to act judicially, fairly and without bias. It is also essential, for the successful operation of the informal process, that he has the ability to redress the balance between unequal disputants and enter the arena sufficiently to ensure that each party's evidence is adduced. As a decision maker I must also remark that for the dispute resolving mechanism to work successfully the decision maker must also feel comfortable in his role, and have full administrative support and adequate security.

I might at this stage indicate that there are a number of important issues I have either not referred to or just marginally touched upon in this paper, for example, lay representation, lay decision makers, the role of the administration, security, accommodation, the right of appeal and complaints about decisions. It may be that these matters can be raised during question time.

In conclusion and as a general comment, I find the more traditional hearings where the parties are represented easier for the decision maker in that he does not have all the problems of control and generally has the knowledge that all proper and relevant evidence has been put before a decision is made. The community, however, demands a more accessible, cheaper and simpler method of minor dispute resolution which requires the decision maker to move into the arena. Whilst we are moving towards this new mechanism we have not yet fully come to grips with the many problems it entails.

We must be careful to remember that the parties are still in '<u>dispute</u>' and it does not necessarily follow that total informality in the round table discussion sense is either practical, required, or desirable. What is desirable in minor disputes is a balance which allows the parties to present cases in a cheap, comfortable and less formal method which is structured to ensure that proper decisions are reached.

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EVALUATING THE 'QUALITY OF JUSTICE' PROVIDED BY THE CHRISTCHURCH COMMUNITY MEDIATION SERVICE

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> In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. Litigation is only one choice among many possibilities, ranging from avoidance to violence. The varieties of dispute settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wish to avoid or encourage conflict, suppress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute-settlement procedures. Although every society provides institutions for dispute settlement, by no means are these necessarily, or exclusively, legal institutions. Conceptions of the role of law change, and assessments of the advantages and disadvantages of submitting disputes to its processes not only shift, but exist in perpetual tension.
>
> - Jerold Auerbach 1983 Justice Without Law? pp 3-4.

INTRODUCTION

In his documentation of a history of nonlegal dispute resolution practices in America, dating from the earliest Dutch settlements in 1647, through those of the Quakers, the Mormons, the mercantilists in the 1700s, to those of the Scandanavian, Chinese and Jewish immigrants of the twentieth

century, Auerbach (1983 : 42) noted 'a persistent cultural dialectic between individuals and their communities ...[t]he emergence of a pervasive legal culture, yet the persistence within it of stubborn pockets of resistance to legalisation'. According to an editorial of the time, the emergence in the early 1900s of conciliation, as a reform aimed at alleviating procedural injustices borne, in particular, by the urban poor, reflected ' a movement toward justice in spite of lawyers'. In America conciliation was followed by the development of small claims courts and the institutionalisation of arbitration. None of these, it would seem, benefitted the poor, who saw these as the second tier of a 2-tier justice system.

All of the pre-twentieth century examples of nonlegal dispute resolution mechanisms described by Auerbach are characterised by an important overriding factor : they were practised in communities which were close-knit. To some extent, then, the move towards legalisation might well reflect a tension between 'community' and 'communities' (Auerbach 1983 : 43). In the twentieth century it is not surprising that the initiative for a revival of alternative dispute settlement arose out of the 'communitarian euphoria' of the 1960s (Auerbach 1983 : 116-117).

The idea was given substance by Richard Danzig, who proposed to incorporate a system based on the African tribal moot, used by the Kpelle of Liberia, into the criminal justice system of America. In the Kpelle moot grievances were mediated in the complainant's home in 'a ritualised process of tribal conciliation'. There were no judgments of guilt. Rather the process emphasised compliance with tribal norms which stressed the value of social harmony. (Auerbach 1983 : 118-119). The transplant was too alien; it was not a success. If social cohesion is absent, then mediation as practised in tribal moots could not work. Alternative dispute resolution mechanisms, if they were to be effective, would have to be relevant to the prevailing culture and obtain legitimacy in the existing legal institutions. It might be argued that it was the pervading legalisation of American culture that both provoked and facilitated the institutionalisation of alternative dispute resolution procedures which began there in the 1970s and have since spread and proliferated into Canada, Australia, Great Britain and New Zealand. As Auerbach noted (1983 : 124):

> Alternative dispute settlement was an idea whose time had come ...

This paper addresses the 'community' and 'justice' attributes of alternative dispute resolution mechanisms. It outlines how these attributes are conceptualised by theorists and how they are implemented by practitioners. In particular, the discussion draws on research carried out as part of the evaluation of the Christchurch Community Mediation Service. It is therefore relevant to provide a context for the discussion by first describing both the Service and the evaluation project.

EVALUATION OF THE CHRISTCHURCH COMMUNITY MEDIATION SERVICE

The Christchurch Community Mediation Service

The Community Mediation Service (CMS) pilot project was established in Christchurch in June 1984. The Service was facilitated by the Christchurch Community Mediation Service (Pilot Project) Act 1983 which covers the function of the service (Clause 4), the functions of the Committee (Clause 5), the appointment of mediators (Clause 6), the conduct of mediation and provisions of privilege and confidentiality (Clauses 7,8,9) and exemption of liability (Clause 10). The Act expires on 31 December 1987 and will be deemed to have been repealed as at the close of that day (Clause 11).

The aim of CMS was to test the effectiveness and acceptability in a New Zealand centre of using mediation to deal with disputes between people who have some form of on-going relationship with each other : for example, disputes between family members, friends, workmates, neighbours, business partners, club members. Such disputes might be over property, behaviour (such as rumour-mongering or harassment), access to children, noise, etc. It was intended that mediation would be conducted by trained, volunteer mediators who would be drawn from all walks of life and a variety of age and ethnic groups, thereby representing the community in which the service was based. Mediators would assist people to discuss their dispute with a view to developing a mutually-acceptable resolution or a means of managing the conflict between them.

Mediation as practised at the Christchurch CMS actively involves disputants in conflict resolution and management by assisting them to work out their own formula for co-existence, rather than looking for imposed solutions backed up by official sanctions. The training and involvement of

members of the local community as mediators was expected to enable them to contribute directly to ameliorating conflicts and disputes presently viewed as the responsibility of officials - for example, the police, justice system, social welfare system or local authorities. Through their mediation training and practice, such mediators were also expected to be able to provide community education in the skills of conflict management.

The Christchurch Community Mediation Service was established on the initiative of Jane Chart, a lecturer in law at the University of Canterbury. Ms Chart had experienced mediation in Australia and America and intended to establish this form of alternative dispute resolution in New Zealand. Since its inception the CMS administration and organisation has revolved around three key sets of actors :

> the Executive, comprising a chairperson, secretary, treasurer, up to 8 members representing legal, police and community groups, up to 5 mediators, and the Co-ordinator of the service as an ex officio member.
>
> the Staff, comprising a salaried Co-ordinator and up to 2 assistants who were either participants on Department of Labour work schemes, or volunteers.
>
> the Mediators and Trainers, comprising volunteer mediators and trainers who were either volunteers or were employed by the Polytech.

In addition, service administration has included various subcommittees, whose members are either Executive members or mediators. The Co-ordinator, and at times the Chairperson, have been ex officio members of these subcommittees.

The Christchurch Community Mediation Service became operational on 11 June 1984. Between that date and 11 December 1985 the Service was evaluated, as required by the Pilot Project Act.

Evaluation Research Strategy

Human services evaluation began in the United States in the 1930s. Recent growth in this kind of research is a consequence of the growing number of government-funded social reforms and innovations in the U.S. and elsewhere

during the 1960s and 1970s. With increasing frequency social policy formulations have included evaluation as an integral part. 'Evaluation was ... seen as a way of ensuring that services, particularly new services, were accountable to taxpayers and the population served. It was felt that both these groups had a right to know what the new programs consisted of and whether they did anybody any good.' (Lippmann 1982 : 29).

Evaluation research methodology is, as yet, in its infancy. Evaluations are essentially practical exercises, conducted for particular people for particular purposes. The research must therefore be relevant to and understood by a wide variety of people, many of whom are not social scientists and have no interest in the theoretical orientations of the research. Any one of a range of evaluation foci might be emphasised in the research, but most of the following components are usually considered :

assessment of need,
definition of social problems,
implementation research (ways of delivering the program),
information retrieval and dissemination,
program monitoring,
impact assessment.

Because the range of goals of an evaluation might be wide, such research must incorporate a variety of methods. Research methods employed in evaluation research range from participant-observation and ethnography to secondary statistical analysis and archival searches, from simulation modelling to social indicator analysis (see, for example, Conner 1981). Methodological diversity is not just desirable but is a necessary component of evaluation research.

Like the goals of, for example, some education and health programs, the goals of social services are often difficult to define. Social services, by their nature, change through time as they respond to the changing social situation in which they are located. Evaluations therefore must also be flexible and responsive to the shifting goals of the service. The interdependence and interaction between the goals and methods of the service being evaluated and the goals and methods of the evaluation itself are well documented in Rossi and Wright (1984).

The evaluation model adopted as a guideline for the Christchurch Community Mediation Service is that described by Patton (1981, 1982). Patton's prescription is a response

to the new goals in evaluation research which were defined by the 1981 Joint Committee on Standards for Educational Evaluation as (in order) :

utility
feasibility
propriety
accuracy (Patton 1982 : 16)

The 1981 committee argued that an evaluation should not be done at all if it would not be useful, feasible, and ethical. To achieve these standards Patton recommended that the research must be responsive and flexible in its goals and methodology. To this end, the evaluator might fulfil several different roles, including those of administrator, consultant, writer, educator and facilitator, as well as that of researcher. In adopting the various positions the evaluator must be politically sensitive, both in terms of the internal politics of the service being evaluated and also in terms of the service's community context.

In the final analysis, the methods employed in an evaluation might be some compromise between preferred methods, practical methods, methods which are financially feasible and methods which are considered ethical. The kinds of information thereby obtained may be dictated by administrative constraints which are outside the control of the researcher. Some instances of such restrictions and compromise are evident in the CMS evaluation (see Cameron 1984).

According to the premises on which the CMS research was based, the criteria appropriate for judging the 'success' of an evaluation reflect the utility of the evaluation. In this research, success criteria differ for different participants within the service: staff, volunteer mediators, members of the executive committee, clients, referral agents and researchers (for elaboration, see Cameron 1985). An assessment of these various measures of 'success' is included in this paper. Firstly, however, it is appropriate to outline briefly the research protocol which formed the basis of the CMS evaluation.

The Christchurch Community Mediation Service Pilot Project Evaluation

The legislation requirement was that the Christchurch Community Mediation Service 'cause an independent evaluation to be made of the mediation service' (Community Mediation

Service (Pilot Project) Act 1983; s.5 (1) (d)). Recognising that social service evaluations are both interactional and contextual, certain organisational arrangements were considered necessary to try and facilitate independence of the evaluation while at the same time not undermine the particular philosophy behind the research paradigm adopted.

An Evaluation Group, seen as separate from and independent of the Service, was established in the early stages of planning for the Christchurch service. The Group's membership during the course of the research has included both government and university researchers. The structure of the Evaluation Group has ensured that the researchers have been protected both professionally and administratively. It has also ensured that the integrity of the research has been maintained regardless of any conflicts of interest which might develop, either among stakeholders in the evaluation or between stakeholders and the researchers. So many safeguards are an acknowledgment of the sensitive nature of evaluation research. At the same time this organisational structure facilitates a formal liaison with the Executive of the service, encouraging the cooperation between stakeholders and researchers which is essential for a fair and balanced evaluation. By this liaison the Evaluation Group has at least tacitly acknowledged its accountability to the service while at the same time maintaining independence of the research.

The overall purpose of the evaluation research was defined as an assessment of the significance of the Community Mediation Service for the community in terms of the need for such a service, the way it works, its effectiveness in dispute resolution and conflict management, its acceptability to users, community groups and referral sources, and its cost. The methods used for investigating these topics are summarised as follows :

(a) The Need For A Community Mediation Service in Christchurch

Three main sources have been studied with a view to determining the need for a mediation service in Christchurch:

- a literature review on alternative dispute settlement organisations
- a survey of agencies in Christchurch conducted prior to the establishment of CMS
- a content analysis of the documents produced to

support the establishment of the service in Christchurch and interviews with individuals who were involved in the drafting of legislation.

(b) Mediation Service Operation

Investigation of the mediation service operation has been researched by means of observation, analysis of documentation and informal interviews conducted with staff, mediators and executive members. Specific activities investigated in this on-going process have been :

- Executive committee activities
- service administration
- service action with respect to the goals of CMS, viz mediation and conflict management, and education in mediation and conflict management
- promotional and funding activities
- mediator training and practice
- client documentation and dispute characteristics.

(c) Effectiveness and Acceptability of Mediation

The effectiveness and acceptability of mediation was investigated by formally interviewing users of the service :

- disputants were interviewed by a client survey and a follow-up survey
- agencies were surveyed at the end of the pilot period.

(d) Awareness and Acceptability of the Mediation Service

Both the clients and the community of which they were a part were surveyed with respect to their awareness of the service in Christchurch and the acceptability to them of such a service.

(e) Cost Effectiveness of CMS

The implementation of a cost-benefit analysis would have been extremely costly and it would be difficult to produce a precise and accurate analysis. Therefore a study which assumed that the benefits of CMS and other comparable dispute resolution agencies (eg Small Claims Tribunal, local authorities) were the same or were arbitrarily held constant was carried out. An analysis of both monetary and time expenditure by CMS was also undertaken.

By investigating the perceptions of all CMS participants, the researchers thus sought to present a multifaceted view of the Service and thus facilitate an evaluation which fairly represented the interests and experiences of all parties. In turn, the 'success' of the evaluation is determined by its utility to these various parties who might then employ the evaluation as a basis for assessment or policy-making.

QUALITY OF JUSTICE

In the protocol developed for the CMS evaluation the research goals included an assessment of the 'quality of justice'. Such a brief presents an enormous task which, in detail, was quite beyond the resources of the research. However, some aspects of 'quality' of justice can be examined from the data collected for other purposes during the research period. Firstly, one can investigate the 'quality' of justice provided for the community in terms of the 'success' of CMS in providing a means of dispute resolution. Secondly, one can examine the extent to which CMS represented the community and provided the community with education in conflict management. Thirdly, one can examine some attributes connected with access to justice, in terms of who has access and why. The remainder of this paper provides an overview of these issues and concludes by reminding the reader of the social nature of conflict in the community.

'Success' in Dispute Resolution and Conflict Management

In achieving an evaluation of the Community Mediation Service researchers were working with, and taking account of, the experiences, actions and opinions of :

- service policy-makers - the Executive that runs the Service,
- service staff, which includes salaried staff, VOTP assistants [1], and voluntary staff,
- clients,
- referral agents, and
- the researchers themselves.

It was possible that the criteria for success considered appropriate or useful by each of these sets of participants

might differ. Therefore, the measures of success deduced by the researchers needed to be understandable to service policy-makers, service staff, referral agents, funding agencies and government policy-makers as well as to other researchers.

The measure of 'success' most commonly cited by staff and Executive members during the evaluation period was expressed by them as a rate in the region of 82%, a figure which compared favourably with similar measures cited for overseas agencies. In providing an assessment of overall service success, the researchers needed to ask where this figure came from, and whether it was a valid measure of success for the service.

Such figures are understood in the context of the process of mediation delivery. When a disputant approaches the mediation service a set procedure is implemented (Table 1). Intervention or resolution might occur at any stage of the procedure. The following measures of success might therefore be computed (figures are for the evaluation period, 11 June 1984-11 December 1985) :

(a) the percentage of all cases presented to the service which are mediatable = 53% (249 cases out of 471 contacts)

(b) the percentage of mediatable cases which enter into some form of negotiation regarding the dispute (ie, both parties are contacted by the service) = 72% (179 cases out of 249).

(c) the percentage of presented cases which are resolved in some way = 41% (100 cases out of 246; 3 cases had an outcome pending).

(d) the percentage of all cases which come to a mediation session = 30% (75 cases out of 246).

(e) the percentage of all cases which reach some form of agreeement = 25% (61 out of 246).

(f) the percentage of mediated cases which reach some form of agreement = 81% (61 out of 75 mediated cases)

(g) the percentage of mediated cases which adhere to the agreement reached in mediation = approximately 83% (50% of clients said their agreement had been kept 'very well' and 33% said it had been 'partly kept').

TABLE 1

INTAKE PROCEDURE AND MEDIATION PROCESS,
CHRISTCHURCH COMMUNITY MEDIATION SERVICE

SERVICE ACTION	EFFECT FOR THE CLIENT
1. (Referral of Party A.)	Recognition by referral agency that a problem exists.
2. Intake of Party A by CMS	Problem presented to CMS.
3. Determination of appropriate action (eg referral to another agency, or suitable for mediation).	Definition of nature of the problem. Identification of appropriate helping agency.
4. Service contacts Party B.	Party B knows that A has a problem.
5. Mediation session arranged.	A and B acknowledge to each other that they both have a problem.
6. Mediation session.	Problem identified, including hidden agenda ; issues clarified; points of view of A and B understood.
Agreement drawn up.	A and B together decide on action for resolution of the problem.
7.	Agreement carried out.
8. (If referred) Referral agency advised of the outcome.Details of agreements are not disclosed.	

Of these various quantitative measures which are available to the different participants in the mediation service, the one most commonly used, almost without exception, by service personnel is the one which in fact represents only a small proportion of total caseload, but which produces the highest measure : the 81% of mediated cases which reach agreements and/or the 83% stability rate for agreements.

An alternative measure of 'success' is the proportion of clients who are assisted towards the resolution of their disputes which, if those clients who are referred to more appropriate agencies are included, represents almost half (41%) of all cases. Other clients claimed to have been helped in the course of intake to the service, and either went away psychologically equipped to handle their dispute themselves or were helped simply by having been heard. Of those clients interviewed by the researchers, 34% said that their relationship with the other party to the dispute had improved since contact with CMS; for 25% this improvement was attributed to CMS involvement.

Measures such as these however, tell only part of the story about dispute resolution. Other participants in the resolution process who might be interested in determining the success of the Service include referral agencies. Here again, mediation or resolution figures might tell only part of the story. Some clients have indicated that they saw referral as 'buck-passing'; such clients who might not have been satisfied by mediation might well return to the original or some other agency. It is also apparent that some individuals are perpetual agency contacts. Informal contact would suggest that, in addition to offering a means of dispute resolution not otherwise available, the most effective service that mediation can provide might be to remove perennial clients from agencies' caseloads, thus permitting them to spend more of their time on cases or situations which are appropriate to those particular agencies.

This determinant of success is particularly appropriate to the police, lawyers and city/county council staff who together referred 31% of cases during the evaluation period. Police and local authority officials (such as health inspectors) who are relieved of disputes or complaints which are beyond their jurisdiction or are not subject to the laws or by-laws they have at their disposal might then be able to spend more time on work which they consider appropriate to their power and expertise.

The Concept of 'Community' in Community Mediation

One of the key assumptions of mediation programs is that mediation, unlike other forms of dispute resolution, is able to deal with conflict in a way which incorporates an analysis of the context of the dispute. It is therefore able to deal with the roots of the problem presented. Mediators are advised that their concern should be not so much with what happened, but with why it happened. If disputants understand the cause of their conflict, it is argued, they will be more likely to prevent a recurrence.

The extent to which this is in practice the case appears limited. Mediation does not appear able to deal with conflict involving three or more parties in more than a superficial way. It is argued, therefore, that mediation does not get at the roots of problems which lie at the community or social level. In particular, critics argue that rather than confronting basic structural inequalities in the social environment, disputants are induced merely to accept these and learn strategies for living with them. The success of mediation for dealing with conflict rests to a large degree on shared interests and values. An ideology of community is implied in traditional models. Singer notes,

> In communities based on ties other than those of residence, such as those comprised of tightly knit religious or ethnic groups, this form of justice has been traditional and contributes to the community's cohesion.
>
> The only danger in adhering to this objective (other than those connected with the demands of funding agencies) is that its fulfillment is restricted, at best, to a limited category of disputes among community members themselves.
>
> (1979 : 580).

Some sociological analysis (eg. that of Abel 1982) is therefore critical of the palliative nature of mediation. Similarly, the assumption that mediation improves communicative capacities of disputants is criticised on the grounds that, while this might be so for two particular disputants about some particular issues, the distorted communication which causes disputes also has social-structural roots which cannot be remedied readily through mediation sessions.

Criticisms of the assumptions of mediation relate to the concept of community and the qualities of mediators. On the one hand, the idea of community implied in neighbourhood justice programs is contradicted by the anonymity which characterises the large urban areas from which disputants are drawn. Contrary to the community justice philosophy it can be argued that by individualising conflict the programs might undermine the ideology of community, rather than create, preserve or reflect it. Hofrichter (in Singer 1979 : 580) has warned that a community model of dispute resolution might not work where no real sense of community exists.

While in theory community justice assumes an ideological community, in practice the 'community' referred to by the Christchurch Community Mediation Service is a geographic community. The Christchurch CMS was intended to serve the Christchurch urban area and surrounding suburbs and districts (1981 population 319470); all people residing within this geographic area are considered eligible to use the Service.

In practice, the Service has been provided for <u>any</u> individual or group who is prepared to travel to the Service, and in a few cases assistance has been given to people from locations as disparate as Invercargill, Westport and Nelson. Although no such instance has yet eventuated, the practicalities of having mediators travel to out-of-town locations has been contemplated. The place of origin of disputants is summarised as follows :

92.7% from Christchurch urban area
2.9% from outlying areas, up to 10km from city
1.7% from towns, 10 to 30km from city
0.7% from places 30km-100km from city
0.7% from over 100km away from city
1.3% from an unknown address

During the evaluation period the Christchurch CMS was located in midcity premises, about five minutes' walk from the central city bus terminus, in a building which also housed the Human Rights Commission and Alcoholics Anonymous. Suburban premises might have been available, and at cheaper rental, but it was believed that to be readily available to people from any locality in Christchurch a central location was necessary (Christchurch public transport operates on a system which radiates out from the city centre; there are no networks which link peripheral suburbs).

One notion of 'community' is that clients represent the sociodemographic profile of people living in the geographic area that CMS serves. When compared to the Christchurch population it would appear that people in the 31-50 age groups were over-represented among CMS disputants. A slightly higher proportion of disputants (63%) than of the Christchurch population were married or had a partner. There was also a greater proportion of non-European disputants than would be expected on the basis of the ethnic distribution for Christchurch. However these differences were not statistically significant. There were significant differences between male and female disputants by employment status and marital status, but not by age or ethnic origin. The employment status distributions however reflected local Christchurch and national distributions. By and large disputants represented the sociodemographic characteristics of the Christchurch urban population.

A second reflection of 'community' is the idea that neighbourhood justice centres are nonbureaucratic and, as a consequence, can reflect and respond to the needs of the community in which they are located. In practice however, it would appear that such centres are often bureaucratic, have become institutionalised and are probably somewhat limited in the extent to which they can be flexible and responsive without jeopardising funding and legitimation.

In part this inflexibility is related to the links of community justice centres with state institutions. Increasingly, at least in New Zealand, functions and institutions formerly assumed or administered by the state are going 'into the community'. In an editorial in the most recent newsletter of the New Zealand Social Advisory Council (SCAN) McCormack asked, what is this 'community'? McCormack wrote about the 'myth' of community :

> While politicians talk about the community, the people who live and work there seldom identify themselves in such idealistic terms. Of course there is 'a community', but it is rarely organised, cohesive or able to communicate its needs to the power base. For 'community' it might be better to read 'voluntary agency', as for the most part these organisations represent the people of a particular 'community'(SCAN 1986 : 1).

Some, but not all, voluntary agencies are staffed and supported by volunteers. Many community organisations need funding. Voluntary agencies, time and again, have to virtually 'beg' for government funding. Such indignity, McCormack argues, is inconsistent with the partnership between state and community that one might expect if such organisations are really 'community' organisations. McCormack calls for a sharing of tax resources with the voluntary sector, rather than a handout from what is left over. To justify such resources, however, evaluation might be necessary.

Sadly, the experience of the Christchurch CMS endorses McCormack's conclusions. At the end of the evaluation period the Service was forced to go into recess, for lack of funds. Currently it is operating on an interim basis with 'bridging' funding. Ironically, if it was not for an impending evaluation report the Service might have gained long-term funding more readily : undoubtedly some potential sponsors have adopted a 'wait and see' approach pending the evaluation conclusions.

Mediators are also supposed to reflect community. Ideally, it is argued, mediators represent the community from which disputants are drawn and (therefore) share their values and understandings. Experience in North America indicates that this is not the case : mediators come from a very limited sector of society. Anthropologist Sally Merry (quoted in Tomasic 1982 : 237) has concluded that if the small-scale, community moot model of mediation is to be achieved then the program must serve very small populations rather than the large and anonymous urban concentrations which currently support them. The idea that mediators are nonprofessional, 'lay' workers is a similar illusion. Mediators often are not formally qualified in professional fields. However, many neighbourhood justice programs (the Christchurch CMS included) lay considerable stress on training and the professional competence of their mediators as mediators. In other programs there is some prejudice against employing volunteers who have not received professional qualifications. The dilemma is epitomised by the assumption that mediators, as community members, should be nonprofessional community members who can empathise with clients in terms of their own shared values, contrasted with the realisation that by not offering highly qualified professionals as mediators the services are at risk of being accused of offering second-class justice.

In assessing whether mediators do represent the community

one is addressing a more general phenomenon, viz the characteristics of volunteers. In 1981 a Gallup survey of 1231 adults in Britain revealed that volunteers differ in important ways from the population at large :

> Volunteering is associated with middle age, middle class status, an extended education and a family composition that includes dependent school-age children.
>
> Young people under the age of 25 are unlikely to be involved in voluntary activity of any kind. Nor are young housewives with children below school age. Apparent differences in the participation rates of men and women appear to be due less to any overall willingness to volunteer than to differences in the definitions used [and] the kind of work undertaken.
>
> - Gerard 1985 : 236.

In particular, the study indicated that volunteers 'have a more favourable view of human nature ... and are more trusting' than the population generally (Gerard 1985 : 236).

However, neither demographic variables nor psychological variables (such as altruism) adequately explain volunteer action. Gerard has suggested that motives for volunteering need to be extended beyond altruism, social exchange and reciprocal benefit to include 'beneficience' and 'solidarity'. Beneficience and solidarity are of special significance to the present discussion. Beneficience is defined as a reflection of a moral view which stresses notions of hierarchy, personal duty and compassion; '[b]eneficience involves accepting inequality as, in some sense, 'given', and it helps to sustain the social order' (Gerard 1985 : 237). By contrast, solidarity implies an identity with the deprived, a commitment to social change and a focus on the causes of inequality. Gerard explains how the interaction between beneficience and solidarity can produce tensions within voluntary organisations with respect to goals pursued and the means of achieving these goals. It is consistent with his characterisation of these 'types' that beneficient volunteers tend to concentrate in welfare organisations and those who are solidarity-oriented within (for example) human rights organisations.

The implications of Gerard's conclusions for community justice organisations are important. Community justice would seem to appeal to both types of volunteers, for quite different reasons. The philosophy of 'community' implicit in such organisations would also differ as their rationale for action. Simplistically, beneficient volunteers would seek to perpetuate existing (structural) community; solidarity volunteers would seek social change in order to establish ideological community. Unless the social goals of the voluntary organisation are quite explicit, and are rigidly adhered to, there is huge potential for tension within the organisation as the conflicting assumptions of the volunteers are expressed in voluntary activity.

In addition to the belief that alternative dispute resolution services reflect community need, the Christchurch CMS organisers defined a community objective in teaching skills in conflict management within the 'community'. This objective has been much more difficult to assess than has success in dispute resolution. There is an implicit assumption that those who participate in a mediation session learn skills in conflict management that they might then transfer into their everyday lives. Mediators, for instance, have had to be reminded of this by service staff in the light of an early tendency to see mediation sessions which did not result in agreements as being 'failed' mediations.

The actual success of this intention to teach conflict management skills has apparently been a mixed one. The persistence of disputes after mediation, the failure to completely satisfy agreements drawn up, and the advent of new disputes between parties who have mediated can be set alongside those clients who have reported that they have taken the skills they learned during mediation and applied them in, for example, their club or workplace.

Conflict management has also been taught in schools, in the prison, in community groups and clubs - but we do not know how much is learned and to what extent these skills are then applied. We also know that mediators themselves might extend their use of mediation techniques into their personal relationships - but again we do not know to what extent they do this. 'Success' of the mediation model needs to be evaluated in the context of other models of dispute resolution : the courts, for instance, or individual initiatives (physical violence, for example). If the long term goal is to make the community a 'better' place, by disseminating knowledge and experience of managing conflict and resolving disputes in a nonadversarial and nonlegalistic

way, it will take time before the ideal can be tested. The ability of an organisation to implement change, while adhering to a model which, at least implicitly, takes for granted existing bureaucratic structure and social inequality, is open to question.

Access to Justice

The criteria of success discussed in this paper all reflect a functionalist model of dispute resolution and conflict management. It is assumed that people have a need for this service and the success criteria employed by the various actors in the process test to what extent and at what cost those needs have been satisfied. One must ask, indeed, does the service satisfy an existing need in the community ? In part the high proportion of CMS cases which have been presented by referral from other agencies answers that question. However, it is probably also true that some of the apparent 'need' has been created by the advent of the service.

There are some writers who argue that industrialised societies have too little internal conflictm not too much. Not only does conflict expose structural inequality but, perhaps more importantly, conflict provides an opportunity for 'norm-clarification' (Christie 1977 : 8). Christie characterises conflicts as 'property' and warns against specialisation in conflict solution becoming professionalisation 'when the specialists get sufficient power to claim that they have acquired special gifts [which] ... can only be handled by the certified craftsman' (1977 : 11). The danger, Christie argues, is that participants in conflict lose their own conflicts as they are 'taken away, given away, melt away or are made invisible' (1977 : 7). Rather than teaching people how to manage their own conflict it can be argued that professionalisation (or the 'specialised nonspecialist') undermines lay people's confidence in handling their own conflict.

In addition to investigating the removal of dispute resolution and conflict management from the community in which these differences occur, one must also address the processes whereby interpersonal differences are labelled 'disputes' and investigate agency-dependency . Such a study was outside the brief of the CMS evaluation.

An alternative method to evaluating dispute resolution and conflict management according to criteria of 'success' in meeting stated or assumed 'needs' of participants in the

mediation service delivery, might be to locate this service in a total social context. Here researchers might address the notion of 'quality of justice' in a much more fundamental sense by asking who has access, and why, and what is achieved by this?

Many of the criticisms made by Abel (1982) and Tomasic (1982), in particular, apply to programs which reflect the close association between neighbourhood justice centres and the formal legal system in North America. Schwartzkoff & Morgan (1982) have examined these criticisms with respect to their applicability to the New South Wales program, which is service-oriented, and have noted that for that program,

(a) The program was used by a wide variety of citisens, being statistically representative of the socioeconomic range in the community;

(b) There were no systematic differences between the two parties to a dispute in terms of ethnic origin, occupation or income. There was no evidence that the program was used by, or allowed, the powerful to oppress the weaker members of society;

(c) It would be implausible to suggest that parties were not given a real choice as to whether or not they participated in mediation, and if so on what basis and with what results (1982 : 182-190).

They argued that in New South Wales there could be little support for the view that the community justice centres were coercive or repressive, that they aggrandised the State or diminished the individual, or that they reinforced inequalities and thwarted reform (1982 : 190).

In the research proposal submitted in application for funding for the evaluation of the Christchurch Community Mediation Service it was noted that the Executive of CMS had given careful consideration to the criticisms of Abel and others and had 'consciously sought to avoid the pitfalls to which they advert, both in [the] formulation of program goals and in [their] approach to implementation' (SSRFC Proposal : 10-11). Such criticisms were neverthless considered relevant to the final assessment of CMS.

The questions which might be asked include :

(a) Are the clients representative of the community served by the Service, or are they disproportionately female, unemployed, elderly or members of some ethnic minority ?

(b) Are the disputes they present considered 'trivial' or 'unimportant' by other agencies ?

Support for the criticisms made by Abel, Tomasic and others (see above) has been provided, at least tacitly, by the narrow profile of both disputants and disputes presented to many neighbourhood justice centres in America. Clients in these centres reflect a preponderance of relatively powerless people, especially in the case of complainants : individuals tend mainly to be female, members of minority ethnic groups, and poor. The disputes such clients present are often heavily embedded in the social structures from which they come.

The research data indicate that CMS clients were not disproportionately of one gender, age or employment status group when compared to the population of the catchment area. There was, however, a slightly higher proportion of non-Europeans than expected, but this group was not large.

Abel and others also suggest that instead of providing easier access to the legal system for such underprivileged disputants, it would seem that neighbourhood justice centres are more likely to be points of exit from the legal system : the question of 'second class justice' is therefore raised. Rather than wishing to get away from the courts into mediation centres, many disputants have a preference for and expectation of dispute processing which is dominated by a courtroom model. Disputants have criticised mediation services on the grounds that they lack enforcement powers, thus having the potential to neutralise demands for justice as well as to mask substantial inequalities. From time to time CMS clients expressed similar criticisms. Other disputants appear satisfied at having what they see as their 'day in court' without actually having the issue in the dispute seriously challenged (see Singer 1979 : 576).

While the CMS considers no dispute too trivial to be taken seriously, it is possible that other agencies do in fact refer on cases which they see as too minor for their jurisdiction or as nuisance cases. Some CMS disputants certainly felt that their cases had not been treated seriously by other agencies they had consulted. In the case of the police and local authorities, however, it should be pointed out that with their present staffing, responsibilities and expertise there is often little that they can do to help in many disputes.

(c) Do clients choose mediation because it is cheap, or because they consider it to be the most effective mechanism available ?

The issues of speed, cost and fairness of mediation as compared to adjudication are complex. A major difficulty in such assessment is the lack of comparability between cases dealt with by the two different processes. Certainly, where it is used for this purpose, mediation can reduce court congestion. But assessment of time must begin at time of entry to the court system, not based solely on the adjudication process; time and cost must be related to outcome, especially to outcome which results from the process, rather than the resolution; recidivism figures need to be related to the degree of coercion in resolution; and so on. While it is difficult to argue against the cost and time advantages of mediation over adjudication, it is equally difficult to argue for them.

While there is little evidence that CMS disputants chose mediation because it was cheap, there is evidence that some clients could not or would not pay legal fees and would otherwise have had no avenue available for settling their dispute. A number of clients said that an 'advantage' of CMS was that it was free. Few clients had any basis from which to judge whether mediation was 'the most effective' means available.

(d) Are power imbalances addressed by the mediation service ?

Singer wrote about the suitability of mediation where there are power imbalances between the parties as follows :

> It is generally agreed that mediation between parties of significantly unequal power is inappropriate. For example, even where disputes are between individuals, no responsible mediator would attempt to mediate between a child abuser and the victim of the abuse. Where institutions are concerned, the question is whether sufficient leverage can be developed to equalise the power of disputants to the point where mediation becomes a realistic alternative.
>
> (1979 : 575).

As a general principle the Christchurch CMS does not accept cases where there is an overt power imbalance. At the CMS there were no significant differences between party A

clients (as a group) and party B clients by either employment status, marital status, ethnic origin or age. However, it is possible that cases of underlying power imbalances are accepted for mediation : for example, power imbalances might be at the root of disputes between neighbours, or members of a club. It is unclear whether mediation in such circumstances would work; it is possible that some attempts at mediation 'failed' because of an imbalance of power between disputants which was not obvious to intake staff.

(e) Are disputes presented the manifestations of other inequalities ?

Singer (1979 : 576) has drawn attention to the possibility that once disputants get to mediation it is possible that particular power imbalances might be revealed. These might relate to, for example, their respective knowledge or understanding of the mediation process, their understanding of the matter in dispute, and their ability to articulate their concerns clearly and coherently. Such disadvantages are very likely to reflect other forms of inequality. For example, disputes at the Christchurch CMS have included instances of ethnic/cultural differences, disputes between elderly people and young people who regard the dispute as some manifestation of an old-age foible, disputes between a sophisticated businessman who 'knew the ways of the world' and an unsophisticated neighbour who simply wanted a 'fair go', disputes between 'respectable' married women and 'immoral' single parents. In all of such instances there was an implication of one party being 'better' than the other. This might not be inequality in the economic or 'class' sense, but it is inequality nevertheless and power balances differ accordingly.

Singer (1979 : 576) has suggested strategies for dealing with these kinds of inequality, including the use of advocates and technical experts. Inclusion of these people would appear contrary to the informal and extralegal goals of mediation. At CMS disputants are discouraged from seeing mediation as a forum for 'giving evidence'. To date, outside 'experts' have not been included at mediation sessions. One strategy which has been used at CMS to help cope with potential power imbalances has been to include nonspeaking supporters at mediation. These are not advocates but provide support, especially where there are cultural differences between disputants or where one person is in dispute with a couple or a group.

(f) What are the connections between the mediation

service and the formal legal system ?

Abel has argued that informal institutions supplement, rather than replace, their formal counterparts :

> The primary business of informal institutions is social control. ... Informal institutions allow state control to escape the walls of those highly visible centers of coercion - court, prison, mental hospital, school - and permeate society. ... They increase the variety of behaviour that can be controlled by diversifying and individualising the remedial apparatus so as to transcend the limited repertoire of prison, fine and money damages. ... They obliterate the fundamental liberal distinctions between public and private, state and civil society, what is forbidden, and what is allowed. In order to facilitate this expansion, they carefully cultivate the appearance of being noncoercive. ... If coercion is effectively masked, then control can be drained of all political, legal and ethical content and freed to become pure psychological manipulation. (1982 : 4-5)

The noncoercive nature of mediation has also been questioned by Tomasic, who argued that disputes are more likely to lead to mediation where the option is presented by authorities. While most of his criticism applies, especially, to court referrals, they cannot be ignored simply on those grounds. Referrals from <u>any</u> agency might well be imbued with some appearance of coercion and there might also be some degree of peer pressure or pressure within a neighbourhood or workplace (for example) for parties to attend mediation.

It is also difficult to extricate the relationship, if any, between outcome and referral source. For example, at the Christchurch CMS the highest proportion of cases (43%) from any one referral agency reaching mediation were those coming from local authorities. Local authorities presented less than 10% of cases but most of their cases were disputes between neighbours. By contrast, a third of referrals came from the police or legal sources and although only 31% of these reached mediation, two-thirds of those that were mediated were disputes between neighbours. Generally

however, neighbour disputes were less likely to reach mediation than were disputes between other types of parties. Dispute type, relationship between disputants and degree of escalation of the dispute all tend to be related to referral source and can be expected to interact together to affect the eventual outcome. It would therefore be misleading to attribute outcome only to the degree of overt or covert coercion imposed by a referring agency.

Although a discussion of 'quality of justice' or 'access to justice' must be careful not to confuse 'justice' with 'law', there are notions of law implied within the alternative justice system. In particular, many such services claim to be 'extra-legal'. As one of these, the involvement of the legal/justice system and trained legal professionals in the Christchurch CMS is somewhat perplexing. The CMS was initiated by a lawyer, its first Co-ordinator was a lawyer and its constitution required that at least three members of the Executive have legal/justice backgrounds : a member of the Law Society, the Registrar of the District Court (or his nominee) and a representative from the police. In addition, legal referrals have been an important source of clients. Responses from a survey of agencies tended to support informal comment that promotional activity among potential referral agencies had been disproportionately aimed at legal avenues. While the argument advanced by some members of CMS, that the legal profession is conservative and resistant to change, can be accepted at face value, one must also ask whether these efforts were an added effort at obtaining credibility in the eyes of the legal fraternity. One might also suggest that they <u>are</u> an attempt to diminish court costs, both in time and money. It is not surprising, then, that some policy-makers are especially interested in what a mediation service might <u>save</u> the justice system.

There are further implications for legal referrals which strike at the heart of the alternative dispute resolution philosophy. These implications are to do with providing supposedly radical attempts to provide nonlegalistic means of dealing with conflict. Although it is argued that civil disputes might be more appropriately dealt with within the community, it is possible that referral of minor noncriminal disputes to mediation confers on these disputes some official status of seriousness. This is especially so when the existence of legislation is promoted as a means of protection for disputants. Referral to mediation by legal professionals is often legitimated by reference to appropriateness or inappropriateness for court action.

Real or apparent association of CMS with the legal system might in turn impede access to justice for some people. It is possible, for instance, that the class origins of those who provide legal or quasilegal services deter clients : Murray (1985) has shown that in New Zealand both lawyers and their clients tend to be 'middle class'. In her research she has found that manual workers, labourers and semiskilled people were much less likely ever to have visited a lawyer than were professional-managerial people. Racial and gender biases were also evident among clients. She concluded :

> Racism, sexism and classism have been presented as possible sociographic barriers to equality of legal access.(Murray 1985 : 14)

In assessing the social implications of services such as CMS one must ask to what extent they individualise conflict. Abel, for instance (1982 : 7) has noted that informal institutions foster disorganisation and disaggregation of conflict 'by instructing the party that he can, and must, resolve the controversy alone', or, as CMS staff reiterate, 'the dispute belongs to the disputant ; the resolution is for him/her to work out'. In so doing the disputant is indirectly blamed for the dispute - though it is phrased in terms of 'taking responsibility' for it. The social and political context of the dispute - crowding in the household, domination in the school, exploitation in the workplace, etc - cannot be addressed except as exacerbating circumstances which make the dispute 'understandable'. Singer noted,

> [T]he need for a collective response or policy transformation cannot be achieved through individualised dispute resolution. ... The political dimension of these injustices is excluded when translated into a misunderstanding resolvable by negotiation and the avoidance of conflict.
>
> (1979 : 576).

Mediators cannot fix social injustice; they can only help the afflicted to live with it.

CONCLUSION

The Christchurch CMS was intended to be a community service. It started with little relevant New Zealand experience in alternative methods of dispute resolution to draw on. Yet despite this it drew together a band of committed staff and volunteers and managed to provide a continuous service throughout the evaluation period. This was accomplished in spite of organisational problems and despite a low level of funding by comparison with similar services overseas.

This paper has attempted to outline the manner in which the quality of justice provided by a community mediation service such as CMS might be evaluated. The discussion has focussed on three goals of mediation : providing a 'successful' means of resolving disputes; serving the needs of the community and providing skills in conflict management for the community; and providing access to justice for those who would not otherwise have it.

The paper has indicated that the 'success' of the Christchurch CMS might be measured in a variety of ways. For example, the achievement of getting disputants to a reach an agreement at a mediation session might be computed as a 'success rate' of either 25% or 82%, depending on whether the denominator is the total number of cases which present at the service as mediatable cases or the total number of cases which actually go to mediation. A mediation 'success rate' of 25% might appear low whereas a rate of 82% is high.

In measuring the 'success' of a mediation service one must also take into account other achievements. For example, one must take into account all those individuals who, by virtue of their contact with the service were then able to resolve their conflict themselves, and those individuals who were helped during intake by clarifying their concern or even simply by being listened to. Other criteria of 'success' include the skills in conflict management learned by clients during mediation, learned by mediators during training and learned by members of the community who attended educational role-plays or read, watched or heard about mediation during media promotions.

Within the criterion of 'success' one must also include referral agencies who were relieved of cases which they lacked either the time, expertise or authority to help and

the needs of volunteers which were met in providing the service.

The major failure of the Christchurch CMS would appear to have been, at least superficially, its low caseloads [2]. In part this was a consequence of an inability to maintain contacts with the 'community' during the later part of the pilot period [3]. The pre-CMS survey indicated a much higher potential caseload in the catchment area than in fact eventuated. Later research indicated that a lack of feedback to many agencies made them hesitant to refer more cases. Yet despite this, it should be pointed out that as an agency not tied to the courts or justice system, the CMS caseload compares favourably with those in overseas services. It also compares favourably with some other comparable service agencies in New Zealand.

The record of CMS in helping to resolve conflict in the community is good. Overall, the success rate of the mediation process, measured in a variety of different ways, was comparable to that obtained in overseas services - this notwithstanding a lack of dependence on the courts for cases. Furthermore, disputants have generally been happy with the service they received. They spoke highly not only of the process and the service in general, but also of the mediators. The establishment of a pool of trained and experienced mediators is a success in itself.

Other community activities of CMS included education in and promotion of mediation in schools and prisons. The Service thus extended beyond a narrow service-model of dispute resolution agency, to attempt to encourage an awareness of conflict and to develop skills in conflict management within the community. The CMS has thus played an important role in sensitising members of the public and referral agencies alike to the possible alternatives to other methods of conflict resolution which, because of their cost (in time and/or money), procedure (eg, laying of charges) or method (eg physical abuse or attack) are either impractical, inappropriate or unpleasant. By continuing its educative and promotional activities as well as casework, CMS will continue to fulfil an important community function.

In discussing the effectiveness of a mediation service one might ask whether a comparable method for resolving disputes might be provided more cheaply. Such a question overlooks other qualities intrinsic to mediation or to the mediation service which might over-ride cost. These qualities concern access to justice and quality of the justice provided.

On the basis of dispute type and previous agency contact it is concluded that CMS did provide a form of justice which was more accessible and more appropriate than alternative forms for many cases. Access refers notionally to the fact that CMS is free and confidential, but also to the flexibility of appointments offered for mediation and the consideration taken of other constraints on disputant attendance : for example, the Service operated an answerphone which facilitated contact by disputants with the Service at any time; secondly, mediations were conducted at any time and many took place in the evenings or weekends, outside 'normal' office hours; thirdly, on several occasions CMS arranged for children to be minded on the premises while parents attended mediation.

The anxieties of policy-makers regarding the 'quality' of justice provided by services such as CMS are often concerned with a notion of 'second-class' justice. Second-class justice is that which is provided for those who cannot afford 'proper' justice (ie, that provided by the conventional legal system). Associated with this is the question of problems which are inappropriate for the conventional channels of resolution or adjudication. A related aspect is the hierarchy of justice within the formal legal system, according to the 'seriousness' of the case and the credentials of the staff (see Nejelski 1977). In New Zealand, for example, legal aid by duty solicitors is provided mostly by young and inexperienced lawyers (Murray 1985 : 17). Beyond court legal aid, there has developed in New Zealand a variety of forms of community legal aid. The three major developments exhibit the hierarchy of expertise that Nejelski referred to : whereas neighbourhood law offices are operated by the Law Society, the community Law Centres are operated by law students and the Citisens' Advice Bureaux legal advice centres are staffed mainly by nonprofessional volunteers. According to the Co-ordinator of the Christchurch Community Law Centre the main barrier to legal services is money : 'People simply are not able to afford legal fees, despite the availability of State aid' (Christchurch Press 12 July 1986). Another lawyer in community practice explained that private practice lawyers naturally want their clients to pay : 'They have word processors and piped musak in the lift to pay for' (Christchurch Press 12 July 1986). This lawyer was concerned also about those ethnic groups who see their disputes differently, the procedure for dealing with them differently and the payment of fines and legal fees differently from the members of the dominant culture. It is somewhat paradoxical that, at least in New Zealand, the members of the legal and quasilegal services who are assisting those clients who have

most difficulty coping with the conventional system are those lawyers who, generally speaking, are most inexperienced (in a formal legal sense) and are probably the most poorly paid.

In the light of these findings and explanations, one needs to ask, firstly, if services such as CMS do represent 'second-class' justice. Some commentators [4] would argue that, on the contrary, if such services do in fact get at the roots of problems, deal with a wide range of disputants and disputes, and help people to resolve future conflict themselves then they are actually a superior form of justice to that conventionally offered. Secondly, one might also ask that even if such services are regarded as inferior to formal, and more expensive, modes of resolution or adjudication, is it not true that second-class justice is better than no justice for citisens who are poor, powerless or alienated ?

Yet in asking whether the form of justice offered by mediation is 'second-class justice', there is often an assumption that where disputes cannot be settled within the conventional system, either because clients do not have adequate resources (money, education or majority-culture values) or because the system does not have the resources (appropriate skill, personnel or time) then the justice available must be 'second-class'. In the case of CMS it is clear that for some clients mediation was a better form of justice than that otherwise available : it was relatively informal, noncoercive, concerned with eliciting solutions which were not punitive but which were 'liveable' and it was aimed at encouraging conflict management, in the long term, by the parties themselves.

But for other clients mediation was used because alternative methods of resolution (eg the courts) or avenues sought (eg local authorities) had not worked. A few clients expressed frustration that lawyers had not acted and that mediators could not enforce agreements - such clients wanted a court-like procedure to settle disputes which were inappropriate for such action. Other clients kept open the option of court procedures subsequent to attempts at mediation. For these clients mediation might be considered a form of 'second-class justice' : it was not as 'good' or as 'successful' as they wanted.

Other discussions of quality of justice ask who the people are who use different resolution mechanisms. There was no evidence that CMS clients were disproportionately elderly, female, unemployed or members of some ethnic minority - ie, those conventionally considered alienated from or powerless within the bureaucratic structure of institutionalised

justice. It would be naive to suggest, however, that conflicts presented to CMS were not manifestations of other forms of social inequalities. In terms of social justice and equity CMS might therefore be regarded as providing a panacea for conflict, rather than seeking to reduce it. Such a stance is consistent with those means of dispute resolution for which mediation is intended to be an alternative.

For those who are concerned with alternative dispute resolution agencies as instruments of state control, and with the denial of fundamental social inequalities, the informality, voluntarism, and neutrality claimed by services such as the Christchurch CMS can be seen as a mythical veneer. Such services are not informal - indeed, the CMS itself cites the structure of the mediation process as one of its advantages. They are staffed and organised in a bureaucratic manner. Reliance on sponsors for funding ensures that such services cannot be independent of the state system. Voluntarism also is an attribute which might apply within the service but perhaps not always outside it - instances of covert coercion to get parties to mediation are known to have occurred. Similarly, the links established by CMS with other agencies, especially legal agencies, make one question to what extent the service really is neutral.

One might reflect back on McCormack's discussion of the role of 'community' agencies when noting Hofrichter's conclusion that,

> The pretension of informal neighborly justice disregards the political nature of conflict and the danger of indirect elite control. Thus what on the surface appears as a movement toward a more personalised, decentralised and community controlled justice, may actually represent a new form of State bureaucracy, extending the purview of State authority well beyond that of conventional courts.
>
> (in Singer 1979 : 580).

Or, as Abel has reported,

> No legal institution, formal or informal, can successfully depoliticise conflict. ...the true significance of informal institutions for conflict resolution and social control is that they empower those who create and operate them.
>
> (1982 : 12).

In addressing conflict as a societal problem, and asking to what extent services like CMS are a panacea, masking deeper conflicts and smoothing over discontent, one must acknowledge that CMS does not treat the causes of conflict as problematic. By individualising conflict the issue itself is not confronted. However, in the absence of such confrontation, the role of CMS as an individual helping agency seems both acceptable and effective. Clients claimed to have been helped, in a variety of ways, by their contact with the Service. More importantly perhaps, the community's awareness of the existence of conflict has been raised, and the possibility of individual action in resolving conflict has been promulgated within the community. In time perhaps, organisations such as CMS might also lead the way in exposing the grounds of conflict and the grounds of inequality in the community. Such an effect would be a significant contribution to ensuring first class justice for all.

NOTES

[1] Voluntary Organisation Training Programme workers are participants on Department of Labour employment training schemes, They are funded for a 12 month period by the Department of Labour.

[2] 249 cases were received by CMS in its first 18 months of operation. Of these 75 (30%) went to mediation.

[3] This was due largely to staffing shortages.

[4] Yvonne Craig JP, editor of Mediation, pers.comm.

ACKNOWLEDGEMENTS

The assistance of Dr Ray Kirk in analysing the CMS data is gratefully acknowledged. Members of the CMS Evaluation Group also provided useful comment and clarification of the issues discussed in this paper. Responsibility for the opinions expressed, however, rests with the author alone.

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THE PRIVATISATION OF JUSTICE : POWER DIFFERENTIALS, INEQUALITY AND THE PALLIATIVE OF COUNSELLING AND MEDIATION

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> Informal justice can extend the ambit of state control. ...Informalism permits this expansion, in the first instance, by reducing or disguising the coercion that both stimulates resistance and justifies the demand for the protection of formal due process. Coercion is indeed relaxed: the symbols of state authority that so dominate the courtroom - a male judge, in black robes, on a raised dais, supported by security personnel - are all banished from the mediation centre; ... Even more important, coercion is disguised: In place of prosecution we find the forms of civil litigation, arbitration, or mediation; staff go to great lengths to make participants feel comfortable ...; the mediator is often female ...; dressed like the parties, and seated with them round a table; even the language is different, stressing help rather than threats ...
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> Richard L. Abel, "The Contradictions of Informal Justice" in The Politics of Informal Justice - The American Experience, vol.1, Abel, editor, 1982, Academic Press, New York, at 270

The 1970s saw a rise in visibility of disadvantaged groups. Women, black Australians, ethnic and other minorities became vocal about their rights, calling for an end to discrimination on grounds of sex, marital status, race, ethnic origin, and in response to these demands and to the relatively high profile given to them through the media and in various forums, governments began passing race discrimination, equal opportunity, anti-discrimination and sex discrimination legislation.[1] The underlying philosophy of most of this legislation was that conciliation should be the overriding concern.[2]

In other areas of the law, counselling and mediation were fixed upon as the "answer" to conflict resolution. In family law, calls began to be made with growing intensity, particularly from those operating within the system, for greater resources to be directed toward counselling services.[3] With other disputes, classed as minor, everyday, or "neighbourhood", the push came for neighbourhood justice centres, mediation centres, or community justice centres, to be established to take on an alternative dispute resolution role.[4]

The impetus to the counselling and mediation approach was a perception that the adversary system, the traditional Anglo-Australian system of justice, was inappropriate for the resolution of certain disputes.

Increasingly the charge was made that lawyers, courts and judges assisted only by making the disputes "worse" - exacerbating conflict, rather than ameliorating it. Additionally, money and time were seen as important: within the traditional system, cost of resolution became higher both in monetary terms and in length of time cases took going through the system. Whether or not access to the courts was more expensive than it had been in the past and whether or not delays had lengthened in comparison with past times,[5] time and cost gained a certain notoriety. Counselling, conciliation and mediation were put forward as positive in decreasing conflict, or settling disputes without conflict; lessening time taken in dispute resolution; and keeping down the costs of justice.[6]

COUNSELLING

The Family Court was founded under the 1975 Family Law Act (Cth) with an emphasis on counselling, informality, and "helping" those affected by marital breakdown. Despite the removal of many of the formalities of traditional courts - such as wigs and gowns;[7] the attachment of a counselling arm to the court; and the removal of "fault" as a factor in determining divorce, the court has come under a deal of criticism on various counts. In particular, the adversarial nature of the legal system, and its influence upon proceedings in the Family Court, has led to increasing calls - even bordering on the petulant - from within the court for greater resources to be devoted to counselling services.

No doubt as a direct response to these calls, in 1983 changes were made to the Family Law Act seeking to place even greater emphasis upon the role of counselling in child custody and access matters. Parties are now required to attend a conference with counsellors before the Family Court is empowered to make an order in relation to a child.[8] Conferences between the parties with the aid of court counsellors or welfare officers are no longer reportable or receivable in evidence in subsequent proceedings before the court; rather, the court is empowered to ask specifically for a report from a counsellor for use in proceedings. The new provisions for mandatory conferences in effect legislate what in the past was a matter of practice. A practice direction ordering appearances before the court stated:

> In general, unless urgent action is required, the court will expect parties in disputes about custody or access to attend conciliation counselling before proceeding to hear the matter or to make any interim or final order.[9]

This trend has been welcomed by many in authority: for example, the Family Law Council; members of the court itself; government ministers. The former Attorney-General of Australia in 1977 stated on a number of occasions:

> Counselling may ultimately become the main function of the Family Court in this country and the role of the judges might be diminished.[10]

In addition to counselling as a general matter, the government has proceeded to establish, as pilot projects, two Family Conciliation Centres,

one at Noble Park in Victoria, the other at Wollongong in New South Wales.[11] A commentator (Finlay, 1985: 563) on the original proposal for "family conciliation centres" described the development positively:

> The Centres would not be courts, and they would not be directly associated with courts. They would be designed to be clearing houses to which people could come for help with the resolution of their matrimonial problems. People would be encouraged to work out their own solutions, if possible. The emphasis would be on counselling and advice, rather than on directive or judgmental intervention ...

This initiative was viewed as providing an alternative system which would "not only be less traumatic, but ... also ... much cheaper, both for the parties and the community":

> The very existence of an alternative system will have an effect on the formation of public attitudes. Once an alternative exists and is known to exist, it will begin to have an impact on public thinking of family relationships. It will encourage people to think of marriage breakdown as something to be resolved by negotiation, not by fighting and further hostility. The problem is one of attitudes ... (Finlay, 1985: 563.)

Yet the move toward counselling as a "solution" in the family law area cannot be accepted as "good" without analysing the type of cases with which counselling is supposed to deal, and the dimensions of the "solution"; it is also crucial to have regard to the realities of the relationships between the parties being counselled. In addition, the stance of those doing the counselling has to be confronted: it is not to question their bona fides as individuals, but to give proper regard to the nature of the training they received; socialisation; ideology; the standards in accordance with which they are required to operate; the nature of the solutions they are trained to deliver.

Marriage is a power relation. Any counselling taking place without recognising this is futile at best, and at worst involves the bolstering of the party having greatest power. As Jean Lipman-Blumen points out, gender roles "are the blue print for all power relationships and are rigorously maintained because any change would signify that this ultimate stronghold of clearly demarcated power is unstable". She (Lipman-Blumen, 1984: 27) goes on:

> Most societies have some system of social stratification that indicates the relative rankings of various groups. A stratification system implies that some groups are above and others below in the pecking order.

Gender is a key criterion:

> With a few monarchical exceptions, in all strata in virtually all societies, women rank below men of the same class, even within their own families ...

> In all power relationships, the parties seek to impose their will on one another through decisions and related behavior; so it is with women and men in their power relationship. But this is hardly a matched contest ..." (Lipman-Blumen, 1984: 28.)

Counselling as a concept sounds fine. For most - or all - of us, it is far "nicer" to believe that differences between individuals can be resolved without bitterness or recrimination, and without harm. Yet this is an unrealistic vision of the world. In the real world, conflicts arise which are valid, and cannot be resolved by everyone being "nice" to each other, or talking through the issues "reasonably". A key area where this is so, is in differences between women and men formerly married, where questions of custody or access revolve around problems of child sexual abuse by a family member - most often the biological father. Certainly, the Family Court formally adopts the approach that where "urgent action is required" parties in disputes are not required to attend conciliation counselling before having the court hear the matter, or make an interim or final order.[12] Yet this rests upon what is determined to require "urgent action".

A study carried out by the Women's Legal Centre in New South Wales has found that in no case where evidence of sexual abuse of children by the father was put forward by the mother, was the father denied access once an access order had been made.[13] Yet evidence is readily available that the level of incestuous abuse within Australian families is high. (Ward, 1985; Scutt, 1984; Waldby, 1985.)[14] It is hardly feasible to assert that in each of the cases where evidence of sexual interference by a father having access exists, the allegations are false. Rather, the problem lies in the nature of the family relationship; ideas of "father right" as dictating access orders; a preponderance of age old beliefs having a strong attachment to the human psyche, that women are wont to make false reports of sexual attack.

Counselling in such cases is of little help to children sexually abused by their fathers. Nor is it to mothers seeking concrete action to prevent or halt the abuse. In the traditional literature dealing with child sexual abuse by fathers, women are confronted with a picture of themselves as conniving at the abuse; participating in it; precipitating it through their "frigidity" - on some occasions; and, in an about face, their "promiscuity" (and thus lack of time for the "deprived" husband/father) on others. In the Family Court, women are confronted with the contradictory (though also having a firm place in traditional writing) picture of themselves as inventing tales of incestuous abuse for devious reasons.

There appears to be some belief that counsellors (rather than courts) are trained to resolve conflict to provide for a win-win situation, and will be more attuned to conflicts arising in families. That is, both parties will emerge from the counselling process the better for it, or at least relatively content that both sides have gained equal airing, and that the resolution is equally fair. Yet this ignores the reality that counsellors are trained and operate within a society wherein power differentials exist between men and women; where certain beliefs (those favouring the powerful over the powerless) are "right"; and where it is difficult, if not impossible, to go

against prevailing ideology. The counsellor dealing with cases through the Family Court involving child custody or access disputes, who built up a record of instances wherein conflict resolution was not (in the counsellor's estimation) possible, and directed all cases on to a court hearing; or referred all those cases to police for appropriate criminal action, would hardly be likely to gain praise from superiors - nor necessary promotions through the system; indeed, she would be very likely not to retain her position. (At best, her time would be taken up with fighting her own hierarchy to accept the criminal nature of the activity involved in the child sexual exploitation.)[15]

The problem of counselling where incestuous abuse is present is illustrated in a case which did not go before Family Court counsellors, but was dealt with by counsellors having the same training, and whose organisation gains support from the federal government through funding, and through the Family Court as a reference group for cases which cannot be dealt with by Family Court counsellors due to numbers. Rosanne Taylor of Bundoora writes:

> I have had the tragic experience recently ... of discovering first hand (and I mean first hand, as I was the person who discovered my husband 'in the act' ...) that this shocking situation belonged not just to families one reads about and hears discussed on TV, but was right here in my own family ...
>
> Being the Xmas holiday break, everything was closed for holidays, and for two weeks I had no help, and no one to turn to for advice, and as you can imagine, my husband was denying everything, and blaming the females of his family for 'blabbermouthing'.
>
> When I finally got to Marriage Guidance, and eventually also to the Queen Victoria Family Psychology Clinic, and also spoke to a clinical psychologist, they all told me that there is No cure, nor any effective therapy for the conditions of 'Paedophilia' or 'Incest', EVEN THOUGH they have 'patients' who have been ordered by the courts to attend them regularly. They admitted to me that they really don't know what to do with these 'patients' whom the courts have 'washed their hands of' in complete satisfaction that they have been either cured or penalised by being forced to attend for 'therapy'.[16]

Roseanne Taylor continues:

> After three and a half months of 'counselling' I finally saw that the only person who would make my husband really look at himself and his problem was myself, and that the only way to do that was to be courageous enough to show him that there are some things that decent women do NOT tolerate, and ask for a separation. I could see that my husband considered that he was only a spectator to the counselling and the problem was not his, but mine.

The danger in adopting the counselling "solution" is that it enables real problems not to be confronted, not only by the parties concerned, but also by the community as a whole.

The protest may be that less graphic cases are referred to counselling, it being entirely appropriate that they should be; that counselling can play a real role in lessening differences between parties to marital breakdown; that having all cases come to court without third-party counselling intervention would cause greater rather than less problems for court and parties. This proposition rests on the basis that not all such disputes are based in power differentials; that, even if they are, courts are not well equipped to handle them; that the court room setting will exacerbate.

Yet, as cases involving realistic allegations of criminal activity on the part of one partner to a marriage are regularly shunted off to counselling, there is no assurance that other equally disturbing cases do not go the counselling route. And not infrequently the stronger party in the relationship uses the counselling sessions to berate the weaker party, continuing the pattern of psychological damage commenced during the marriage. In one case, in a Family Court counselling session the ex-husband in a custody dispute continually decried his former wife for being an "under-achiever" - she was "only" an education officer in a community organisation, he a man with professional training, and with many years experience in that profession. (With consequent property, assets, income, status, power, prestige - all well in advance of his former wife.) This was why, he asserted, he should have custody of the children and if she attempted to claim custody the Court would refuse her.[17] The truth is obvious to those having any non-sexist perception: that the woman had kept house, husband and children for the 14 years of the marriage, whilst the husband studied, then established himself in his profession. Her "under achievement" in fact shows up well, in terms of her intellect, intelligence and sheer persistence in continuing to educate herself and obtaining a paid job of some status in that part of the world where women are "allowed" to participate and take employment. In this case, the counsellor reacted at one session by saying to the husband: "Sam, you're an absolute bastard." Yet this response would be regarded as totally out of order and not in accordance with acceptable counselling standards; indeed, the counsellor ran the risk of having the husband go to the head of the counselling service and having her disciplined.[18]

Counselling gives the stronger party yet another forum in which he can exhibit his strength - and the privacy of the sessions means that his abuse of the process does not come to public attention. (If the counsellor does not support the less powerful, no one else can.) In continuing this abuse, the husband is able effectively to deprive his former wife of more confidence in herself, ensuring she has less faith in her ability to control her own life and gain support from the system. She is isolated in a position where the problems she suffers are viewed as personal rather than political. "He's a bastard" (if that) and nothing more. He may well be a "bastard". But the issue in reality goes way beyond this to the nature of male-female relations as a whole; to the unequal relationship that is marriage; to the need to publicise power differentials and male-female inequalities, rather than privatise them through hidden "justice" processes like counselling. Not only does she fail to get satisfaction through failure to resolve the case fairly, no other women in similar cicumstances are

helped by the process. The world remains as it is, without hope for positive change.

CONCILIATION

Concilition is the primary function of offices established under equal opportunity legislation or its equivalent in various Australian jurisdictions.[19] In the Fifth Annual Report of the Commissioner for Equal Opportunity, Victoria, the Commissioner states:

> Conciliation is the primary function of this office. Its rate of success is central to the effective administration of the Equal Opportunity Act, and to the level of community support for anti-discrimination machinery. Successful conciliation is also central to the containment of costs. Hearings before the Equal Opportunity Board are expensive, both for the individual who is complaining and for the community in general. (Fifth Annual Report - 1982.)[20]

However, the Commissioner goes on to point out that problems have arisen "concerning the nature of the settlement itself". Some settlements "have been lower than complainants felt they were entitled to receive". This arose because complainants were "reluctant to take the matter further", or because "the negotiation did not result in substantiating their allegations". Commenting further:

> Failure to substantiate a complainant's allegations almost invariably leads to a settlement less favourable to the complainant than if more complete information had been available. Not surprisingly, complete information concerning the facts has been refused by respondents only in situations where such information could be to their detriment. This refusal to provide information has also been closely linked to reluctance on the part of a complainant to proceed further; and indeed, in a number of instances, the production of desired information has followed from a threat of Board proceedings. (Fifth Annual Report - 1982.)

This highlights the problem with "conciliation". Although similar bodies around Australia report high levels of "successful" conciliation, the question required to be asked is how is "success" measured? That a case is settled before going before the Board or Tribunal is no assurance that the outcome is "satisfactory" in the eyes of the person discriminated against, nor is it any assurance that it is in fact "just", "fair", "reasonable". The Commissioner in Victoria acknowledges the obvious truth that the more vulnerable a person is, the more likely to experience discrimination, and "at the same time, the fewer resources they [are] likely to have to combat it":

> This continues to be true, and is a factor in the small number of cases that have been referred to the [Equal Opportunity] Board. Many complainants, whether they like it or not, see that they have no alternative but to settle for whatever the conciliator can negotiate on their behalf. This raises a number of critical issues about the nature of conciliation and

> the responsibility of the conciliator. (Fifth Annual Report - 1982.)

If cases are being settled because complainants have too few resources to carry them through to a Board or Tribunal hearing, then the very nature of "conciliation" has to be questioned. Furthermore, statistics of "satisfactory conciliation" or "settlement" give an illusion of a system working effectively in the interests of those discriminated against. Taking into account the comments of the Commissioner for Equal Opportunity in Victoria (and the reality of a world where those discriminated against are less powerful than those discriminating against them), rather than assisting the cause of those subjected to discrimination, conciliation may well be assisting the cause of those effecting discrimination.

But the issue goes beyond that of the individual complainant. "Settling" discrimination cases through conciliation, carried out in private, detracts from recognition of the pervasive problem which is discrimination. It turns a structural matter into a question of individual or personal harm. Sex-based, racial and ethnic discrimination have a political base. They arise out of patterns and practices unfavourable to women and racial and ethnic minorities. These patterns and practices require public airing and public resolution. Instances of their being complained about need to be drawn to the attention of the wider community. A public authority must acknowledge the harm and affirm the need for effective redress.

The far reaching effect of not hiding away cases of discrimination through "conciliation" and "settlement" is evident from those cases taken before Equal Opportunity Tribunals and Boards. One of the most celebrated cases is that of Deborah Wardley, who was refused a position as pilot with Ansett Airlines, solely on grounds of her sex. In addition to securing her a job as pilot, hearings through the Equal Opportunity Tribunal in Victoria and the High Court of Australia succeeded in revealing the deliberate job discrimination to which women are subjected, as well as the foolishness of those running large corporations in Australia. Evidence was given by Ansett officials that women were "not strong enough" to pilot aeroplanes (reminiscent of charges that women could not drive buses or trams through "lack of strength")[21] and that Deborah Wardley "might become pregnant, anyway" and therefore would be off the job for a time. (Of course, men get the flu, go on holidays, take special leave, travel overseas on study leave and the like, but this does not prevent them from obtaining jobs as pilots - indeed some of those factors might mean that they are more likely to secure such positions.) When the Australian Institute of Political Science wrote to Ansett Airlines complaining of the discriminatory policy and stating that it would have to reconsider its standing travel arrangement with Ansett, the General manager of the company replied:

> Naturally we are concerned with what you have written, but feel that it is important that you appreciate that Ansett is not anti-female in employment generally.
>
> The attached statement gives some details of our employment and we believe the figures speak for themselves.[22]

Indeed, the figures "spoke for themselves", showing women clustered in the lower-paid, service-type jobs. Although women were employed in large numbers, they held no positions of authority and prestige. Cunningly no salary levels were included in the letter - had they been, women would have taken their place at the bottom of the list. Sex discrimination was revealed as being embedded in the organisation.

A second case raising public awareness of sex-based discrimination as "conciliation" never could was that of O'Callaghan v. Loder and the Commissioner of Main Roads in New South Wales. Ms O'Callaghan complained to the Anti-Discrimination Board that she had been sexually harassed by her employer, Mr Loder. Her complaint stated:

> I wish to make a complaint of discrimination based on sex which is against the Anti-Discrimination Act. I am employed as a lift attendant at the Department of Main Roads and I have been sexually harassed by the Commissioner, Mr Loder [sic].[23]

Ms O'Callaghan's complaint was that she had been "subjected to unsolicited and unwelcome sexual contact by Mr Loder, who at the relevant time was either the incumbent Commissioner for Main Roads, or was acting as such. She at the time was a lift driver in the Department". The Tribunal described "the sexual contact" complained of, which:

> ... occurred in the Commissioner's suite and took the form of putting an arm around her, kissing her, attempting to touch her breasts and, on one occasion in September 1981, forcing her to hold his exposed penis until he ejaculated.

In the upshot, in an extraordinary decision[24] the Equal Opportunity Tribunal dismissed the complaint. However, despite the different formal outcomes in Wardley and Loder, as a matter of public perception it was clearly registered that employment discrimination and sexual harassment no longer had the (open) support of authorities. Had either case been "settled" by "conciliation", there would have been no public enlightenment. As well, there would have been no affirmation amongst women suffering from these forms of abuse that they now have avenues through which they are entitled to plead their case. Equally important, there would have been no recognition by men of the requirement not to sexually harass and discriminate against women, and the real possibility of a public airing if persisting in such activity.

As for those cases noted as being "conciliated" by equal opportunity bodies, what satisfaction is experienced by the individual complainant? In disputes conciliated through Family Conciliation Centres, as in those conciliated through discrimination processes, the question is serious. Under the Family Law Act provision is made for a person who fears attack or abuse by a marital partner to apply for an injunction to require that partner (or ex-partner) not to attack or abuse: s.114. In an article in the Law Institute Journal headed "Innovations work telling changes to Family Law" (Walker, 1985: 768) it is reported:

> Another procedure peculiar to the Dandenong [Family Court] Registry is where, upon the making of an ex parte application, the Registrar convenes a conference between the parties in order to conciliate the matter before it is heard before the court.
>
> This measure was introduced last November, just before the usual Christmas rush of applications to alter custody and access arrangements. Of nineteen such applications made during November and December last year, seventeen were resolved in this manner without a court hearing.

The article goes on to say that the registrar "is anxious to point out that where an applicant insists on a court hearing then of course that person is not deliberately frustrated in or denied their wish":

> 'Most ex parte applications relate to violence of one sort or another, but even so we've found that the applicant really only wants the other person to be reasonable. We've had little trouble in tracing the other persons and getting them in to talk.'
>
> This procedure, also introduced in the Brisbane Registry, has been estimated to have been successful in settling some 60 per centof ex parte applications. (Walker, 1985: 768.)

"Successful" - in whose eyes? in whose reality? Key matters for remark are:

> 'where an applicant insists on a court hearing ...'
>
> 'of course that person is not deliberately frustrated in or denied their wish'
>
> 'most ex parte applications relate to violence ...'
>
> 'the applicant really only wants the other person to be reasonable ...'
>
> 'tracing the other person and getting them in to talk'
>
> 'estimated to have been successful ...'
>
> 'settling some 60 per cent ...'

In 1986 it should no longer be necessary to point out:

> Historical conditions, institutional arrangements and practices justified by ideology, access to resources, norms, values, even stereotypes, all channel men into dominant and women into subordinate positions. (Lipman-Blumen, 1984: 29.)

It is a nonsense to talk about women applicants "insisting" on having a court hearing, when confronted by a system which is set upon conciliation. For those having control over whether or not a court hearing is the answer, it is certainly not necessary to deliberately frustrate or deny any person her wish to have a court hearing. Discriminatory practices by no means always arise out of deliberate action, or only arise out of such action. The assertion of power over others is not always a result of deliberation. "Persuading" those who are less powerful, or feel less powerful, into accepting an alternative procedure may not seem, to the party doing the persuading, to be coercion - but it may nonetheless be coercion. The classic instance of women being "persuaded" not to take action of a court-kind is that of the police officer who tells the women wishing to have her husband charged with assaulting her - often severely - that it is all too hard to go through the process; that after all she doesn't really want her husband sent away to gaol; why don't they just kiss and make up; "come on, you wouldn't want the kids to go hungry over Christmas, now, would you ..." (slight threat in the voice, sometimes ...)

It should be no revelation that applicants "really only want the other person to be reasonable". For women subjected to violence by husbands or ex-husbands, and to mothers whose children are subjected to abuse of a physical or "sexual" nature, the hope is that the husband/father will "really only" exhibit some "reasonableness" by ceasing the violence and abuse. Yet "conciliation" is hardly likely to bring this about, taking into acount already existing evidence of the nature of violence in marriage and sexual abuse of children by family members. Sadly, at present it is unrealistic to assert that cases such as these brought before the courts would necessarily result in any different formal outcome. Evidence too readily available shows the lack of seriousness with which cases of violence and abuse against women and children in families is treated by courts generally.[25] Yet the minimum which results from court hearings involving such matters is a plus which can never result from their being treated privately, through conciliation - namely, they are heard in public and are thereby brought before the community as a matter of concern. Having these cases heard publicly means that those of us who do take such matters seriously are alerted to their incidence; to the way in which courts deal (or fail to deal) with them; to the lamentable way in which women are treated by the "justice" system. And the failure of formal, public justice to deal appropriately with these cases is not answered by providing even less satisfactory, private systems. The answer must be to channel resources into making the public system work effectively. Privatising instances of violence against women and children - just like privatising discrimination against women (and other groups) - through "conciliation" and "settlement" distances them from their political context, as patterns and practices directed against disadvantaged groups. It allows them to continue without redress and militates against collective action of those abused and discriminated against. It obfuscates political awareness.

MEDIATION

Mediation has been described (Bryson, 1984: 1445) as:

> ... a way of breaking the spiraling hostility and communication breakdown which usually accompany a

> dispute. Where the parties to a dispute have a continuing relationship it is important to have avenues of resolving differences that do not further separate them. The role of mediators is not to sit in judgment and hold up one party as being right and the other wrong, but to help the disputants reach an agreement which is satisfactory to all participants.

Traditional mediation lore contends that the parties themselves "determine the resolution of their dispute" and therefore "emerge as 'winners'":

> It is the mediator's task to facilitate this - a difficult role and one which requires people with the right personal characteristics and life experience as well as having substantial and continuing training. (Bryson, 1985: 1445.)

But of course it is difficult to "mediate" where one party is "right", and the other "wrong"; or where no agreement is capable of being reached which is justly satisfactory to all participants; or where it is impossible for both parties to "emerge as winners".

The assumption underlying mediation as a means of resolving disputes or conflicts is that both parties are equal, and both are equally responsible for the conflict or dispute. The emphasis is strongly upon the need to ensure that a continuing relationship can be established between the parties, where the dispute has arisen in this context. Yet there is a massive difference between attempting mediation where two parties - neighbours of roughly equal social skills, status, incomes, living conditions - are arguing about a dividing fence, and taking that route where wives and husbands are involved in violent or abusive disputes, whether relating to themselves and the children, or solely themselves.

Although strong reservations were expressed to government about the involvement of community justice centres in "resolving" family disputes, when proposals were going through in New South Wales,[26] it appears that those considered warnings have not been heeded. It is reported that most disputes handed by the centres in New South Wales:

> ... are between neighbours, but significant numbers of disputes between family members, fellow-workers or people in other types of social and business relationships have been successfully resolved through mediation. Of those that sit down at the mediation table, 85 per cent reach an agreement ... (Bryson, 1985: 1445.)

The question is how can disputes between family members, between husbands and wives, be "mediated", particularly where they involve violence? (And some of the other listed groups may not be so readily mediated if political awareness is the key.) To speak of "mediation" in the context of social, economic, political, sex and gender inequality is nonsense. "Mediation" is possibly only where parties being mediated are equally powerful in social, economic, political, sex and gender terms. In the absence of such equality, "successful resolution" must be suspect, if not impossible.

It may be contended that the presence of a mediator or mediators "balances off" inequalities between the parties. However this cannot be true. First, the overriding philosophy of mediation is that the mediator plays a neutral role. "Neutral" in Anglo-Australian culture means almost inevitably that the dominant ethic rules - the power held by men will not be downgraded, and the lack of power held by women will not be supplemented. Even if mediators act to realign imbalances, it is questionable that they can succeed: research into interaction between teachers and students shows that boys are paid overtly more attention than girls, even where the teacher leans toward the girls in a conscious effort to redress the balance. (Ingvarson and Jones, 1981; Spender, 1982; Stanworth, 1981; Cosgrove, 1981.)

It is further notable that attempts are made at community or neighbourhood justice centres to ensure that mediators "reflect the ages, outlook and cultures of the disputants". Do parties in conflict have the same "outlook", necessarily? The "outlook" of a party determining that violent and aggressive acts against his wife are appropriate hardly seems worth replicating in a mediation session. To talk of culture as if it is "fixed", "homogenous" reveals a lack of attention to reality.

In the real world, "culture" may be different for women and for men. The dominant culture, the culture to which attention is paid, is that organised by and derived from male rules, male determinations, male exploits, activities, habits, beliefs. As Jessie Bernard has pointed out, in every marriage there are in reality <u>two</u> marriages - the husband's marriage and the wife's marriage (Bernard, 1972.) Although they reflect the same marriage, they are not the same. The dominant white male culture sees itself as "the" culture. It:

> ... sees its mythology as all-knowing and all-revealing. In truth, however, it is just the opposite. [Anne Wilson Schaef] realised this most clearly ... when ... doing a workshop on racial issues in a Southern state [in the United States of America]. (This was during the heyday of the civil rights movement, when school districts were required to sponsor workshops on this topic in order to keep their public funding.) The group [she] was working with was about half blacks and half whites. Neither side wanted to disturb the tenuous equilibrium they had established thus far, and they invited [her] in because [she] was perceived as essentially harmless. (Wilson Schaef, 1985: 13.)

Anne Wilson Schaef continues:

> I had designed a relatively simple exercise I wanted to try out on the group in order to generate some data. I asked the participants to draw three columns on a sheet of paper. In the first, they were to list those characteristics which they perceived as uniquely black. In the second, they were to list those they perceived as uniquely white. In the third, they were to list characteristics they saw as common to both groups. (Wilson Schaef, 1985: 14.)

Schaef explained the exercise, then waited for the participants to complete the task. After a while, she says, "the anxiety in the room became almost palpable", and she decided to find out what was happening:

> I found that the Blacks had done precisely what I had asked them to do. Because they knew the Black system, they had been able to list characteristics they perceived as uniquely Black. Because they also knew the White Male System - they had to in order to survive - they had been able to list characteristics they saw as uniquely white. They were ready to move on to the third column. (Wilson Schaef, 1985: 14.)

However, "the whites were having great difficulty completing the exercise; ... because they knew nothing about the Black system, they could not do column one." And, Schaef outlines:

> Because they could not see the White Male System for what it is (one has to experience non-pollution before being able to recognise pollution), they could not do column two either. Increasingly frustrated, most of them had gone directly to column three. They had decided to ignore the differences between the two systems ('Let's not look at differences. Differences separate us!') and focus instead on common characteristics ('Let's look at ways in which we're alike and ignore the experience of being Black in the White Male System!') (Wilson Schaef, 1985: 14.)

Then, she says, the whole group began cheating, with people looking at one another's papers:

> When the whites saw that the Blacks had been able to come up with answers for the first two columns, they became agitated ('What do they know that we don't know - and how can this be?') When the Blacks saw that the whites had not been able to come up with answers for those two columns, they felt exposed. ('We cannot let them know that we know that they don't know more. We'll lose our jobs if they find that we know they aren't superior.') (Wilson Schaef, 1985: 15.)

The claims made for mediation are boundlessly optimistic, and can be dangerous. The contention that mediation provides a "win-win" situation in disputes involving husbands and wives, enabling them to continue in their relationship "successfully" must be made in ignorance of the realities of power differentials and inequalities. Where such disputes involve violence, the appropriate way for the matter to be dealt with may more properly be one which does not enable the relationship to continue at all. Indeed, the outcome may realistically be one which results in unhappiness for the male party, who wishes the relationship to continue - although an observer could well be disposed to ask why, when he persists in his conduct of violent abuse against his partner or children. The "solution" which sees the parties remaining together as "win-win", may in fact be "no-win" for the wife, who remains in the violent marriage, or who remains obligated to allow access

to the children, by the husband, despite her real fears about their safety and wellbeing in his hands.

COUNSELLING, CONCILIATION AND MEDIATION : SHORTHAND FOR LET THE POWERFUL RETAIN POWER?

Writing of conciliation in the realm of family disputes in Britain, Anne Bottomley points out that calls for conciliation are "typical of the widespread current concern to find a more humane and satisfactory approach to the process of divorce and the settlement of disputes arising from marital breakdown" (Bottomley, 1985: 164-165.):

> The image presented of law and lawyers as distanced from the parties and, by implication, concerned more with their own game rather than the needs of those involved, is a common theme. This one-dimensional image of law is counter-posed to the image of those 'with relevant expertise' who hold the key to being able to make properly informed decisions. The use of this expertise is linked with the need for informality and the use of conciliation.

As she says, there is no real explanation or analysis of what is meant by conciliation, what it means in practice, or what it might mean.[28] Rather, the agreement is that it "simply has to be better than the present system".

In the British discussion of conciliation in the family law area, the concentration has been upon custody disputes. There has been little or no mention of property conflicts:

> The evocative symbolism of the raised platform in contrast to the round table is an apt shorthand, signally that at the root of the problem is a system that emphasises conflict, formality and decisions 'handed down' rather than a process which allows the parties to reach agreements based on shared understanding and with the help of experts who know what is in the best interests of the children.
>
> The case rests here. No further explanation is given as to what conciliation might mean or whether conciliation is the only mode of informal justice or indeed whether adversarial proceedings are the only mode of formal justice. Not even a passing reference is made to any possible problems with informal justice and 'individuals with relevant expertise' are apparently non-problematic, at least in comparison to lawyers. Conciliation seems to take on the role of a code word which says everything and therefore does not need to say anything ... (Bottomley, 1985: 165.)

In Australia, similar shorthand is used, with conflict frequently being laid at the door of the formal justice system, and in particular at the feet of the lawyers.

There is no doubt that the way in which lawyers deal with clients requires improvement. Charges are made of elitism of lawyers; their failure to properly inform their clients; ignorance of issues relevant to their clients' cases, despite clients making valiant efforts to brief them. (Clients may be brushed off with statements that what they have to say is irrelevant to the case; or to "be quiet", or "the judge will be cross" - indicating that lawyers have failed to consult with their clients adequately before coming into the courtroom.)[29] Yet it is equally doubtful if clients have a high regard for psychologists, psychiatrists, social workers or welfare workers - all of whom have been put forward by critics as preferable for making decisions about, say, child access, or helping people through the decision-making process as to custody - than lawyers or judges.

Contrary to the case in England, property division and property settlement have been proposed as properly to be dealt with on a counselling or conciliation basis, with registrars presiding over conferences compulsorily required to be participated in before disputing spouses are entitled to enter into the formal justice domain, the court. Yet it is unwise - and indeed flies in the face of reality - to suggest that conflicts over property division are solely, or mostly, attributable to the failure of the parties to talk reasonably with each other. There is no doubt that real conflicts, real disputes exist in this area. If parties are "conciliated" or "counselled" to a "satisfactory" settlement, a very sound possibility arises that they have agreed to a settlement which is not fair to one of the parties - most often the wife.

Where property is concerned, Australian society has in the past subscribed to a belief, bolstered by the legal system itself, that men own property - and women do not; that men's contribution to the accumulation of property is superior to that of women, whether women's contribution is financially direct, financially indirect, or of a non-financial nature. (Mallet v. Mallet (1984); Scutt and Graham, 1984.) It is absurd to suggest that those operating within the Family Court are immune to this ideology, whether they be judges, lawyers or registrars - or any other parties operating within the system to "conciliate" or "counsel". The problem with providing compulsory mechanisms designed to "settle" property division conflicts is that they will not result in a just resolution of the dispute, if "just" is interpreted in accordance with its rightful meaning. "Pressure" has been condoned by the Family Court in bringing about family property settlements. (In the Marriage of Anderson and Anderson (1982).) Even without obvious pressure, in the light of real world differences in men's and women's status, it is more rather than less likely that "satisfaction" occurs in accordance with existing biases.[30]

And it is not only in cases involving husbands and wives, or children in family relationships, that conciliation, counselling and mediation may be dangerous concepts, denying rather than extending rights, or obfuscating the inequitable processes of dispute resolution. Richard Hofrichter contends that neighbourhood justice centres dampen class conflict in a number of ways: first, the process "individualises conflict by creating a forum that offers an alternative to the neighborhood or union meetings in which collective action might be taken". He quotes Jerold Auerbach:

> Are these forums likely to deflect energy from political organization by groups of people with grievances in common (for example, tenants in slums or neighorhoods slated for development) or even discourage them from developing a litigation strategy that might offer more effective leverage for social and economic change? (Auerbach, 1980.)

Secondly, Hofrichter says, the neighourhood justice centre process "ignores the social basis of conflict by handling problems on a case-by-case basis without generating a public record":

> And although disputants can technically raise any question or issue, the content of conflict is divorced from collective interests, segregated from similar cases, and limited to the immediate relationship between the disputants ... Consumers may 'win' cases as individuals by getting their money back or obtaining the repair of a product, but they lose as members of a wider social class interested in preventing a recurrence of the incident or effecting a change of policy. (Hofrichter, 1982: 240.)

Richard L. Abel makes the point that the outward absence of coercion does not mean that coercion is lacking in informal dispute resolution. In alternative processes dealing with criminal matters, the minimizing of coercion "for strategic reasons" does not mean that it is eliminated:

> It would be naive to expect otherwise: state action cannot avoid using force; social control cannot function without it ... The modus operandi is similar to the police interrogation in which the suspect is alternately confronted with a 'bad' cop, who is large, unpleasant, and threatening, and a 'good' cop, who promises to protect the suspect if he will cooperate ... (Abel, 1982: 271.)

Although, as Abel acknowleges, informal dispute resolution "offers a haven from the formal systems from its lengthy, costly, humiliating process and threat of prison":

> Informal hearings use a variety of subtle techniques to influence the parties: modes of questioning (in which the mediator is much more active than a judge would be), the alternation of public hearings with private caucuses (in which the adversary is assigned the role of the bad cop), and of course the implicit threat of returning the matter to court ...

CONCLUSION

Informal justice does not dispense with norms. As Richard Hofrichter points out, it means only that norms are articulated less clearly:

> The unstated assumptions of a professionally trained cadre of middle-class mediators about what constitutes a reasonable claim, the proper use of force, or the content of justice may have a significant bearing on the outcome, particularly when

> disputants are predominantly poor, inner-city residents. (Hofrichter, 1982: 242.)

The content of justice and what is a reasonable claim is also likely to be dependent upon assumptions about men and women, women's rights and men's rights, racial characteristics, ethnic features, in accordance with norms which do not need to be stated to exist, nor to be adhered to.

Women as litigants have sometimes decried the legal system on grounds that it is male dominated and therefore uninterested in women's claims - indeed, inimical to women's rights. Yet simultaneously women have a strong sense of "fairness" and "justice". It is ironic that those who are in disadvantaged groups are more likely to believe the ostensible aim of any system of justice - namely, that it seeks to dispense justice, rather than replicating inequities, inequalities and injustices existing in the world outside. And it is instructive that from the late 1960s and in the 1970s and 1980s, when women have become, together with other disadvantaged groups, more inclined toward seeking to use the justice system to gain acknowledgement of, and redress for, the fundamental error of sex-based discrimination; more attuned to the basic inequality meted out through the criminal justice system; and more vocal about the right of women to share equally in property distribution and other appurtenances of marriage, considerable efforts are being made to temper women's demands and deflect them into a privatised system of mediation, conciliation or counselling.

Women are beginning more often, and collectively, to acknowledge the political nature of the legal system - not only as a weapon against women and women's interests, but as a mechanism that can be used to gain a platform for women's demands, as well as, sometimes, concrete redress.

So long as women are disadvantaged, discriminated against, and subjected to the problems of inequality, the more important it is to gain forums through which these issues may be debated and acknowledged. Women have shunned hierarchical organisation on the basis that it leads to the abuse of power. In that, women are right. Yet the seeming elimination of hierarchy or formalised justice in hopes for a more egalitarian system is unrealistic as long as the control is held in the hands of those who are the powerful, in traditional terms, or who replicate the power relations which have become entrenched in bureaucratic and administrative organs of the state, not only in formalised justice systems. As Nancy DiTomaso says:

> Precisely because hierarchy concentrates power, it also makes it more 'visible'. In hierarchical organizational structures, the locus of power is more easily identified than in dispersed organizational structures. When the locus of power is more visible, then the 'point of change' is also more easily identified. Therefore, under conditions of resistance from subordinate classes, a diffusion of power or decentralization may be the 'best' means to maintain the existing relationships of domination - all other things being equal - because decentralization scatters the point of change. (Di Tomaso, 1978: 84.)

For those who are disadvantaged, the more public profile that can be given to that disadvantage, the more opportunity arises for group recognition and collective action, and the more quickly it can be eliminated. The privatisation of justice is detrimental to the interests of the disadvantaged, in that it shuts off from public view the very nature of the inequality from which the individual and the group suffers. Whilst the feminist movement is fighting for recognition amongst all women of abuses committed against women as members of a group, "private justice" is fighting back to individualise those abuses. "Private justice" renders the personal apolitical.

The implication that disputes can best be resolved by mediation, conciliation and counselling ignores power differentials and inequality. The idea that the problems of the adversary system and traditional justice can be resolved by the establishment of alternative systems hides from view the fact that despite valid criticisms of the adversarial process, positive aspects exist which should not be removed from disadvantaged groups in particular.

In the rush to correct perceived problems of the traditional justice system - problems which are very real - a programme of privatisation has been allowed to develop in the guise of "helping" those who are powerless. Yet in the doing of this, the powerless, the disadvantaged, the discriminated against may well be even more disadvantaged. Their disputes are being turned into private problems existing on an individual level, to be kept away from the public arena and out of the public eye. Yet it is the disputes involving the disadvantaged, the powerless, the discriminated against which require that public arena. In adopting the privatisation approach, imprimatur is being given to the depoliticisation of legitimate disputes betweeen the discriminated against and the discriminators, the powerless and the powerful. In a world where power differentials and inequality are real, with real detriments, counselling, mediation and conciliation serve the interests of the powerful to the detriment of the powerless.

FOOTNOTES

1. For an outline of these Acts and their operation, see for example Chris Ronalds, Anti Discrimination Legislation in Australia, 1979, Butterworths Sydney; Helen Mills "Equal Opportunities" in The Dunstan Decade: Social Democracy at State Level, Parkin and Patience, editors, 1981, Longman Cheshire, Melbourne, 115: Jocelynne A. Scutt, "Legislating for the Right to be Equal" in Women, Social Welfare and the State, Baldock and Cass, editors, 1983, 223; Jocelynne A. Scutt, "In Pursuit of Equality: Women and Legal Thought 1788-1984" in Women, Social Science and Public Policy, Goodnow & Pateman, editors, 1985, George Allen & Unwin, Sydney, 116.

2. Racial Discrimination Act, 1976 (South Australia) provides for criminal penalties with regard to discrimination on racegrounds in certain circumstances. However, this is unique in the Australian context. The bulk of statutes dealing with discrimination take a non criminal approach with the first step in the process being conciliation.

3. Numerous newspaper stories; also Annual Reports of the Family Law Council.

4. This mode of dispute resolution gained a high profile in New South Wales, mainly at the instigation of Jane Chart, an officer then with the New South Wales Department of the Attorney-General and of Justice, who had returned from the United States where she had taken a research trip looking at neighbourhood justice centres operating in various jurisdictions.

5. Expense is not a new problem in the legal system. Even more so in the past, it was difficult for persons of modest means to gain redress through the legal system. (On this issue in family law, for example, see Roderick Phillips, Divorce in New Zealand: A Social History, 1981, Oxford University Press, Auckland; Monckton Milnes, editor, On the Property of Married Women and the Law of Divorce - A Collection of Documents, reprinted 1975, William S. Hein & Co, London.) With delay, it is worth noting that in the Report of the Royal Commission for enquiring as to the means of avoiding unnecessary delay and expense, and of making improvements in the administration of Justice in the working of the Law, 1899 (Victoria) it was stated:

> 195A. For the purpose of taking down the depositions of witnesses to be used in a higher court, we recommend that in the metropolitan courts, in the first instance, the clerks be instructed to take down the evidence by typewriting and to qualify themselves to use typewriting machines. The experience of the courts in Sydney shows that by this mechanical aid much time and labour are saved. At present the written depositions are copied by typewriters in the Crown Law

> Offices for the use of the Crown Prosecutor. Under our proposal the necessary copies could all be obtained at once. It is admitted that the typewriting machine produces a noise which irritates ears not accustomed to it; and probably it would be well to give the magistrates power to forbid the typewriter in such cases as they think fit. We have no doubt of the ultimate result.

6. See, for example, Annual Reports of the Family Law Council.

7. See Family Law Act 1975 (Cth) s.97. Generally on the Family Law Act and its operations. See, for example, H.A. Finlay "Dispute Resolution in Australian Family Law" (1984) 58(4) Australian Law Journal 213; Frank Bates, "The Role of the Law and the Resolution of Family Problems" (1984) 58(8) Australian Law Journal 448; H.A. Finlay "Fault and Violence in the Family Court of Australia" (1985) 59 (9) Australian Law Journal 559. It is interesting to note that there is a strong push from some quarters to have wigs and gowns introduced into the Family Court of Australia, apparently on the basis that this will bring back authority into the system. Yet it is somewhat difficult to understand how gowns and horsehair head gear should be considered to signify authority. Rather, it would appear that that authority will be maintained - that is, respect - if the court acts in accordance with the principle that its decisions are fair, and enforceable. A problem arising in the Family Court arena is that some litigants fail to respect the court because there is little enforcement of orders - particularly in the area of maintenance, for example.

8. Section 64(1b) - re children; and 79(9) - re property. Exceptions to the principle relate to interim or consent orders, or where there are good reasons, such as urgency or consideration of practicality, which intervene against the requirement of attending a conference.

9. Practice Direction, Australian Family Law and Practice, CCH, vol.2, 54-817.

10. See, for example, For Women, Today and Tomorrow Conference 13 August 1977; Australian Commonwealth Council of the Mothers' Union, Conference 6 June 1977 (Adelaide); Address at the opening of the Family Court in Melbourne, 17 May 1977. See further on this issue H.A. Finlay, "Dispute Resolution in Australia Family Law" (1984), particularly at 223 ff.

11. On the operation of the centres, see Family Law Council, Annual Report - 1984-1985, AGPS, Canberra ACT, at 38.

12. Practice Direction, Australian Family Law and Practice, CCH, Vol.2, 54-817.

13. Study conducted by Marion Brown and Julie Stewart, Women's Legal Centre, New South Wales.

14. The reluctance of those trained in the traditional mode to accept the truth of child sexual abuse is notorious. Although there are counsellors within the Family Court system who are attuned to present day realities, the traditional view has a firm hold in the legal system and other authority systems generally.

15. For an experience of this problem in another, though related, field, see Anne McDonald and Rosemary Crossley Annie's Coming Out, 1985, Penguin Books, Ringwood.

16. Letter dated 17 April 1985, held by the present writer. Real names - of individual and geographical locations - have been changed to preserve confidence.

17. Personal communication. This highlights the problem for women coming into the system as litigants or supplicants. Where counsellors are male, women run the risk of their identifying with the husband's position. Where counsellors are female, similarly the woman runs the risk of the counsellor identifying with the husband's position - research into power relationships shows clearly that those in the subordinate position frequently identify with those in the superior position, as a means of preserving some feeling of esteem. See Jean Lipman-Bluman, Gender Roles and Power, 1984.

18. On this issue see, for example, Jean Lipman-Blumen, Gender Roles and Power, 1984. Where the counsellor is female, and due to raised consciousness identifies with the position of the subordinate partner, the woman, she places herself in an at risk situation, in that her superiors are likely to be receptive to complaints from the husband of lack of ethics on the part of the counsellor on the basis that she has not maintained neutrality by her actions or attitudes.

19. For example, Commissioner for Equal Opportunity in Victoria, Counsellor for Equal Opportunity in South Australia. In New South Wales, the office of Counsellor for Equal Opportunity was originally a part of a two-tiered structure, being the Office of the Counsellor for Equal Opportunity, and the Anti Discrimination Board. The latter acted as a tribunal to hear cases which were unable to be conciliated. In 1984 the structure was changed so that an Equal Opportunity Tribunal was created to hear unconciliated cases, the Anti Discrimination Board retaining the Counsellor for Equal Opportunity function.

20. The extract is also contained in Appendix VI of Commissioner for Equal Opportunity, 6th Annual Report - 1983, Government Printer, Melbourne, at 110. The extracts immediately following are from the same source.

21. See article on the fight for women to gain a right to drive Melbourne trams, in Elizabeth Windschuttle, editor Women, Class and History, 1980, Collins, Melbourne; see also Scutt, "Legislating for the Right to be Equal", 1983; Chris Ronalds, "To Right a Few Wrongs: Legislation Against Sex Discrimination" in Pursuit of Justice: Australian Women and the Law 1788-1978, Mackinolty and Radi, editors, 1979, Hale & Ironmonger, Sydney, 190.

22. Quoted Scutt, "Legislating for the Right to be Equal", 1983, at 232 (letter dated May 1979).

23. See O'Callaghan v. Loder and the Commissioner for Main Roads, unreported Equal Opportunity Tribunal, New South Wales, Sydney, 30 September 1983, at 1. The immediately following quotation comes from the same source, at page 3.

24. The standard of proof utilised in this case does not appear to be the standard applied in civil cases. Furthermore, it is a far more stringent standard than would be applied in a criminal jurisdiction. Further on this case and the judgment, see Scutt, "In Pursuit of Equality: Women and Legal Thought 1798-1984", 1985.

25. See, for example, the study carried out by Marion Brown and Julie Stewart of the Women's Legal Centre, NSW; Carol O'Donnell and Jan Craney, Family Violence in Australia, 1982, Longman Cheshire, Melbourne; Jocelynne A. Scutt, Even in the Best of Homes, 1984.

26. For example, in 1979 a submission was made to the Department of Attorney-General and of Justice, as well as to the Premier of New South Wales, by the Women's Electoral Lobby on this issue. See also Wendy Faulkes, "Pursuing the Best Ends by the Best Means" (1985) 59(8) Australian Law Journal 457, at 460.

27. See also Wendy Foulkes, "Pursuing the Best Ends by the Best Means", where it is stated that disputes dealt with include those relating to fences "or harassment, to threats, property damage and ultimately violence".

28. See comments by Elizabeth Evatt, the Chief Judge of the Family Court on this problem in the Australian context. This point is well made in a discussion about "conciliation", "mediation", "negotiation" and "arbitration", prepared for the conference on Alternative Dispute Resolution at the Australian Institute of Criminology, by Martha M. Gelin, Brief Introduction to Alternative Dispute Resolution: Concepts and Processes, 1986, AIC Canberra.

29. The work of Di Graham as convenor of the Women's Electoral Lobby Family Law Action Group, documents these complaints. Also see Wendy Faulkes, "Pursuing the Best Ends by the Best Means", at 458.

30. One of the problems is that the disadvantaged party may consider a settlement to be fair, when objective reality indicates it is not. for example, this is so in the family law area. In an instance presented to the WEL Sydney Family Law Action Group, a woman reported that she was quite satisfied with her settlement, and could not understand what the agitation was about on behalf of women. On further questioning, however, it was revealed that she thought she had gained 60% of the assets, and that this was "more than satisfactory". She gained 60% of the family home, but all other property beyond that went in total to the divorcing husband. She did not receive any of the superannuation due to her husband, nor any right to a portion of the superannuation to which she had clearly contributed as a non financial contribution and co-contributor upon retirement or resignation of her husband. She also stated that the car had been retained by the husband - "but of course, it's his car"!

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ALTERNATIVE DISPUTE RESOLUTION:
A NEW SOUTH WALES POLICE PERSPECTIVE

Detective Sergeant C.S. Ireland
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INTRODUCTION

The New South Wales Police Force, as would be the case with other forces, is usually seen by its public and its members as primarily a law enforcement agency. Whilst this is true to some extent, adoption of this viewpoint suggests that the only method of disposition of calls or problems available to police is to invoke legal processes.

Members of the New South Wales Police Force make extensive use of the processes variously termed, and imprecisely defined, as negotiation, conciliation, mediation and consultation. In addition to use of these processess, police make many referrals to other helping agencies, some of which may also engage in alternative dispute resolution.

Further, whilst making referrals to other agencies and using the alternative methods of dispute resolution in contacts with their 'customers', police also use alternative methods for problem solving and grievance resolution in areas that can be broadly termed personnel administration and industrial relations.

Calls for service to police

Before dealing with the uses made by police of alternative dispute resolution it is useful to give an indication of the nature of calls made to police. Requests received by police for assistance or service vary widely in nature. For example, they may range from a dispute between neighbours to arresting and charging a murderer before a court. When a citizen has a problem he or she will almost invariably call police for attention, be the problem large or small, whether police are the appropriate agency, have appropriate skills and resources to deal with the problem or not.

For most of New South Wales, police are the only 24 hour social service/helping agency available. Many of the incidents involve offences against the law and can be addressed by arrest and charge, or by initiation of legal process. Many other incidents, however, do not lend themselves to such treatment; they may not involve an offence against the criminal or general law; they may involve behaviour or actions that are merely tortious in nature; or they may be disputes or disagreements that have no criminal or tortious remedy. Even where remedy may exist in tort, it may not be realistically available to the parties due to prohibitive cost; and even if the remedy was available at no cost it would not necessarily resolve the underlying cause of the problem, which in many cases is misunderstanding and lack of adequate communication.

A comment on the impact of a dispute or incident on the individual is appropriate at this time. Many disputes whilst of a minor nature to police, the legal system and others, are of immense importance and concern to the parties involved. In the case of a dispute between neighbours there is often no escape, save one of the parties moving house. Disputes between neighbours can develop from an exchange of words, over the behaviour of a child, through putting the hose on each other (a reasonably common referral) and lighting incinerators when the neighbours washing is out, and escalate to assaults and even homicide.

Police often find themselves powerless to act in many such situations. They can give advice or attempt to mediate, concilitate etc., but are usually unable to devote the time necessary to allow people to resolve the problem, even if this is an agreement to disagree.

The unfortunate consequence is usually an escalation of the dispute or disagreement, perhaps followed by violence or some other criminal act. Calls of this type are usually serial in nature and even after escalation, to assault for example, police action by arrest will not resolve the underlying causes.

In many ways police are in a similar situation to some medicos who when faced with too little time and too many patients fall into the temptation to use the prescription pad to treat symptoms rather than the underlying causes. Police have severe limits upon the time that can be devoted to particular problems/incidents, particularly those of the type involving ongoing relationships between parties/disputants. Fortunately at least in the metropolitan area of Sydney there has since 1980 been an option, in the form of referral in appropriate circumstances, to one of the three Community Justice Centres.

ALTERNATIVE DISPUTE RESOLUTION/DISPOSITION: A DEFINITION

A definition placing alternative dispute resolution into a New South Wales police context might be: Dealing, solving, resolving or disposing of a call/problem/situation by referral or by use of the processes of consultation, mediation, conciliation or negotiation. This is distinct from initiation of legal processes using police, prosecutors, justices and legal representatives as actors in the court system.

POLICE USE OF ALTERNATIVE DISPUTE RESOLUTION METHODS

Internal Relationships

Internal disputes involving equal employment opportunity, sex and race discrimination and industrial relations are subject to resolution by alternative methods within the New South Wales Police administration.

Resolution of grievances and complaints under the Anti-Discrimination Act (1977 as amended) (N.S.W.) is attempted by conciliation at the workplace or local level, and if unsuccessful, by referral to an equal employment opportunity grievance committee.

In the industrial relations area, the Police Force and its major industrial organisation the Police Association of New South Wales have entered into an agreement conciliate disputes involving non-commissioned officers. The aim of the procedure is to resolve grievances in the workplace and this requires that supervisors exhaust all conciliatory processes prior to referral of the dispute to a higher level.

External Relationships

The Community Relations Bureau has under its control a number of liaison groups which have three functions; first, to establish communication with their target groups; second, to improve relations between police and the target group; and third to resolve disputes between the two groups. Disputes may be general or specific in nature. Conciliation and mediation are utilised in attempts at resolution. The liaison units address themselves to aboriginal and ethnic communities, and to homosexuals and youth.

The Anti-Discrimination Board and the Human Rights Commission are often involved in dispute resolution where police have involvement, particularly in matters of race and sex discrimination.

COMMUNITY JUSTICE CENTRES

Police Involvement

The New South Wales Police Force has been involved with Community Justice Centres from their formative stages, and was represented on the co-ordinating committee responsible for setting up centres on a trial basis in 1979/80 and later with their management and direction.

The Force continues to be involved through a police representative on the Community Justice Centres Council, provided for in the present legislation, Community Justice Centres Act (1983).

From the early stages police were also involved with the centres as mediators. There are presently eight active mediators, two at Wollongong and three each at Surry Hills and Bankstown Centres.

Referrals - Police Involvement

The three Community Justice Centres at Surry Hills, Bankstown and Wollongong received a total of 2200 referals from all sources for 1983/84 and 2300 for 1984/85. The table below sets out referrals from all sources and the percentages from each source.

TABLE 1
REFERRALS BY REFERRAL AGENCY 1983/84 AND 1984/85

	1983/84		1984/85	
	No.	%	No.	%
Chamber Magistrate	525	23.9	637	27.7
Bench Magistrate	179	8.1	99	4.3
Police	122	5.5	123	5.3
Legal Aid	166	7.5	146	6.3
Community Legal Centre	51	2.3	44	1.9
Private Solicitors	112	5.1	114	5.0
Local Government	185	8.4	196	8.5
State Government Department	228	10.4	243	10.6
Non-Government Department	87	4.0	131	5.7
Federal Government Department	26	1.2	18	0.8
Mediator	14	0.6	9	0.4
Previous Client	47	2.1	145	6.3
Media	25	1.1	46	2.0
Self	381	17.3	267	11.6
Other	21	1.0	37	1.6
File Re-Opened	29	1.3	40	1.7
Family Court	2	0.1	5	0.2
	2200	99.9	2300	99.9

Source

Second Annual Report, Community Justice Centres 1984/85, Attorney General's Department, New South Wales, Sydney 1985.

Police Referrals

Police referrals made to Centres during the two years of operation of the current legislation have remained fairly constant. It will be seen that Bankstown receives significantly higher police referrals than the other two centres; this is attributed to that Centre taking referrals from the densely populated western area of Sydney. Police referrals by centre are set out in the table below.

TABLE 2

CASES REFERRED TO COMMUNITY JUSTICE CENTRES BY POLICE
1983/84 and 1984/85

	B'stown	Surry Hills	W'gong	Total all Centres	%of all Referrals
1983/84	56	42	24	122	5
1984/85	61	32	30	123	5

Source

Second Annual Report, Community Justice Centres, 1984/85, Attorney General's Department, New South Wales, Sydney 1985.

Nature of Referrals

Referrals are examined by Centre staff and the nature of disputes identified. A dispute is invariably classified as having more than one 'nature'. The table below sets out in part, the nature of disputes referred by police during 1984/85.

TABLE 3

NATURE OF DISPUTES REFERRED TO COMMUNITY JUSTICE CENTRES BY POLICE 1984/85

NATURE	NUMBER
Abusiveness	40
Childrens behaviour	34
General harassment	33
Parent child dispute	13
Animals	10
Assault	19
Damage	17
Threatened assault	15
Child leaving home	4
Sexual abuse	1

Source

Community Justice Centre, Statistical Analysis, Dispute by Nature, 1985. Attorney General's Department, Sydney 1985.

NOTE: A dispute may have more than one nature.

Most of the dispute types set out in the table above involve disputes between neighbours, parents and children and others with continuing relationships. Police intervention, particularly by arrest in these circumstances is likely to contribute to polarisation and escalation of the dispute.

Outcome of Police Referrals

Disputes referred to Community Justice Centres have an almost 50% probability of resolution. Outcomes of police referrals for 1984/85 are set out in the table below.

TABLE 4

OUTCOME BY PERCENTAGE OF REFERRALS BY POLICE TO COMMUNITY JUSTICE CENTRES 1984/85

OUTCOME	%*
Conciliated	21.5
Agreement	23.1
No agreement	3.3
No show	0.7
Party B no contact	13.2
Party B declines	27.3
One party withdraws	9.1

* Does not equal 100 due to rounding

NOTE: Conciliation defined as: An impartial third party acts to bring principals together for the purpose of dispute settlement. A conciliator may continue to transmit offers for settlement from one party to another.

Source: Second Annual Report, Community Justice Centres 1984-85, Attorney General's Department, New South Wales, Sydney, 1985.

Other Police Involvement

Police often have involvement in cases referred to Community Justice Centres by other agencies, in particular those made by chamber and bench magistrates. Police are involved in some way in approximately 90 per cent of referrals from chamber magistrates and bench magistrates. Approximately 50 per cent of referrals from bench magistrates involve persons actually facing police charges. The high rate of police involvement is probably due, at least in part, to the police practice of referring disputants/parties to chamber magistrates for advice.

Community Justice Centre Referral Implications

Most referrals, whether by police or others, have underlying causes and are not necessarily resolved satisfactorily by arrest, charge and court appearance.

Mediated settlements are 'owned' by the disputants, not imposed from above; it is more probable then, that as they are parties to both the original dispute and the settlement that they will abide by their agreements.

Disputes which have been referred and resolved are no longer subject to escalation and as such are not likely to require further police involvement by attendance, referral, arrest or charge.

Resolution of disputes formerly requiring involvement of police, allow for release of staff for other duties, for example, crime prevention, detection of more serious offences and supervision of traffic.

Further, mediation attempts to provide disputants with mechanisms for communication in the future. Problems are more likely to be resolved without third party intervention, in particular by police.

POLICE AS MEDIATORS

Involvement of police as mediators is somewhat problematic due to potential conflict of duty between that of a mediator and that of a constable.

Duty as a Constable

All members of the Police Force hold the office of constable and as such have a duty to preserve the Queen's Peace (Lewis -v- Cottle [1938] 2 K B 454). The Queen's Peace, whilst formerly having a narrower meaning is now taken to mean coming within the jurisdiction of the Queen's Courts, more simply put, coming within the law.

The Police Regulation Act (1899) (N.S.W.) at Section 9 prescribes the form of affirmation or oath to be taken by members of the Police Force. The key areas are '...that I will see and cause Her Majesty's peace to be kept and preserved and that I will prevent to the best of my power all offences against the same...' [See Appendix A].

Section 7A of the Act establishes a duty to protect life and property:

(1) It is, and shall be deemed always to have been, the duty of a member of the police force to protect persons from injury or death and property from damage, whether the persons are, or the property is, endangered by criminal acts or otherwise.

(2) The duty imposed by subsection (1) is in addition to, and does not derogate from, any other power, authority, duty or function conferred or imposed on a member of the police force by or under this or any other Act or by law.

Section 27 of the Act provides:

> Nothing in this Act contained shall be deemed to diminish the duties or restrict or affect the liabilities of constables at common law, or under any Act now in force or hereafter to be passed.

Police have a clear common law duty to maintain law and order; further they also have many duties imposed by statute. In short, a constable has a duty to:

- protect life and property
- detect offenders
- bring offenders to justice
- prevent crime.

Whilst it is true that the law also allows for exercise of discretion by constables in the performance of their duty (Fisher -v- Oldham Corporation (1930) 2 K B 364; and, Attorney General of New South Wales -v- Perpetual Trustee Company (1955) A C 457), this discretion is in reality highly constrained by Commissioner's direction and by statute law. Exercise of discretion is also subject to post facto review, internally by the Internal Affairs Branch, and externally by the Ombudsman.

The Community Justice Centre Act (1983) (New South Wales), Section 27(2) provides protection where a member of the police force makes a referral to a Community Justice Centre for mediation rather than resorting to arrest.

In addition to common and statute law, members of the New South Wales Police Force also have a duty to the National Code of Ethics.

Duty as a Mediator

The path to mediator status within the New South Wales Community Justice Centres of New South Wales is by completion of the Mediator's Instruction Course conducted by the Department of Technical and Further Education and assessment of performance by the Centres' Director. A mediator may then be accredited by the Minister, in this case the Attorney General under the provisions in Section 11 of the Community Justice Centres Act (1983) (N.S.W.). Finally, Section 29(1) of the Act requires that no person shall exercise the function of a mediator before making an affirmation or oath of secrecy. The form of the affirmation is attached [See Appendix B].

The duty of a mediator, unlike that of a constable, has not been the subject of extensive legal examination and interpretation. The law cannot be relied upon to satisfactorily explain what mediation is, what a mediator does or what the duty of a mediator is. Indeed given the privilege provisions of Section 28 of the Act this is most unlikely to happen in the future.

The mediation process as practised within the Community Justice Centres of New South Wales requires a mediator to:

- act as impartial and neutral third parties
- assist parties to reach a settlement or resolution
- maintain confidentiality
- recognise the voluntary nature of participation in mediation
- maintain party ownership of the dispute
- provide parties with a method by which they may resolve problems in the future.

During training mediators also receive instruction on the ethics of mediation.

Conflict of Duty - Constable -v- Mediator

It is clear, then, that there is potential conflict between the duties of constable and mediator. Police duty is essentially the maintenance of law and order; mediation, in contrast, is not subject to extensive legal examination or interpretation, and is a practice bounded by voluntary and ethical codes.

Let us for a moment imagine a hypothetical mediation session in which a constable/mediator had been given details of an abhorrent offence or crime committed by one of the disputants, say, for example, infanticide or incest.

Socrates, in taking hemlock rather than saving himself, demonstrated that duty is not about eloquent words but about difficult personal actions. Our hypothetical constable/mediator now has a conflict of duty. Should he or she follow the duty outlined in the Police Regulation Act and common law OR should the Community Justice Centres Act be followed. How then should the dilemma be resolved?

The hypothetical constable/mediator could attempt to take solace in the Section 28 provisions of the Community Justice Act that makes a mediator (and others) '...not liable to be proceeded against for misprision of a felony...' or the other privilege provisions relating to inadmissibility of '...anything said or of any admission made in a mediation...'. This will, however, not remove our constable/mediator's conflict.

Our constable/mediator could, also, gain some comfort from Section 29 of the Act. Subsection (2)(c) provides for disclosure of information by mediators and others in circumstances:

> where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property.

This would of course not overcome the difficulties of Section 28 (4) of the Community Justice Centres Act (1983):

> Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body.

Our hypothetical constable/mediator may, of course, be placed into conflict again if the circumstances of the offence or crime disclosed was such to require immediate or urgent action; action perhaps involving our constable/mediator in the arrest of a disputant. Nothing that is contained in the Community Justice Act absolves the constable from doing his or her duty. It remains a personal dilemma.

Whilst the situation presented above is hypothetical it is nonetheless possible that a constable/mediator will be so placed. Members of the Police Force are, however, no different in this from members of other professions or occupational groups with duty or ethical standards. We are all faced with conflicts of duty or obligation in our lives. What separates some from the rest is an appreciation that a conflict of duty or of obligation exists.

MEDIATION: A PERSONAL NOTE

I have often been asked why I would want to be a mediator and get involved in the other people's troubles. My answer to such a question is two - fold. First, it had become apparent to me that many minor disputes that formerly, and probably still do find their way into the courts were unlikely to be satisfactorily resolved within the adversary legal system; if anything they will problably be exacerbated. There must be a better way. Second, on a more personal note, this society has not been unkind to me, why then, should I not give something back.

Mediation works. Parties that were not able to talk to each other at the start of a session are at least able to co-exist. Others are able to resolve misunderstandings that have bubbled on for years. Mediation, when it is successful is very satisfying; when unsuccessful very draining. The successes seem to exceed the failures at least in my experience.

CONCLUSION

The New South Wales Police Force applies alternative dispute and grievance resolution processes to its administration and operations. There is a recognition that other methods, for example resorting to the adversary legal system, are not in many cases appropriate where continuing relationships are involved. Equal employment opportunity, sex and race discrimination and industrial grievance conciliation are typical applications within the Force administration. Operationally, alternative methods are applied in contacts with members of the public where appropriate. In the metropolitan area of Sydney and Wollongong, police may refer cases to one of the three Community Justice Centres.

Police made referrals to Community Justice Centres on 122 occasions in 1983/84 and on 123 occasions in 1984/85. For 1984/85 the outcome of police referrals was resolution in almost 45% of cases, comprising conciliated resolution in 21.5% of cases and a mediated agreement in 23.1% of cases.

The types of disputes referred to Community Justice Centres were in the main between parents and children, neighbours and others with continuing relations. These relationships are not usually improved by police intervention in the form of arrest or other adversary legal process. It must be appreciated however, that police are often obliged to follow this course due to the seriousness of the offence or offences involved.

Some conflict of duty, between that of a mediator and that of a constable can exist in some circumstances. These conflicts should not be seen as problems only for police, acting as mediators, but also for others with ethical or professional responsibilities.

The types of cases referred to Community Justice Centres by Police are often those with a history of regular complaint and attendance. They consume large amounts of police time with little probability of satisfactory resolution. Referral to a Community Justice Centre dramatically increases the probability that the dispute will be resolved; also that police attendance will not be required in the future. This does not involve tangible money saving for the Police Force, but it does release staff for other matters of more serious concern.

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APPENDIX A

POLICE REGULATION ACT (1899) NEW SOUTH WALES

Oaths to be taken by members of the Police Force.

9. (1) Subject to subsection (2), no person appointed to be a member of the Police Force shall be capable of holding such office or of acting in any way therein until he has taken and subscribed the following oath:-

> I, A.B. do swear that I will well and truly serve our Sovereign Lady the Queen in the Office of Commissioner, Deputy Commissioner, Assistant Commissioner, Superintendent, Inspector, Sergeant, or Constable of Police (as the case may be), without favour or affection, malice or ill-will, for the period of
> from this date, and until I am legally discharged, that I will see and cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences against the same, and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God.

(2) A person who objects to take an oath as provided by subsection (1) may, instead of taking the oath, make a solemn affirmation in the like manner and form -

(a) substituting the words "solemnly, sincerely and truly declare and affirm" for the word "swear" in the form of the oath; and

(b) omitting from the form of the oath the words "So help me God",

and the making of such an affirmation operates in relation to subsection (1) in the same way as the taking of the oath.

APPENDIX B

COMMUNITY JUSTICES CENTRES ACT (1983) NEW SOUTH WALES

MEDIATOR'S AFFIRMATION OF SECRECY

I, of

being a mediator within the meaning of the Community Justice Centres Act, 1983, do solemnly, sincerely and truly declare and affirm that I will not, either directly or indirectly, except as permitted under Section 29 of that Act, and either while I am or after I cease to be a mediator, make a record of, or divulge or communicate to any person, court or tribunal any information, document or other matter disclosed during or incidentally to a mediation session.

Subscribed at]
this day]
of 19]
before me-] .....
Signature

.....
Justice of the Peace

DE-INSTITUTIONALISED SOCIAL CONTROL : THE EVOLUTION OF INFORMAL JUSTICE AND ITS EFFECT ON GOVERNMENT SYSTEMS OF SENTENCE ADMINISTRATION IN CRIMINAL MATTERS

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INTRODUCTION

Informal justice, or Alternative Dispute Resolution (ADR), has, since the early 70s, evolved into a genuine 'movement' with its own adherents, training programs, conferences, etc.

This movement, while remaining ill-defined, is having a significant effect on the 'formal' justice system. In criminal justice, the influence of this movement can be observed in strategies associated with community policing, prosecution policies, court or judicial administration, and sentence administration.

Regardless of whether ADR programs define themselves as alternatives within the system, alternatives to the system or alternative systems, they all have emerged in response to one or more of the following beliefs:

1. The use of litigation as a primary means of resolving social conflict, particularly disputes between persons where no serious personal harm or 'public wrong' has yet occurred, is not only wasteful in overburdening or overcrowding the courts but is immoral in detracting the judiciary from more serious matters and reinforcing a lack of responsibility-taking on the part of individual citizens.

2. The cost of litigation is increasing creating further and continuing disadvantage to the poor and powerless.

3. The 'psychology' of resolving disputes in an adversarial context is personally and socially debilitating regardless of judgments about outcome (whether they are fair or just).

4. The 'community' should be more involved in the justice process.

5. There is a need to concentrate more on the causes of conflict rather than simply isolating, describing and making punitive judgments about events arising from conflict situations (family difficulties, economic problems, etc.).

6. Sentence administration (corrections) programs are, for the most part, too expensive and 'crime-producing'.

7. State systems of punishment or conflict resolution, particularly in criminal law, are disadvantageous to the specific victim since these conflicts are regarded as violations of public rights and duties. Therefore, sanctions in criminal law are intended to reflect the public good and these sanctions will not necessarily provide direct satisfaction to the victim. (For a useful discussion of this issue, see Ashworth, 1986).

PROBLEMS OF DEFINITION

For purposes of this paper, ADR programs will be defined as any program which attempts to resolve disputes using methods other than those provided in traditional court-related programs and dispositions or government regulatory action. (See also Edwards 1986.) This will allow a consideration of ADR as also including alternatives within the system. This is important to any discussion of the effect this general 'movement' has had on what is commonly known as the correctional system. Technically, however, a 'pure' definition of ADR in criminal matters would not include changes in program structure and style within the system since the system of criminal justice is the traditional means by which conflicts on criminal matters are resolved. Some would insist that ADR be defined as necessitating private sector or non-government status. In North America, defining ADR this way would allow for the inclusion of prison programs given the trend, in some jurisdictions, for governments to contract with the private sector for the provision of custodial programs accessed by order of the court. Indeed, one of the effects of ADR on the correctional system (along with economic considerations) has been this growing trend to 'privatise' programs of conflict resolution which had previously been administered through the bureaucratic apparatus of government.

Having noted this debate on definition, and some of its implications, this discussion will proceed on the grounds that ADR programs do appear in government bureaucracies as proposed alternatives to traditional methods used by those bureaucracies for conflict resolution.

Another problem of definition emerges in relation to this topic. The objective of this paper is to discuss ADR in relation to the post-sentence practices and programs of governments which are usually perceived as responsible for organising and administering dispositions available to the courts in sentencing. In most jurisdictions based on English common law, the basic dispositions in criminal matters, apart from conditional or absolute discharge, are prison, probation, fines, or some combination of these. The definitional problem is, what do you call the bureaucratic agency(s) which is responsible for administering these dispositions? and, even if a common term can be applied, do these dispositions account for the full range of organised state responses to criminal or quasi-criminal matters?

In the jurisdictions with which the author is most familiar, in Canada and the United States, prison and probation programs are usually regarded as correctional or part of corrections administration while the administration of fines is considered part of court administration. An exception to this is in those jurisdictions where fine-option programs have emerged. These are usually operated through probation agencies which most often are part of the corrections system but may be part of the 'welfare' or social services system. Additionally, there are some jurisdictions which attach courtworker and family court counselling programs to correctional administration (for example, the province of British Columbia in Canada) even though these are, at best, programs or services relating to quasi-criminal matters. About the only element of post-sentence programming which is consistently regarded as 'corrections' is imprisonment and even where the broadest definition of corrections is used, some elements of government administration providing dispositions available to the court in sentencing criminal offenders may not be included.

For purposes of this paper, therefore, the term sentence administration rather than corrections will be used to describe the governments' organisation and administration of dispositions available to the court in sentencing. Within sentence administration, the primary focus will be on probation and those programs which have traditionally been accessed through a probation order (although some of these are emerging as options directly available to the court in sentencing) such as, community work/service orders, fine-option programs, restitution programs, family-court counselling programs, etc.

GOVERNMENT STIMULATION OF THE TREND TOWARDS ADR IN CRIMINAL MATTERS

There is really very little doubt that conditions and trends within government programs of sentence administration have contributed to the emergence of the ADR phenomenon. All seven of the concerns or 'beliefs' articulated earlier in this paper have been formally expressed by representatives of criminal justice agencies and the private bar interested in criminal justice matters. In some cases, it could be argued, the 'press for alternatives' originated within these agencies and professional groups. A number of motivations for this interest have been articulated:

1. A 'humanitarian' concern about the conditions associated with criminal sanctions.

2. A 'professional' concern about the failure of criminal sanctions to rehabilitate, deter or prevent crime.

3. A 'socio-political' concern about the lack of community involvement in responding to the crime problem resulting in increasing intrusion by the state and its agencies in the lives of individual citizens.

4. An 'economic' concern about the escalating costs of state initiated methods to resolve or respond to social conflict.

Relatively recent developments within sentence administration reflect these concerns:

1. The evolution of probation systems to provide a non-carceral disposition under conditions of community supervision. Out of these systems has emerged most of the forms of alternative disposition, e.g. fine-options and community work service, etc.

2. The movement toward a reintegration objective and away from the rehabilitation objective in sentence administration. This has resulted in greater attention to support programs for prisoners on release from prison and greater use of community resources to meet offender needs in relation to personal behaviour and community support.

3. An expressed interest in relating dispositions for offenders more closely to the interests and needs of victims of offences - e.g. restitution and victim service programs.

4. Perhaps the most interesting development has been the organisation of the resources of sentence administration (primarily probation) in association with police and prosecution agencies to promote and, in some cases, develop formal and informal programs of diversion. These are programs intended to divert the accused away from the formal criminal justice system, its decision-making apparatus and dispositions, at the earliest possible opportunity.

GOVERNMENT RESISTANCE OF THE TREND TOWARD ADR IN CRIMINAL MATTERS

While it appears evident that there is considerable support within the sentence administration components of the criminal justice system related to the development of ADR programs, there is also resistance. This resistance emerges for several reasons:

1. As the system of sentence administration has changed to accommodate non-traditional or alternative methods, more of the professional supports found in the community are being used with less reliance on the professional/therapeutic skills found in the 'system'. An example of this is the movement in prisons and probation from client-centered counselling approaches to case management approaches. This has changed the sentence administration professional from a 'people-helper' to a 'people-organiser'. For many this is viewed as a loss of status and power. It is a less satisfying role. Consequently, there is a resistance to the development of 'people-helping' services (e.g. mediation/ counselling) which would further reduce the

usefulness and necessity of these services within the system. (One evidence of this professional resistance to changing roles in North America is the growing trend for government employees to seek employment with ADR programs operating in the private sector or to leave government and develop their own private mediation/counselling service.) This attitude among professional groups in government service places pressure on upper level administrators to withhold funding support for private agency programs. This is an important problem since most of the funding support is located in government. An additional result is that this phenomenon may result in the government co-opting private programs initiated with government funding. These programs, of course, may be co-opted simply by removing government funding and absorbing the activity into government operations. (For further discussion of this point see Ekstedt and Griffiths, 1984, Ch. 10.)

2. As greater numbers of ADR programs emerge both within the formal criminal justice system and outside it, the problem of determining and enforcing standards of practice emerges. Problems in this area in recent years has resulted in increasing resistance both by the courts and government bureaucracies to place alleged or convicted offenders in ADR programs. The best example of this in North America is diversion programs where police, prosecutors or probation officers may enter into contract with an alleged offender, a community agency and themselves to place the alleged offender in an ADR program on the understanding that further processing in the criminal justice system will be stayed. Numerous questions related to the standards associated with these contracts have emerged together with claims of double-jeopardy and denial of 'due process' (Ekstedt and Griffiths, 1984, Ch.10). The lack of formal safeguards as provided by the traditional criminal justice process is often considered by the 'system' to be more important than the outcome of an ADR initiative.

3. In addition to the normal bureaucratic resistance to organisational change evidenced in the points made above, there is, especially in the criminal area, a difficulty in the public mind concerning the relationship between ADR and the requirement for punishment in criminal matters. While civil liability may be restitutive in nature, the 'purpose of criminal liability is to declare public disapproval of the offenders conduct, by means of public trial and conviction...' (Ashworth, 1986, p.89) Therefore, efforts to develop ADR programs in the criminal justice area may be further resisted by government as a result of public pressure for a more coercive and, thus, more punitive approach in response to this form of conflict. Consequently, there is considerable evidence that systems of sentence-administration will emphasise ADR programs (both internal

and external) or de-emphasise them directly in relation to public expressions of approval or disapproval. (Ekstedt and Griffiths, 1984, Ch. 4).

CONCLUSION

There is no doubt that ADR initiatives and the concomitant evolution of informal justice has both influenced and been influenced by the formal state systems of criminal justice. While some of the most interesting and potentially successful ADR programs are probably found in the resolution of civil disputes, considerable development has occurred in the criminal area. Community work/service, direct victim services, restitution programs and the wide range of diversion programs all attest to the influence of the ADR movement on the formal operations of the criminal justice system.

The combination of support and resistance within the system of sentence administration may be seen as paradoxical and perhaps even problematic. However, criminal justice has traditionally operated (at least theoretically) as a system of checks and balances so that one component (such as police or corrections) may not deny justice to a citizen simply to promote its own interests no matter how humane or well-meaning those interests may be. As elements of 'private' or informal justice emerge in the criminal area, it may be useful for a similar set of checks and balances to emerge as well.

The promotion of co-operative rather than coercive methods for the resolution of social conflict is a highly desirable objective, particularly in social systems based on democratic principles. The evidence is that decisions reached by co-operative means are not only more humane, they are better decisions. The anticipated outcome may be less ideal than one arrived at by fiat or by adversarial means, but it is much more likely to be realised in the lives of the persons most affected by both the problem and the decision to resolve it. One continuing influence of informal justice or ADR initiatives is to keep this principle constantly before the formal, state bureaucracies responsible for criminal justice matters.

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IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE CRIMINAL JUSTICE SYSTEM

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There are no formal mechanisms in New Zealand for conciliation or mediation of matters involving criminal offences. The resolution of criminal disputes is in urgent need of attention because the present court system is in danger of buckling under its own weight. Occasional increases in the number of judges, the potential use of instant fines for lesser offences, the decriminalising of certain traffic or public welfare offences, or other administrative responses, could help reduce the load, but of themselves are not total solutions to the problem.

There has been a recent upsurge of interest in the use of alternative dispute resolution methods. From the litigant's point of view it has to do with expense of litigation, delays and accessibility to the court. It also has to do with fear of courts and the uncertainty of litigation, the associated stress, and the fact that agreed settlements generally are preferable to imposed solutions. Alternatives to the court may be a more economical form of dispute settlement.

I would wish to stress, however, that we cannot countenance any new system which might take away basic rights. Indeed, I do not think the public would have much confidence in such a system. My examination of alternative dispute resolution, therefore, is subject to this caveat.

To summarise the New Zealand scene, we have three discernible types of alternative dispute resolution mechanisms in place: first, true mediation as in the community mediation project (see Jan Cameron's paper) set up outside the court structure, where the voluntary process is centred around the disputants with non-authoritarian mediators merely assisting in finding a solution; secondly, mediation coupled with investigation performed by a non-authoritarian figure as part of a quasi-judicial structure such as exists in the human rights and tenancy legislation; and thirdly, conciliation and/or mediation as part of the statutory court procedures of the Family Court in New Zealand. It is to be noted that in respect of community mediation, failure to reach agreement does not result in the matter proceeding to a higher tribunal within that system, whereas in the other instances

failure at conciliation or mediation level (unless the parties subsequently agree themselves) results in a quasi-judicial tribunal or in the case of the Family Court, a court adjudication on the disputed issues. However, the important issue is whether results are achieved. It is clear from available statistics and also from my own experience that such methods are working successfully. Indeed, in the Family Court, mediation is now an integral part of the system.

Within the criminal justice system, the use of reparation meetings between victim and offender provides an interesting example. It does not happen often but when it does the general feeling of probation officers is that it is successful, that something has been achieved particularly in the intangible, emotional area. The victim has gained in understanding; the offender has apologised directly to the victim. I have two examples:

(a) The victim was an articulate teacher who also owned a small restaurant. He had been assaulted and his property ransacked. The young Maori offender was inarticulate. The probation officer arranged for a Maori voluntary social worker to be present as support for the teenager - because of the power imbalance factor in mediation. The victim was able to get his feelings off his chest and wanted to understand the offender's behaviour.

(b) In another case, the victim - a woman of a very different socio-economic class - met the offender and expressed annoyance at the length of imprisonment ordered by the court as the disposition of the case.

What are the advantages and disadvantages of the present systems? This can be considered in two ways: first the comparison of alternative dispute resolution methods at present in place with the adjudication or court process; secondly, the comparative advantages and disadvantages of true mediation (eg. community justice centres) as against structured (ie. part of a court system) mediation.

A major advantage of alternative dispute resolution is a greater informality in resolving disputes, providing less trauma and less anxiety for the participants. If the outcome is successful then the agreement is something that has been worked out and agreed to by both parties. They participate more in the process and have less fear as to the outcome. It is also a cheaper system of resolving disputes. Thirdly, problems or disputes which are not suited to or even acceptable in, the present court system can be resolved by alternative methods.

The disadvantages as I see them are that alternative methods may fail to resolve the dispute; voluntariness may lead to a refusal

to participate. Furthermore legal principles may be overlooked or ignored (whether this is a good or a bad thing would depend on the circumstances). There may then be some incompatibility between the two systems. It would arise firstly from the means used by the alternative methods where strict rights could be overlooked or ignored (as the Americans would say, 'lack of due process'). Secondly, the end result may not accord with the law. For example, under New Zealand matrimonial property law, parties to a marriage have more or less defined rights. A mediated settlement might ignore those. However, the problems need not arise if lawyers are involved in the process as they are in Family Court mediations.

The advantages and disadvantages of true mediation as against structured mediation incorporate some of the foregoing matters. Specifically I see true mediation as not yet fully accepted by the New Zealand public as an alternative to the court structure. (This may be historical as in the law we are prisoners of form to a large degree.) A true mediation system might take too long to resolve disputes. There is no right of appeal and the decision reached is binding only so far as the parties wish it to be. The rules of res judicata do not apply. The legal ethical rules do not apply. On the other hand, structured mediation can have the drawback of the authoritarian figure forcing agreements on parties which they might not otherwise want with a likelihood of less acceptance of and refusal to implement the agreement. There is, however, no research to show that agreements reached in structured mediation are less effective than any others. In the Family Court I feel that structured mediation may be more effective, particularly in intractable cases. (I have gained the impression over the years that in some instances parties feed on the dispute and use the litigation as an emotional crutch of self-justification.) The success of Family Court mediation has been achieved because it is a non-adjudicative process; because an authoritarian figure has conducted the mediation; because there is the ever present knowledge of adjudication if agreement is not reached; and because in guardianship, custody and access cases the focus is away from the immediate participants. The incentive of avoidance of adjudication in my view focuses the parties on the real issues.

Although the public, the lawyers and the judiciary do not fully accept alternative dispute resolution, attitudes are changing and mediation, in particular, may be the means by which we ease the litigation system towards the 21st century. There is no doubt that alternative dispute resolution methods are appropriate for some types of disputes within the present court system. I see no impediment to the use of structured mediation in civil litigation and mediation conferences could be combined with pretrial conferences. Perhaps a better description would be 'settlement conferences'. The experience of the Small Claims

Tribunal in New Zealand indicates that this could work in civil litigation at least where the cases are simple. I am yet to be convinced that such a system would work satisfactorily in complex civil litigation involving for instance a multinational company. Structured mediation in the Family Court is here to stay and there is no doubt that all matrimonial issues can be mediated. Such a system might also be implemented in relation to family protection and testamentary promises actions.

However, I see difficulties in implementing structured mediation and indeed any alternatives in the criminal and quasi-criminal jurisdiction. The Children's Boards and Police Youth Aid are a start and there is a move in new legislation to have 'complaints' which are filed in the Children and Young Persons Court and which are quasi-criminal proceedings addressed to parents in neglect cases, dealt with in the Family Court. If this occurs then it may be in due course that mediation conferences will be called in respect of those proceedings.

I am at a loss to suggest anything constructive for the adult criminal jurisdiction. The state as the guardian of the so-called 'public interest' has a large stake in criminal proceedings and we have moved a long way from allowing the offender and the victim to resolve alone their dispute. The basic question is whether the present system of criminal justice in New Zealand needs improvement and if so whether that improvement takes the form of alternative dispute resolution. The problem would need to be identified and then considered from the point of view of the offenders, the victims and the state (not necessarily in that order). The solutions would need to improve the present system but can we, for instance, do better than the adversary system, as a fact finding vehicle in criminal cases? If the adversary system is left intact there is little scope for change pre-conviction. Post-conviction trends are more promising and could be extended in the compensation/reparation areas.

Before we can effectively institute anything like mediation or conciliation in the criminal jurisdiction there will, in my view, have to be a new approach to crime and criminal offending. Proponents of our present system will say that most of the rules and protective mechanisms of the criminal law were hard won over the centuries and that change is unthinkable. Might I be so bold as to suggest that if our criminal law system was more inquisitorial and less adversary then there would be greater possibilities. In New Zealand the present criminal law system lies rather uneasily with an increasingly enlightened sentencing approach. We have the adversary system of adjudication, played like a game, with great emphasis on winning or losing. If the accused is convicted he or she is then subject to a rather benevolent sentencing process where his or her welfare or rehabilitation are given a reasonably high priority. I detect

in some quarters, particularly in America, and it may apply here in Australia, that with the increasing crime rate, particularly crimes of violence, there is a definite swing away from that type of sentencing to a more punishment oriented sentencing. The resolution methods on to the present criminal justice system a fresh approach will be necessary before anything worthwhile is achieved. Even then the preservation of basic rights of the individual will remain a stumbling block.

How can future steps be implemented?

I see a place for community mediation projects and I would be happy to see the justice system tap into these services. A good example exists at this moment in the matrimonial property field. Arguments over goods and furniture tend to be protracted, and waste much judicial time. Ideally they should be mediated and this could be done quite outside the court system. Provided disputants are made aware that failure to resolve their dispute does not preclude them from legal resolution I see the community projects working alongside the court system. I see no objection to private mediators operating as is done in the United States of America provided once again there are the safeguards I have already referred to. As far as the court system is concerned I consider that conciliation and particularly mediation should be given more exposure to the public by inclusion by statute where appropriate in the present litigation process. A starting point might be in the civil litigation area. If and when there is general acceptance of say mediation, consideration could be given to the establishment of a mediation court as part of the legal system. The Family Court in new Zealand is heading in that direction already. Such a court would be in line with what has already happened in parts of the United States. It would require mediators trained not only in mediation skills but also in the law. Parties to a dispute could then either choose the mediation track or the adjudication track and the choice of the former would not preclude access to the latter. Such a court could also take over all structured mediation rather than have the litigation judges involved with it. It would have authority and standing, and would include lawyers, but it would also be clearly defined as a non-adjudicative body. I consider that it would then have more chance of being accepted by the public. But all that is in the future.

MANAGING PROGRAMMES

SETTING UP PROGRAMMES - QUALITY CONTROL AND TRAINING - LEGISLATIVE ISSUES AND MANAGEMENT STRUCTURES

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1986 is International Year of Peace. It is easy for the community to view peace as a worthwhile objective - even as necessary if we are to survive - but something that is the responsibility of world leaders, not really something we, at a local level, can do much about.

ADR programmes are a practical example of peaceful resolution of disputes at a local level. It is appropriate for 1986 to begin a process in Australia of a sharing of ideas, and the important documentation of ideas, programmes and techniques will enrich and improve the practice of alternative dispute resolution in Australia.

ADR is finding itself more and more in the spotlight - sometimes it seems to be "flavour of the month". Programmes are proposed, changes to existing structures suggested. It is essential that we get our act together, to make sure that ADR programmes are based on solid practice, understanding of what we are doing, and respect for human rights.

It is not my intention to be an AMC (Alternative Management Consultant) in this paper. It is sufficient to say that sound management practices are as essential to ADR programmes as they are to BHP.

Most implementation or management committees will begin with an exercise to "determine our objectives" - a worthy and necessary exercise. The result will usually be a polite form of words, agreed upon at great expense of time and energy (and perhaps with the assistance of highly paid consultants).

I suggest many ADR programmes - especially if they are "handed down" by funding organisations, are given an undeveloped brief. Much effort has to go into determining these vital questions of "why are we here", and "what is expected of us". This is an intellectual exercise - if usually invested with a high degree of emotion, as radical and conservative forces clash.

As the planners and managers come to grips with these questions, a product more important than mere objectives and strategies emerges. This product is the philosophy of the programme - its underlying beliefs and principles. It emerges from an often anguished recognition of what is important about what the programme is attempting.

Unlike the statement of objectives, it is unlikely to be written down, and is perhaps not even clearly identified.

Developing and understanding the programme's philosophy allows all other decisions to be based on one simple principle:

> The practice of the programme should be consistent with its philosophy.

I think this should be emblazoned on the desk of every ADR manager and should be intoned regularly at management and implementation committee meetings.

Simple as it sounds, this is not at all a comfortable doctrine. In fact, it is decidedly uncomfortable. Adoption of it may end much of the agonising over "what should we do?" or "how should we do it?" But, in its place we have a gut-grabbing knowledge that, to maintain our integrity and our direction, we have to do things that are personally difficult, threatening and potentially isolating. We have to come to terms with our prejudices, our carefully nurtured protective devices and, most difficult of all, with open and honest communication. We have, in fact, to take our own medicine. This is the "uncomfortable" side of this doctrine.

WHAT THEN IS THE PHILOSOPHY OF ADR?

(1) Who does it serve?

Central to the philosophy is the question of

> Who does the programme serve?

This seems a basic question, but too often this is poorly defined - or defined and then forgotten. "The Community" I expect will be the answer - but I challenge this easy response.

"The Community" as defined by whom? The whole community? Or part of it? ADR clearly does not service that part of the community which seeks to profit from continuing conflict or escalating litigation.

"People in dispute?" - comes closer. Do we <u>really</u> claim to serve people in dispute who are determined to win?

Assuming the programme is to serve the users - ie. people in dispute who want resolution by ADR methods - programme managers must ensure that this is maintained.

The world of "Community service" is littered with memories of organisations that forgot this basic consideration and began to serve an elite group, individual political ambition, leadership egos, or, more frequently and more sadly, served principally the "providers" - the staff, volunteers and committees. Rarely is this done with malicious intent or by design. More likely, the focus changes gradually, with the programme continuing to provide a service to users, but in reality the resources are directed more and more in other directions. The new consumers of the programme's resources are likely to be stakeholders in the programme. It is appropriate that stakeholders (or people/groups with an interest in the programme) consume some of the resources; it is unacceptable for this to become the primary function.

There is a responsibility to build into structures and processes mechanisms for accountability that will prevent inappropriate diversion of resources and energy. As public resources become more and more limited, the accountability of all programmes becomes more and more important.

ADR programmes can be both effective and efficient. It is up to programme planners and managers to ensure that they are, and are seen to be.

(2) Who makes the decisions?

ADR is based on the willingness of parties to enter into dispute resolution processes. I suggest ADR represents an opportunity for people in dispute to continue to own and control their own dispute, and to make decisions regarding the resolution of the dispute.

It is this involvement of disputants in the decision making processes that distinguish ADR from a process of merely de-mystifying the law and bringing it more in touch with users of the system.

If we assume that all ADR programmes contain elements of decision-making by the person in dispute, identification of the extent and timing of this decision making helps to determine many other aspects of the programme.

For example, an arbitration programme where the parties are able to decide on who is to arbitrate will require different intake processes from one where the parties' only decision is to accept the decision of the appointed arbitrator.

The programme where decisions are made on the basis of regulation requires different arbitrators than a programme whose arbitrators act more as "creative problem solvers".

A mediation programme where the mediators do not make substantive decisions or offer "expert" opinions demands practitioners who can accept that the users know best what is O.K. for them.

If a programme is based on "expert" third parties making decisions for the parties, all decisions regarding allocation of resources, all decisions on who the third party neutral will be, are determined. This path leads back to an adversarial model which may begin as ADR, but will soon be encumbered by demands for legalities, representation and appeals procedures. Recognition of these probable demands helps in estimating the financial resources needed, and in deciding on the relevance of legal qualifications.

Such consideration will lead us to ask -

(3) How alternative is it?

ADR programmes can range from a specialised informal part of a highly formalised court system, to quite unstructured attempts to provide third party neutrals. ADR cannot be tidily enclosed in one box, with the traditional legal system in another.

ADR does not operate in a vacuum. It operates within the community, and all aspects of its operation will impact on the community.

No matter how "alternative" we may want to be; no matter how unsatisfactory we might think the "traditional system" is, we must be careful that we do not take away from people in dispute rights that have been established - often after a long hard fight.

Maintenance of rights may seem at first glance to sit oddly with ADR, but incorporated into the philosophy of a programme, such an ideal will ensure ethical practice, and ultimately credibility and acceptance.

Although we know who the programme is to serve, and who is to make the decisions, and we know how alternative it is to be, or can be - do we yet know what it is we are trying to do? We might well ask -

(4) What is the point of it all?

In straight management talk, this becomes consideration of our "Charter".

Do we want "Peace"?
Or is it "Understanding"?

It's easier if the point of it all is to make decisions for people. Generations of judicial structures and government departments have been doing this without noticeable argument about why they are doing it.

I suggest that the more "alternative" the programme becomes, the more "user-centred" it becomes, the harder it is to be specific about these questions.

The purposes mentioned frequently in ADR circles include

- communication between disputants
- taking responsibility for ones own action
- co-operative problem-solving
- recognising difference
- mutual understanding

- none of which are easy to tie down into concise, measurable objectives.

However, a commonly held belief of what the programme is all about is necessary if the programme is to function in an acceptable manner.

The importance of this belief or understanding is clearly seen when a programme encounters a conflict of roles - when the programme is at odds with its funding or parent body, or when staff and management are operating on apparently different beliefs.

In these circumstances it might help to refer back to the programme's objectives. A charter, if formulated, is likely to be too vague, or all-encompassing.

Provided there has been some prior discussion of underlying principles and beliefs, relating the disputed practice to the philosophy is more likely to provide meaningful guidance.

Ironically, such discussion and development of understanding is itself consistent with the philosophy of that part of ADR based on open communication - or the mediation end of the spectrum.

Generally it is accepted that mediation is based on a full and open discussion of all issues relevant to the dispute and to the relationship between the parties, and that the parties make the decisions on settlement.

For an ADR programme using mediation, this ideal of open and honest communication places certain responsibilities on the practitioners. It is not good enough to say that "they", (the disputants) must be open and honest, unless we (the practitioners) are prepared to demonstrate openness and honesty. After all, we are all presumably on the same side, whilst "they" have been enemies perhaps for years.

If the programme's practice is to be consistent with its philosophy "we" must not only be open and honest with "them" but also with the rest of the "we" - that is, our colleagues and all other stakeholders in the programme.

This is the uncomfortable side of the doctrine I referred to earlier.

Ensuring that practice is consistent with philosophy is relevant also to communication between ADR practitioners. We assume that ADR users have at least a willingness to work out their differences.

ADR practitioners, to be consistent, should be prepared to enter into discussions with one another in a spirit of open communication and creative problem solving.

We all know of course that our own programmes have found the "one true way to peace".

It is inappropriate however, for ADR practitioners to begin any process of exploration and negotiation with an inflexible agenda and fixed positions. Like most ADR processes, the most useful exchanges will occur when there is opportunity for "explanation", "exploration" and negotiation.

Three specific areas have been suggested for more detailed consideration at this stage of our development. These are "Setting up Programmes", "Quality Control and Training" and "Legislative and Management Structures". Like most of the complex disputes dealt with by ADR programmes, all of these issues overlap to varying degrees. There is no doubt, however, that detailed consideration and worthwhile discussion of all areas is enhanced by practitioners having a clear understanding of the philosophy of their own programme.

The following consideration of these three areas is intended to raise issues, not to provide answers.

SETTING UP PROGRAMMES

The period of establishment of a programme is one of excitement and stimulating discussion - often coupled with frenzied activity and unparallelled frustration.

It provides the opportunity for and challenge of making decisions in the absence of precedents.

At some stage, objectives will have been established - either formally or informally.

Implementers and planners have many "nuts and bolts" issues to consider, as well as the philosophical ones.

There are problems of securing adequate funding and other support, conflict with established organisations over "turf", and the difficulty of getting access to relevant information on other ADR programmes. Having gained information, the implementing manager must determine what processes and techniques can be "borrowed", or whether the programme needs to invent its own. Scarce resources can be wasted on re-inventing the wheel but I acknowledge that this process of invention may be more important to the programme than the wheel it invents.

The implementers must consider training and quality control. Issues of legislation and legal rights must be considered, and management structures determined.

Ultimately the credibility of ADR (and its survival) will rest on accountability. Whose responsibility is that? The implementers, the managers, the practitioners or the funding body's?

A prime consideration when setting up programmes is of course the "style" of service to be provided - including the method or methods of dispute resolution to be employed. Understanding the programme's philosophy makes this easier, but does not make the decisions - especially where the programme has more than one role.

An often neglected aspect of planning programmes is the design of "intake" processes. I define these as the processes used by the programme in contact with the disputants before the actual resolution session begins. Definition is a problem - as this part of the contact may in itself involve recognisable dispute resolving techniques in order to get agreement to enter the process.

Development of these processes usually seems to be left to the implementing manager, and in the past have been (and I believe still are) the "Cinderella" of ADR. This is ironic when considering that they concern 100% of the programme's caseload and the mediation or arbitration may involve only a small part of the case load.

Programmes where these processes are not consistent with philosophy run the risk of conflict between staff and resolvers, or between sections of the organisation.

Another neglected consideration may be the time of entry to the dispute - and how to enter it.

This question of who, how, when and why to enter a dispute as a third party neutral has implications for all aspects of programme management - including legislation. It has a role in determining the role of the third party neutral, in determining the mode of dispute resolution to be employed. This area is deserving of detailed consideration by planners and managers.

Like all other aspects of management, entry into a dispute must be consistent with the philosophy of the programme.

QUALITY CONTROL AND TRAINING

Consideration of this aspect of programme management should begin by questioning whether training and quality control are in fact necessary. If "ordinary people" can be mediators, as asserted by community mediation programmes, can they be effective as they are, without specific training?

There is a need for information on the levels of training of third party neutral available and used in Australia.

Quality control of ADR is often put in the "too hard" basket, although some mechanisms are now demonstrating effectiveness - both of ADR and of the quality control mechanisms.

The issues of Quality Control, Evaluation and Research are not always considered apart, and in turn are part of the accountability of the programme.

ADR programmes have been (and continue to be) evaluated to an astonishing degree. However it is rarely that an evaluation comes to grips with quality control - probably because the evaluation is of the inevitable "pilot phase" of the programme when quality control does not usually emerge as an issue until later. I acknowledge also the difficulty of evaluating "quality" of a new programme where there are no precedents.

Training cannot be divorced from decisions on who will be the third party neutral, and just what their role is to be. This question in turn is the subject of other discussions.

LEGISLATIVE AND MANAGEMENT STRUCTURES

These two topics are discrete, but interdependent. Any legislation should consider proposed management structures, any management structures must be conscious of legislated requirements. Both are issues faced by people responsible for setting up programmes. Quality control and training issues impact on

legislation and management.

First consideration is the question of need or not of legislation. As with all other issues, understanding of the philosophy is the first necessity. This issue cannot be considered in isolation from the issues of access to law, and the rights of all people concerned with the dispute and its resolution. It is inappropriate that an ADR programme, purporting to be an advance or improvement for the community, should in fact take away rights from individuals - or put them into a worse position.

ADR would soon lose credibility if a programme established to reduce litigation resulted in increased actions and appeals.

Management structures of existing ADR programmes are even more varied than the techniques used for dispute resolution. All new programmes seem to need to design their own structures. Each community has a sense of its own individuality and demands a design and a structure "that is right for us". This of course is entirely consistent with the philosophy of mediation where the people concerned know what is best for them.

As well as the management structures of programmes, the place of ADR programmes within the broader structure of government and community is an important issue.

I have not raised in this paper the specific question of who is in control of the programme - the "community", the "workers", the "bureaucracy" or any other equally mysterious "them". This very basic decision may have an almost overwhelming impact on the management structure and legislation.

Perhaps we should ask ourselves just how "alternative" or creative we want to be. Is it really "alternative" to simply follow the pattern of other programmes that were, in their time "alternative" by being community controlled, or having community based management structures.

I argue that the New South Wales experience of devising an alternative that operates <u>within</u> the system represents an innovation beyond "community management".

The following lists of possible discussion subjects demonstrates that, like most disputes, isolation of just one aspect (or incident) is unproductive. However, like ADR processes, the complexities of setting up and managing programmes can be separated into "bite-sized" proportions, provided all issues are considered, and we don't lose sight of the philosophy of the programme.

Setting Up Programmes	Quality Control and Training	Legislation and Management Structures
Who makes the decisions?	Who makes the decisions?	Who makes the decisions?
Philosophy	Philosophy	Philosophy
Objectives	Objectives	Objectives
Who is responsible?	Who is responsible?	Who is responsible?
Establishing need	Establishing need	Establishing need
Credibility	Credibility	Credibility
Accountability	Accountability	Accountability
Standards	Standards	Standards
Quality control and training	Who is 3rd Party Neutral?	Quality Control
Legislation	Who does training?	Who does training?
Management structures	Fitting training to legislation	How is it set up
Who does the training?		

I trust this seminar will be effective in establishing communication, exploring issues, accepting responsibility and reaching agreement.

ESTABLISHING AN ALTERNATIVE DISPUTE RESOLUTION PROJECT WITH A COMMUNITY BASED PHILOSOPHY

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INTRODUCTION

The 1984/85 Federal Budget made provision for funding over a two year period for the establishment and evaluation of the Family Conciliation Centre pilot project. Under the project the Federal Attorney General's Department has funded two centres, one in Wollongong, N.S.W. and one in Noble Park, Victoria. The objectives of the project are to provide accessible, community-based services which assist families resolve conflict and offer an alternative to litigation for the resolution of family disputes. The Noble Park Centre identified `community mediation' as the alternative dispute resolution philosophy best able to assist it meet these objectives. This paper outlines the Noble Park experience of putting this philosophy into practice.

The establishment of a new project is an interesting venture. It provides both opportunities and constraints to the funding agency, the service system of which it becomes a component, management and workers and the community in which it is located. It is important that both benefits and costs are acknowledged and I will attempt to identify those which have become evident in the planning, implementation and evaluation of the Noble Park Family Conciliation Centre. Many of you have trodden this track before me and I hope that our collective experience will make it easier for those who follow and those who fund.

CONTEXT FOR THE FAMILY CONCILIATION CENTRE INITIATIVE

A number of legal, social and political influences can be identified in the climate which prompted the then Attorney General, Senator Gareth Evans, to act upon the Family Law Council's recommendations and establish the pilot project. Some of these are identified and their continuing influence upon the Centre's development and its future beyond June 1987 should be acknowledged.

a) Family Law and its Administration

The Family Law Act, 1975, followed trends in other western countries to remove the concept of `fault' from divorce, give prominence to the `interests' of children in decisions which affect them and encourage separating couples to make decisions themselves and rely on adjudication only where attempts at private decision making and conciliation have failed. Consistent with the Act's philosophy a Family Court was established which offered opportunities for people to make applications without legal representation and employed personnel whose task is to provide information and facilitate settlement of disputes through conciliation.

After 10 years of experience both intended and unintended consequences of the Act and the Court's two tiered model of operation have been identified. These have been documented in a number of sources and a range of remedies and improvements proposed. Those which I suspect had particular influence upon the decision to establish the Family Conciliation Centres were:

Firstly, the majority of people who access the Court's conciliation services do so after litigation has commenced. Given the high rate of agreement reached in Court conciliation (Bordow, 1982) it has been suggested that earlier access to services offering the opportunity for agreement preparation may reduce, still further, litigation in Family Law matters.

Secondly, it has been suggested that the Court's adherence to and acceptance of the conciliation philosophy has left it a `weak' and `ineffectual' Court which does not obtain the respect needed to enforce orders. In particular, the inadequacy of the Family Court in dealing with domestic violence has been cited (Waters, 1985). It has been suggested that a physical and/or administrative separation of the conciliation and adjudication functions of the Court may have advantages (Kiel, and Kingshott, 1985, p.2 - 6).

Thirdly, the costs of legal aid in Family Law matters and Court administration are increasing annually. Measures which reduce litigation and

`screen out' of the system those who would be better served by other services or who could make their own arrangements with minimal assistance are proposed as a way of reducing costs.

An additional issue is that State and Federal Governments have complementary and sometimes competing jurisdiction for different types of family disputes.

State laws and courts deal with children and property of couples who are not married as well as custody and guardianship under child welfare legislation. The Federal Government has jurisdiction over marriage, children and property of a marriage. This can be confusing to the community, costly to service users as they attempt to unravel the `maze' and involves a certain amount of duplication of court and service costs.

A `one stop shop' on family matters could reduce confusion.

b) Families and the Pressures Upon Them

Family cohesion has been identified as vulnerable in a community where employment is increasingly insecure for some, two incomes are frequently necessary to purchase a family home, parenting responsibilities compete with work responsibilities, and one consequence of family dissolution is women and children living below the poverty line in increasing numbers.

Research undertaken by the Institute of Family Studies and others has improved our knowledge of social factors placing pressure upon families (Social Support in an Australian Community, 1982, p. 10) and has been accompanied by increasing demands for a redirection of Federal Government spending. Some suggest that the investment in the `divorce industry' should be redirected or matched by investment in family support services and intervention pre-separation.

c) Federal Government links with `Community' and Current Funding Strategies

In looking at the context of the Family Conciliation Centre development it is also relevant to take a cursory glance at Federal Government funding for community based programs.

In response to demands from the women's movement in the early 1970s the Gorton Government by-passed conservative State Governments by making grants for child care services directly to community based organisations on the basis of submissions demonstrating `need', management viability etc. This pattern of Federal Government grants to geographic communities or small organisations was expanded during the years of the Whitlam Government. In the last 10 years this trend has been reversed. The pattern of funding is now increasingly in the form of tied and untied grants for State and Local Governments to administer. Where grants are provided direct to communities it is usual for a Federal-State consultative mechanism to be established. Federal bureaucracies consequently have limited direct experience of the `communities' selected to sponsor the projects.

The Attorney General's Department does provide funding to community legal services and some community based agencies providing marriage guidance counselling. Economic restraint has contained the expansion of these programs in recent years with the consequence that the Department has not had the opportunity to deal with `new' communities seeking funding for initiatives.

d) Community Service Development in Victoria

In setting the context for the Noble Park Family Conciliation Centre development it is important to draw attention to the Victorian scene. Community based and accountable services have an extremely strong tradition in Victoria. This philosophy underpins a major proportion of our health, family support and increasingly education service provision. The tradition is a legacy of a number of things including Victoria's scale, rapid urban expansion in the 60s and 70s and government funding strategies. A preference for community based services can be traced back in time a long way but received particular impetus when after the withdrawal of the Whitlam Government's Australian Assistance Plan a State version, the Family and Community Service Program was implemented. F.A.C.S. as it became known has provided an avenue for funding community initiatives and also placed

conditions of service accountability to users, the community, and funding body. The program also established regional consultative mechanisms representing the key community service departments, local government, major agencies and elected members. This imposed a mechanism for liaison and information sharing.

Community based organisations and self-help groups have also received considerable backing from the Victorian Council of Social Service. V.C.O.S.S. has advocated strongly to State and Federal Governments on issues of funding, organised legislative changes so that incorporation was flexible and not tied to 'charity' models (via the Voluntary Association Act) and resourced groups with information.

I shall refrain from discussing comparative socio-political theories which suggest that community involvement/management models as promoted in Victoria are frequently mechanisms to increase State intervention and control and diversion from class or community action. However, in closing the discussion on the community context of the pilot project I will make the highly subjective statements that in Victoria 'community' implies more than the 'spray on solution' of the 1970s Bryson and Mowbray, 1981).

e) <u>The Springvale/Dandenong Community</u>

The decision was made to locate the two Family Conciliation Centres in communities serviced by newly established Registries of the Family Court of Australia. It has been suggested that the rationale for this decision was prompted by concern that the Centres and their potential service users would be disadvantaged if access to the Family Court was limited. Alternatively, it has been suggested, that the Centres were intended as the conciliation arm of the Wollongong and Dandenong Registries. Irrespective of the reasons the choice of service location can be identified as having a considerable impact upon their respective development. In relation to the Noble Park Centre's development, factors which can be identified as important in the community context are outlined.

Firstly, of importance is the 'regional context'. For the purposes of planning and service delivery

Community Services of Victoria has divided the State into eighteen regions. The municipalities of Springvale and Dandenong are located at the north-western extremity of the Westernport Region. The region covers an area of 3,506 sq. km. and has a population of 441,780 in 1983 living in rural towns and hamlets in West Gippsland, Mornington Peninsula and Dandenong Ranges; retirement and holiday settlements along the perimeter of Port Phillip and Westernport Bays; and suburban settlement often in large 'new' housing developments. Population growth in the region is rapid.

Secondly, Dandenong and Springvale have dissimilar functions within the region.

The City of Dandenong is a traditional service centre. It was the market town for West Gippsland and is, today, a regional service centre from which de-centralised Government departments, instrumentalities and community service agencies operate. Amongst the latter are offices of the Legal Aid Commission of Victoria, Catholic Family Welfare Bureau and Marriage Guidance Council. Dandenong has a relatively small residential population of whom those of Russian and Dutch extraction are sizeable minorities.

In contrast, the City of Springvale is a large municipality with pockets of older residential areas but with most housing being established during the 1960s and 1970s. There is a diversity of socio-economic statuses which can be identified geographically, e.g. Dingley being an area of middle and upper income groups and Noble Park North being lower income groups.

Springvale has a tradition of being the 'first' home of newly arrived migrants. A migrant hostel, until recently, was located within the municipal boundaries and successive waves of Greek, Turkish, Vietnamese, Cambodian and more recently Ethiopian and Angolian migrants have settled in the municipality. Work is available in the large industrial complexes which stretch along the south of Dandenong Road between Clayton and Dandenong. These are predominately devoted to automotive industries.

Community service provision within the City of Springvale has developed incrementally. Groups of

residents, workers and politicians have affiliated on the basis of interest, geography, religion and ethnicity to develop service proposals, obtain funding and manage services. The City of Springvale has strongly supported such groups. The result is a range of services developed upon resident/consumer advocacy, self-help and community based principles. Examples are the Springvale Legal Service, Springvale Community Aid and Advice Bureau, Keysborough Parish Centre, Indo-Chinese Mutual Assistance Association, Latin American and Turkish Associations.

The differences between the two municipalities in terms of their function within the region, their population and service delivery tradition has had implications for the development of the Noble Park Centre. Foremost was how the proposal was viewed. In Springvale, a proposal which offered resources and additional services, e.g., financial counselling, without the usual preliminary fight for funding was seen as an opportunity not to be missed. In contrast the Dandenong service network had the expectation that the new Family Court Registry would complement existing services and meet needs identified. Further, two Dandenong based agencies, Catholic Family Welfare Bureau and the Marriage Guidance Council of Victoria received funding from the same source for what was perceived as similar work. Secondly, was the decision making processes within the two communities. Dandenong services being predominantly regional offices of centralised organisations have limited autonomy. Reaction to the proposed establishment of the Family Conciliation Centre would, therefore, have to be checked against the policy of the 'parent' organisation. This can take time. In contrast, Springvale based organisations had ready access to their policy making bodies. They were in a position to have an opinion about the proposal in a shorter space of time.

In summary, the social, legal, political and community service delivery traditions of both immediate and broader communities as well as of the funding body can be seen to have an influence upon the development of the Noble Park Family Conciliation Centre pilot project.

GUIDELINES FOR FAMILY CONCILIATION CENTRE DEVELOPMENT

In July 1983 the Attorney General, Senator Gareth Evans, asked the Family Law Council to advise him on the implications of introducing `family law clinics' as a means of improving services to potential Family Court litigants. The proposal had been developed by the Chief Judge of the Family Court of Australia. Justice Elizabeth Evatt had alerted the Attorney to the potential of reducing family law litigation by improving access to information, community education, conciliation and mediation services. The Family Law Council investigated the proposal and reported in November 1983. The Council confirmed the Chief Judge's opinion and set out principles, role, structure and the services to be provided as well as recommending implementation on a pilot basis. The report also delineated some alternatives to be considered in the development of a mediation service. These I shall outline briefly.

Firstly, the report reinforced the intention of the Family Law Act (1975) that adjudication be used as a last resort only when other attempts at bi-lateral resolution have proved unsuccessful. In this regard the Council stated:

> The Council considers that the conciliation process should be available first, before litigation is instituted, rather than, as tends to be the situation at the moment, it being an integral part of the litigation processes. (Family Law Council, 1983, p.4)

The Council therefore proposed that services be located in the community where they would be accessible and linked with existing community services which would offer a wider range of options for assistance prior to litigation.

Secondly, the Family Law Council argued that the State had an obligation to offer various avenues for dispute resolution and endorsed the potential of mediation as an alternative to the justice system. The Council quoted Lord Devlin in this regard:

> The obligation of a State to provide justice is not discharged by devising a single and inflexible mode of trial whose cost is beyond the reach of the ordinary citizen. Its obligation is to provide as many modes of trial as are necessary to cover the variety

> of disputes that may commonly arise so that for each type there may be selected a mode that will offer a reasonable standard of justice at a reasonable cost. (Lord Devlin, 'The Judge', p. 69, Family Law Council, 1983, p. 3-4)

The Council acknowledged different models of mediation and noted that there was debate as to the application of 'lay' mediation (i.e. mediation conducted by people with skills and training but not necessarily professional training in law or counselling) to the area of family disputes. It suggested that both models could be incorporated into the proposed pilot project. The existence of protective legislation and an established training course in N.S.W. was proposed as reason for a community mediation model to be developed in that state.

Thirdly, the report drew attention to the fact that where joint decision making has resulted in a mutually acceptable agreement separate representation is required for an agreement to be 'formalised'. The Centres were proposed as an alternative in this regard.

And, finally, the Council endorsed the Chief Judge's proposal that a range of services be provided under one roof and that these not be restricted to persons who qualify for legal aid in Family Law matters and extend to de facto as well as married couples and their children. the Council proposed that the Centres provide:

(1) General information, education and advice;

(2) Provision of or referral to a wide range of facilities including:

- (a) marriage counselling;
- (b) financial counselling;
- (c) counselling or conciliation with respect to child disputes;
- (d) counselling or advice in respect of property or other financial disputes;
- (e) mediation in cases which are appropriate to that service;
- (f) referral to social welfare (housing,

pensions etc.) advice; and

(g) immediate referral to legal aid or to an appropriate local practitioner practising in Family Law in matters requiring urgent Court action (such as a situation of violence, etc). (Family Law Council, 1983, p. 19, 20).

The Family Law Council report along with advice from Council members and officers of the Attorney General's Department provided the Noble Park Centre with guidelines for development and an indication of where the Centre fitted within the legal/community service network. In implementing the proposal the Centre also drew upon a knowledge of the Springvale/Dandenong service network and the principles of both mediation and community management.

IMPLEMENTING THE PROPOSAL

In early 1984 the recommendations of the Family Law Council report were canvassed in the Springvale/Dandenong community. The consultation was initiated by Trisha Harper, then a member of the Family Law Council, and those initially consulted represented Springvale Community Aid and Advice Bureau, Springvale Legal Service and Community Services Department, City of Springvale. This was followed by a meeting hosted by the Mayor of Springvale to which a large number of Springvale and Dandenong legal and community service agencies were invited as well as representatives of ethnic communities. A representative of the Attorney General's Department and Trisha Harper, Family Law Council, outlined the proposal and obtained from the meeting an expression of interest.

With the release of the 1984/85 Budget which confirmed funding of the project on a two year pilot basis, a meeting was called of those who had been involved in preliminary discussions. It was this group representing a number of Springvale organisations as well as a representative from the Marriage Guidance Council of Victoria, Dandenong Registry of the Family Court and the Cities of Springvale and Dandenong which met on a fortnightly basis to plan the shape of the F.C.C. and make arrangements for its establishment. Officers of the Attorney General's Department were also regular participants.

The Implementation Committee's major task was to develop a service approach which integrated the

objectives set for the project by the Family Law Council and the Attorney General's Department with those derived from mediation and community management. The marriage offered both strengths and contradictions. A strength was the well developed philosophy and practices implied by community management, the chief among these being:

1. Accountability of the organisation and its services to their community and the use of participatory structures, reporting and ongoing evaluation to ensure this.

2. Relevance of the organisation and its services to its community. The expectation is that community services, like other consumer items, should respond to the pressure of demand and should meet quality control standards. The provision of services unresponsive to local need and of inadequate levels of service are increasingly viewed for what they are, tokenism.

3. Access and equity in allocating the resources of the organisation and its services. This requires a recognition that some groups may require positive discrimination to ensure that they too can gain a share of scarce resources.

An additional strength gained was through the involvement of key organisations and community members on the Implementation Committee. This brought legitimacy to the project.

A contradiction was that the organisation did not develop through the process of identified community need, recognition of need by the broader community, development of strategies to redress this and resident action to develop appropriate services. It was imposed, albeit on a receptive community, but imposed to meet objectives and agendas set elsewhere. A second contradiction was that resources were only provisionally offered and no assurance given as to the continuation of the project beyond the pilot phase, a mere 18 months after the Centre opened to the public. A final contradiction was the enforced rate of development of the project which does not resemble the incremental development of most community based organisations. This is best illustrated by the responsibilities of the Implementation Committee which in December 1984 was responsible for one staff member and by June 1985 was employing 8 full time and 20 sessional workers.

Central to the service approach of the Noble Park Centre is its identification with mediation. The goal of mediation is that of `empowerment' so that individuals, families and communities can take responsibility for their own lives and their own disputes. This contrasts with the `advocacy' orientation of legal and community service professions and the organisations which traditionally employ them. Empowerment is achieved by applying the principles of mediation which:

: ensures that decision making is voluntary and discussions confidential;

: places responsibility for resolving inter-personal conflict with those directly involved;

: starts from the assumption that the interests of those involved are best achieved through joint problem-solving and direct negotiation;

: provides the services of trained impartial third parties to aid negotiation;

: uses information to ensure that people make informed choices and explore all options for resolving the dispute; and

: respects the personal, moral and cultural values of those involved and each person's right to self-determination.

Mediation underpins all aspects of the Centre's direct service provision, delineates worker roles, and has influenced staff and management practices. Initially mediation also provided a focus for investigation and joint learning by Implementation Committee members and workers.

IMPLEMENTATION TASKS

The Implementation Committee approached service development from a planning perspective. It clarified objectives, set goals, allocated tasks according to skill and expertise and developed a time frame. The speed with which the Implementation Committee was able to move reflected the fact that a number of members worked co-operatively in other forums, had a practical knowledge of community based and managed services, and that there was a high degree of consensus with the project's objectives. These were interpreted into the

objectives of the Association which are attached as Appendix 1. In the three months between September and December 1984 the Implementation Committee:

: reviewed available literature and from a knowledge of the local service network identified the services to be delivered by the Centre;

: drafted a constitution and had the Association incorporated;

: found premises and had them renovated under direction from Attorney General's Department;

: received funds;

: employed a Co-ordinator; and

: set implementation goals and a timeline for their completion. Refer Appendix 2.

Key tasks emerged as requiring completion within the implementation phase. These included:

Match of Services to Local Needs

The Family Law Council report listed a number of services to be either provided through the Centre or within the local service network for the objectives of the project to be achieved. Knowledge of local needs, community composition and existing service network assisted the Committee to identify the service components most needed.

: Financial counselling had long been identified as a service needed in the Springvale/Dandenong community. One agency, Dandenong Valley Family Care, provided this service but its service was over-extended.

: Mediation was identified as an integral component of the Centre and was seen as complementing services provided by the Dandenong Registry of the Family Court, marriage counselling agencies and other local organisations.

: Family Law information was identified as an integral component of the service.

: Community education was identified as an integral component of the project but a staff appointment

was delayed to allow the manageable establishment of the project.

: Counselling services were available within the Springvale/Dandenong community with three agencies - the Family Court, Catholic Family Welfare Bureau and Marriage Guidance Council of Victoria being funded through the Attorney General's Department. Referral to these and other counselling services was seen as potentially meeting this need.

: Welfare assistance was also identified as available through the local service network through Citizens' Advice Bureaus, Local Government as well as State and Federal Government agencies and other community based organisations. Specialist assistance was available by referral.

: Integration of direct service provision, Centre functioning and administration was seen to be achieved by the employment of an `intake' worker, co-ordinator and administrative staff.

Staffing Structure

The Committee adopted a `flat' organisational structure in line with that proposed by the officers of the Attorney General's Department. A Co-ordinator was employed with responsibility for day to day oversight of a multi-disciplinary team. Team members were seen as having similar levels of responsibility and as being accountable to one another as well as to the Committee via the Co-ordinator. Professional demarcation was minimised by the team approach and as responsibilities were comparative a single salary scale was adopted, i.e. Public Service Award for Administrative Workers.

Staff Responsibilities

Staff responsibilities were specified in the areas of:

1. Shared staff responsibility for direct service intake work;

2. Specialist staff responsibility for areas of professional responsibility e.g. the Community Lawyer for the standard of legal information provided by other staff and the provision of legal information to service users;

3. Community education as the responsibility of all

staff; and

4. Social action and law reform in relation to areas of specialist knowledge.

An example of a job description is attached as Appendix 3.

Mediation Service

The first decision to be made in developing a mediation service was whether a 'community' or 'professional' model of mediation should be developed. In reaching the decision to implement a community mediation model the Committee and staff were:

1. Impressed by the experience of the Community Justice Centres in New South Wales and overseas models e.g. Hawaii, Denver, San Francisco.

2. Aware of the cultural diversity and number of community languages used in the Springvale/Dandenong community and believed that it would meet community need.

3. Saw the model as flexible and economically viable. In addition it was compatible with the service goal of maximising empowerment.

As Roberts points out an in-built contradiction can be identified between professional influence and participant control.

> In the real world we must expect to find a range of mediators, from the reticent neighbour at one end of the spectrum to the dominant, directive expert at the other. The disputants are perhaps unlikely to surrender much of their power to determine the outcome of the former, but when the latter forms his own view of the dispute and actively persuades the parties to accept it, he is likely to achieve a significant degree of control over the outcome. The more the mediator succeeds in transforming the view of the dispute entertained by the disputants and the greater his success in directing the outcome, the smaller any analogy with negotiation remains. (Roberts, 1983 p. 550)

Implementing this decision involved the development of a training course; recruitment, selection and training of mediators and the adoption of quality control, monitoring and accountability practices. The mediation service was operational in June 1985 and has been subject to ongoing evaluation (Hooper, and Greenwood 1986 P. 75-79).

Integrated Direct Service Model

The Centre's model of direct service aims at maximising negotiation. It defines the role of specialist workers trained in family relations, law, education and family finances to the provision of information and the clarification of options for resolution. Mediators with negotiation skills assist family members in the task of creative and co-operative problem solving. Centre services can also be used by individual family members who want to obtain information and clarify options. A diagramatic representation of the direct service model is attached as Appendix 4.

Protective Legislation

To ensure that the Centre could operate according to the proposed model, legislation was required to ensure the confidentiality of the discussions held, and documents prepared, at the Centre.

With the appointment of the Community Lawyer and an assessment of legislation developed to protect other mediaton services e.g. Community Justice Centres in New South Wales, the need for protective legislation was drawn to the attention of both Victorian and Federal Attorneys General. The form of legislation and the extent of the cover required was the subject of continual consultation during the first year of the Centre's operation and became a matter of urgency with the implementation of the mediation service.

In July 1985 the Victorian Attorney General foreshadowed an amendment to the Evidence Act to extend legal professional privilege to the Centre workers. The press statement which accompanied the announcement reported the Attorney General, the Hon. Jim Kennan, as outlining the problems faced by the Centre and the proposal planned as:

> The Family Conciliation Centre at 35 Buckley Street, Noble Park is one of two pilot projects funded by the Federal Attorney

> General's Department. The Centre provides free and confidential information to family members with the aim of assisting them resolve family disputes.
>
> Many family disputes do not invoke the protection of the Family Law Act because disputes may involve de facto spouses, or grandparents and grandchildren and disputes between siblings, all of which are governed by State laws, he said.
>
> Mr. Kennan said one of the aims of family conciliation was to provide a valuable alternative for those family members unable to use the facilities of the Family Court.
>
> The State Government welcomes the opportunity to co-operate with the Federal Government in this area. Everyone agrees that it is desirable that there is an attempt to settle Family Law disputes without the trauma of litigation.
>
> In order to function effectively the confidentiality of those services must be adequately protected. The question of confidentiality in mediation sessions has been recognised in the establishment of Community Justice Centres in N.S.W. and New Zealand, although the provisions governing privilege are different owing to the different nature of their work, he said.
>
> (Press Statement, Hon. Jim Kennan, Victorian Attorney General, 18/7/1986).

With the enactment of the Evidence (Amendment) Bill in January, 1986, the Federal Attorney General's Department advised that it did not consider there was a need for complementary Federal legislation as `laws of states are binding on the Commonwealth'.

Centre protocol has been developed to ensure that staff practices are consistent with protecting confidentiality. These include:

: centre workers to take an oath/afirmation of secrecy;

: rules of evidence not to apply in mediation sessions;

: parties to a mediation to be informed that records of agreement made in mediation are not admissable as evidence.

This is complemented by the Code of Conduct recently adopted and attached as Appendix 5.

Evaluation

From the outset it was proposed that the pilot project be evaluated by external evaluators. This did not, from the Centre's perspective, reduce the need to develop internal monitoring and evaluation procedures. The Centre gave high priority to developing appropriate record keeping and analysis tools, and documenting progress.

In mid 1985 Social Impacts Pty Ltd, a Sydney based company was appointed to conduct the evaluation of the Noble Park and Wollongong projects. A model for the evaluation was proposed which attempted to measure each Centre against objectives which it itself generated. Those developed by the Noble Park Centre were:

1. Provision of alternative means of family dispute resolution:

   a) different from legal process;
   b) different in philosophy and method to other services.

2. Empowerment of service users.

3. Provision of accessible services.

4. Provision of a community based service.

5. Legal reform and social action.

6. Prevention of escalation of family disputes and the destructive management of marital separation.

7. Cost-benefit efficiency and effectiveness.

The evaluation methods adopted were observations, interviews with staff, Committee and other service providers and questionnaire completion by service users. The evaluation report is currently being completed and will provide guidance to the Government in deciding the future of the project.

Management Structures

Between June 1985 and January 1986 the Committee met on a fortnightly basis and responsibility for finding premises, incorporation and finance was delegated to sub-committees which met at additional times. With major physical implementation tasks completed by Janaury 1986 the Committee met monthly and set up two sub-committees - Staffing, and Finance and Administration. This structure has continued to serve the Centre adequately. In June 1985 the Committee, anticipating the election of additional members at the Inaugural General Meeting, defined Committee, Office Bearer, Sub-Committee, Co-ordinator and staff responsibilities. Briefly these were:

	Major Responsibilities
Committee of Management	: Formulate and review policy; : Set priorities; : Liaise with Attorney General's Department and other organisations. : Monitor and integrate Centre work; : Delegate tasks.
Chairperson	Represent Committee of Management.
Secretary	Service the Committee.
Treasurer	Financial recording and accountability to Association and Canberra. Convene Finance and Administration Sub-Committee.
Finance and Administration Sub-Committee	Set and monitor accounting standards and practices. Monitor income and expenditure. Ensure safe work environment.
Staffing Sub-Committee	Set and monitor staff conditions of employment, salaries etc.
Co-ordinator	Manage Centre within policy guidelines set by Committee.

	Prepare information to aid policy making.
All Staff	Meet service requests, and set and monitor standards.
	Report to Committee and Sub-Committees.
	Contribute to Centre and service development.

Accountability to the community and Association members has been via newsletters, meetings and reports. In addition the Committee seeing itself as a participatory structure has designated its meetings as `open' with the option to close them for discussion on funding and staffing matters.

The investment of skill, time and energy by Committee and staff during the implementation phase is difficult to quantify. It is hoped that it is an investment which will provide a continuing return to the Springvale/Dandenong community.

WHAT CAN BE LEARNT FROM THE NOBLE PARK EXPERIENCE?

The Noble Park Family Conciliation Centre has achieved a great deal in the short time that it has been operating. It has succeeded in setting in place a management structure, pioneered a new service delivery model and assessed the early results of this. It has also initiated social action and law reform and has grappled with the issues of accountability, skills development and co-operative decision making. These achievements have not been gained without some costs and in this final section I shall outline some of these.

Unfortunately, my observations are not completely objective (the role of an external evaluator) but reflect my personal biases and the difficulty that I personally encountered with grappling with some of these issues. I hope these observations will make the path easier for those who follow.

Pilot Project Status

The `pilot' proviso of a project makes its status unclear to the community, other organisations operating in the network, staff and management and to the agency that funds it. While `pilot' gives a degree of licence

for experimentation it also brings responsibilities and insecurities. It is important that this be acknowledged especially when a pilot project is established to deliver services to a community.

One of the particular constraints imposed on the Noble Park Family Conciliation Centre by its pilot status was an unrealistically short period of time designated as the pilot phase. The 1984/85 Federal budget announced funding for a two year period. In that short period community acceptance of the proposal and responsibility for management had to be gained, the planning and development work had to be completed as well as `results' shown. Two years for a project of the scale and potential impact of the Noble Park Centre was unrealistic.

This became evident with the appointment of the evaluators who were scheduled to report to Attorney General's in October 1986. This was <u>after</u> the date that the project funding had been guaranteed. While this inconsistency was brought to the attention of the funding agency it was not until March 1986 that continuation to June 1987 was assured. The delay in deicsion making is understandable as the decision had to be referred to Cabinet. However, the delay caused unnecessary insecurity for community, Committee and staff.

For an organisation to be able to set clear goals and be more than reactive there must be a degree of consistency between philosophy, aim of intervention and service delivery style. In the attached table two service delivery approaches are contrasted by way of example. These can provide a guide to the sort of issues which need to be thought through in an organisation. However, the development of a consistent approach takes time, and an 18 month pilot phase means that the task is merely started.

CONTRAST OF CONSERVATIVE AND SOCIAL DEVELOPMENT APPROACHES

KEY COMPONENTS	CONSERVATIVE	SOCIAL DEVELOPMENTAL
Goals	Maintenance of the system and therefore adjustment of the individual to the status quo	Changes to socio-economic-political system to achieve equity and social justice.
Orientation to power structures	Based on consensus - therefore structures and institutions not questioned or challenged	Based on conflict resulting in quotations and challenges to structures and institutions
Values	Not seen as necessary to identify as it is assumed that the values of the dominant groups are universally accepted	Must be identified as it is recognised that different values are held by different groups
Action perspective	Action taken is short term, reactive, preventive	Action taken from long term developmental perspective
Focus	Mico/local	Micro/local and macro/societal
Target groups	Disadvantaged sub-groups	Residents/citizens
Evaluation	Desirable	Essential
Citizen participation	Tokenistic - consultative	User control by citizens
Planning strategy	: Identification of specific problems; : Examination of existing services; : Implementation of new programs with emphasis on avoiding duplication	: Community development process; : Identification of common needs, values and objectives; : Analysis of existing programs; : Formulation of new policies and programs; : Implementation with emphasis on co-ordination and integration

(Wills, et al.,1985, p.43)

Another consequence of being a `pilot' is that of community perception. People may be less likely to `risk' investing time in the development of a project with a future that appears less than secure. It also gives some service users the impression of being `guinea pigs'.

Community Acceptance and Ownership

The essence of community based organisations is that they are owned, managed and accountable to their community. Where many of the project objectives have been set by agencies not located within that community, thorough consultation is a pre-requisite. In each community there are established avenues through which such consultation can occur e.g. Regional Consultative Councils, local co-ordinating groups, professional bodies. Inadequate consultation runs the risk of alienating sections of the community or service network.

The physical distance and lack of direct experience in identifying and using community networks for consultation purposes was a disadvantage for the Federal Attorney General's Department. It also meant that the Centre had to work hard to `earn' legitimacy and overcome genuine confusion as to the comparative functions of the new Family Court Registry located in Dandenong and the Noble Park Centre.

The use of `ready made' objectives for the project also meant that the community and committee did not have the same opportunity to `work through' service options and alternative approaches. This to a large extent was compensated for in the Noble Park project by the commitment, hard work and clear potential for the project perceived by the Committee of Management. However, it made the task of informing and involving the community in a `ready made' and rather specialist organisation more difficult. The Centre will have to continue to work hard in this area to ensure community acceptance and ownership and, thereby, be true to its community based philosophy.

Sensitivity to the Perception of Other Organisations

The announcement of the pilot project brought a strong reaction from a number of organisations particularly those which relied upon the same funding source for what was perceived as similar services e.g. organisations funded to provide marriage guidance counselling. Such a reaction could have been

anticipated and action taken to ensure that a free exchange of information take place. Limited consultation and inadequate access to existing written material created suspicion and hostility which could have been reduced had preliminary consultation been more extensive (Griffin, 1984, p. 22).

Evaluation

Evaluation was an accepted component of the project. However, for an evaluation exercise to produce respected outcomes it should be adequately planned and staged at a time of the Centre's development which will maximise information available for analysis.

The Committee was concerned early about the lack of clear objectives for the independent evaluation, the lack of consultation with it and the closed `appointment' procedures. It sought input into the process of developing a brief for external evaluators and selecting those evaluators. Members of the Committee and staff had experience in these areas and believed that this would have been of advantage to the Attorney General's Department. The unwillingness of the Department to engage in consultation over this issue had the potential of influencing the Centre's attitude to the evaluation.

The timing of the evaluation was not sympathetic to the other demands upon the Centre. A more realistic time line may have been a three year operational period during which external evaluation was built into the last 18 month period (12 months data collection, 6 months analysis and documentation). The evaluation, as conducted, placed additional data collection demands on staff and service users at a time when the Centre was still developing its own data collection procedures and a consistent model of operation.

The evaluation itself did not appear to place the same importance on `relevance' to the community that the project attempted to. Data collection from service users was obtained by questionnaires. The only language that these were available in were English. As 40% of Noble Park Centre service users are overseas born and a large number of these are not proficient in English it was of concern to the Centre that additional methods of data collection were not instituted. A real challenge to the Centre is its capacity to meet the needs of its community and the evaluation will have to be augmented to monitor our capacity to meet the needs of smaller sub-groups.

Planning

Planning is simply a process of looking ahead. In planning the implementation of the pilot project it would appear that inadequate attention was given by the Attorney General's Department to some of the issues highlighted in the Family Law Council report. The most important of these from the Centre's perspective was the failure to addresss the need for legislation to ensure confidentiality. This had to be addressed by the Centre itself and, though a profitable exercise, diverted staff and management attention from other issues.

From this reassessment it is evident that the successful implementation of the Noble Park Family Conciliation Centre pilot project would have been enhanced by better planning, realistic timelines and more thorough consultation.

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ASSOCIATIONS INCORPORATION ACT 1981

Section 5(b)

STATEMENT OF PURPOSES

1. The name of the proposed incorporated association is Family Conciliation Centre.

2. The purposes for which the proposed incorporated association is established are:

   (1) To establish a Centre which provides an alternative to litigation in the resolution of family disputes and which:

      (i) is community based and easily accessible and open to all people involved in family disputes;

      (ii) recognises the multicultural nature of society and the need for diversity;

      (iii) recognises the diverse nature of families in the Australian community by providing services to people in a personal relationship who are in dispute;

      (iv) provides a community mechanism for alternative dispute resolution which is relatively inexpensive, expeditious and fair to the parties involved;

      (v) assists people to make their own decisions when resolving their difficulties.

   (2) To provide information and referrals in relation to a range of matters affecting families or family members.

   (3) To assist people in the early stages of a dispute to resolve their difficulties.

   (4) To provide a range of services aimed at preventing or resolving family disputes, for example, family counselling, crisis counselling, financial counselling, legal advice, mediation.

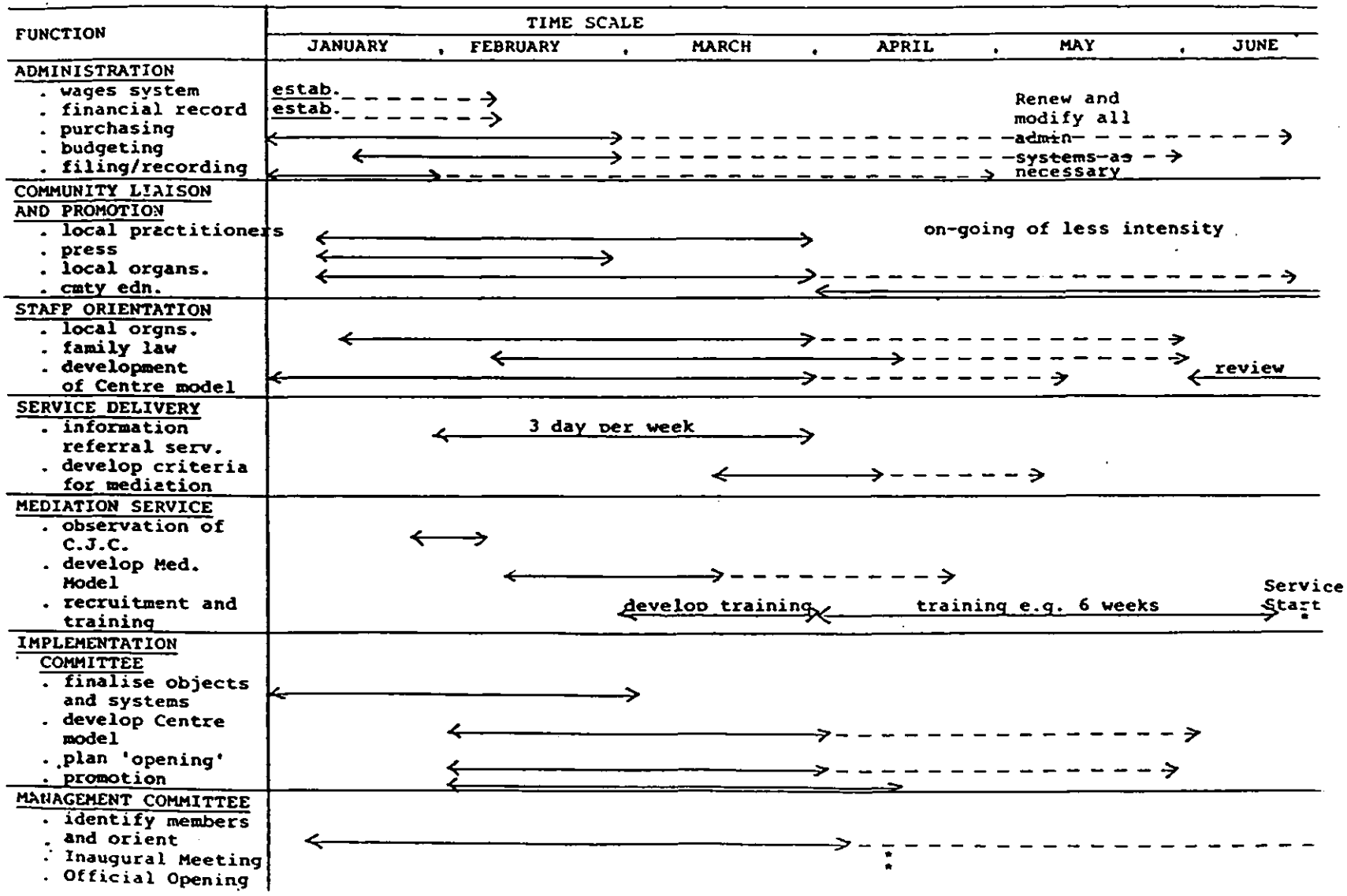
   (5) To conduct programs of community education on the work of the Centre and the issues with which it is dealing.

   (6) To conduct training sessions for paid and unpaid staff to enable them to assist in carrying out these

IMPLEMENTATION PROGRAM

APPENDIX 2

15/1/85



APPENDIX 3

JOB DESCRIPTION

Position: Community Education Officer

Program: Family Conciliation Centre,
35 Buckley Street,
Noble Park. 3174.
Telephone 547 6466.

Funding: Federal Attorney General's Department.

Conditions: As per Victoria Social and Community Services Award.

Salary: Commonwealth Public Services Award.
Class 6 $26,041 to $27,694 or
Class 7 $28,602 to $30,206

Duties:

1. Direct Service Responsibilities

: To co-ordinate the promotional and community education responsibilities of the Centre.

: To prepare promotional material and information on aspects of family law, financial management, rights and responsibilities of family members and the Centre and its method of operation.

: To have material translated into relevant community languages.

: To assist with the development of training material for use within the Centre and by other organisations.

: To interview people approaching the Centre with the aim of providing relevant information and referring them to appropriate services.

2. Service Planning Program Implementations

: To develop and implement short courses to improve the skills of family members, e.g. step-parenting, access arrangements.

: Record resources and establish methods of ensuring their accessibility to Centre workers and service users.

: Prepare and disseminate material and evaluate its effectiveness.

APPENDIX 4

FAMILY CONCILIATION CENTRE

DISPUTE RESOLUTION PROCESS

ASSESSMENT

1. INTAKE/ASSESSMENT

Via : Interview and telephone

Objectives : 1. Provide information on Centre its role in aiding conflict resolution.

2. Assess needs of all parties re:

- information on legal/financial systems
- communication patterns of parties
- escalation of dispute
- suitability for Centre/other services

Maximum of 3 Sessions per family

REFERRAL TO OUTSIDE AGENCY	MEDIATION - CENTRE SERVICE	'SPECIALIST WORKER' - CENTRE SERVICE
- Legal representation - Family Court - Marriage Guidance and Separation Counselling - Child guidance - Budget Advice - Specialist Inform.	- Clarification of needs of both parties - Problem solving with future focus - Points of agreement clarified Up to 3 sessions	- Legal inform. - Financial inform. - Information on needs of children - Relationship issues - Property settlement - Options to make legally enforceable Up to 4 sessions

OUTCOME

OUTCOME

Reached via : negotation between parties via mediation or outside Centre

EVALUATION

- Test agreements reached
- Questionnaires, interviews: Centre and Evaluators.

APPENDIX 5

FAMILY CONCILIATION CENTRE - NOBLE PARK

CODE OF CONDUCT

1. Information received by a Centre worker in connection with their work at the Family Conciliation Centre is confidential, and shall not be revealed to any person, other than a fellow worker or a member of the Committee of Management of the Family Conciliation Centre, in the course of their work.

2. Information about case files received by a member of the Committee of Management of the Centre shall not be disclosed to any person, other than a staff member or fellow Committee member.

3. Information received by a Centre worker from a person in an individual interview or private session shall not be disclosed to any other person without the prior permission of the person from whom the information was received.

4. Centre staff shall take an Oath of Secrecy in the form prescribed in Appendix A.

5. The following exception shall be applied to the confidentiality rule: where a criminal act is committed in the Centre, Centre workers who witness such an act may supply evidence of that act to the appropriate authorities.

6. Centre workers are obliged to identify and disclose to a fellow worker any affiliation or association that they have with any service user that might cause a conflict of interest or affect the perceived or actual neutrality of the worker.

7. If a co-worker, the Co-ordinator or a service user expresses the view that a particular worker may not, or has not remained neutral in the provision of services, then that worker should disqualify themself from providing further services to the service user(s) concerned.

8. Centre workers currently employed and current members of the Centre's Committee of Management are unable to use Centre services because of the potential conflict of interest and the effect the worker association may have on the co-workers providing that service.

9. Centre workers cannot accept any money or items of value from service users for work done.

10. Centre workers cannot incur obligations to a service user which might interfere with the impartial performance of his/her work.

11. When a Centre worker is approached by a service user with whom he/she has worked, and is requested to perform services outside the Centre the worker shall decline to provide those services.

12. At no time will Centre workers offer individual service users legal or other specialist advice. When requested to give such advice Centre workers will refer service users to appropriate sources of independent legal advice or other appropriate agencies. "Advice" in this context refers to the giving of an expert opinion as to future action, but does not refer to the provision of information.

13. At no time will mediators offer individual service users information. When requested to provide such information mediators will refer service users to full time Centre staff.

14. Centre workers are obliged to record, monitor and upgrade their skills in line with Centre policy, and to participate in ongoing training and supervision.

15. A person who has undergone a course of training at the Family Conciliation Centre shall not, for personal gain, advertise that fact, nor will they hold themselves out to be an expert in mediation or other area as a result of that training.

APPENDIX A

OATH OF SECRECY

"I..... do swear by Almighty God, or, do solemnly and sincerely affirm and declare,

That I will not disclose to any person any communication or admission made to me in my capacity as a worker at the Family Conciliation Centre/mediator except in so far as is necessary for me to do so for the proper discharge of my functions as a worker at the Family Conciliation Centre/mediator".

SWORN/AFFIRMED BY .....

BEFORE ME .....

DATE .....

MANAGING PROGRAMMES

QUALITY CONTROL AND TRAINING

Ms Linda Fisher
Mediator and Trainer
Community Justice Centres
Sydney Technical College
Sydney

An argument for establishing an alternative dispute resolution service is that it is cheap to run: it saves money for governments and individuals. It could be further argued that costs could be cut even more by allocating no resources to evaluation, quality control or training.

However, in all methods of alternative dispute resolution involving a third party neutral, whether it be mediation, conciliation or arbitration, people are expected to act as mediators, conciliators, arbitrators and - by implication - to have some expertise in the roles assigned to them.

Given that this is the expectation, one is led to ask the question: "Is there a need for training for these roles?" This gives rise to another, related question: "Is there a need for quality control?"

Given also that the services being examined have, in some way, to justify their existence, the mechanisms of accountability must also be considered, and a further question arises: "Is there a need for evaluation?"

These are important areas of discussion for each service. Unless practitioners of alternative dispute resolution have answers to the criticisms from conventional legal systems regarding the need for training, the need for quality control, and the need for evaluation, they are in danger of having their services labelled "second-class justice".

THE NEED FOR TRAINING

Though there are differences of philosophy, and thus of methodology, between the services loosely connected under the banner of "Alternative Dispute Resolution", there are, as has been amply demonstrated, many similarities also.

One similarity is that practitioners are expected to have expertise in the roles assigned to them - or are assumed to have expertise in these roles - by the users of the service, whatever

the service. There can be no argument that users of these services have an unquestioned right to expect professional, competent and impartial counselling/mediation/advice/negotiation/ arbitration on their behalf from a third party neutral. Investigation is needed, however, on how that expectation can best be realised and the goal of competent guidance be achieved. One way, and I stress that it is ONE way, is by training. In any programme planning, for any method of alternative dispute resolution service, "to train or not to train" is the question. For if one starts from this basic premise of perceived expertise, one must confront the issue of the necessity for training - or otherwise.

Acceptance of the Need for Training

If one agrees with, and accepts, the statement that training is the "best" (ie. easiest, quickest or most cost-effective) way of achieving a satisfactory level of expertise - a satisfactory standard - for that service, and decides to institute a training programme, certain issues have to be considered, and certain decisions have to be made. One must judge how best to achieve that level of expertise required, through training. Thus, the following decisions must be made:

(a) on the type of training to be undertaken, whether it be pre-training, on-the-job training, on-going training, specific training, or a mixture of these;

(b) on the length of training to be undertaken, whether it be for days, weeks or months, whether it be further broken into shifts or undertaken all at once;

(c) on the method of training, whether it be by utilising case studies, role plays and simulation games, whether by demonstration or lectures, or whether by simply training on the job, or perhaps by a mixture of methods.

Another set of decisions will have, of course, already been made:

(d) on the selection of trainees, and on the selection procedures used to identify suitable participants;

(e) on the selection of trainers, whether they be academics, teachers/tutors or trainers, or whether they be people already "in the job".

This last is in part determined by the legislative and management structures of the organisation concerned. For example, it would depend on what sort of credibility the training should have, or be seen to have, whether the credentials be those of an

educational institution such as a university or technical college, whether of the organisation itself, or whether an outside, independent, so-called "expert" training organisation would best serve the purpose of the funding body or the parent body.

The management structures involved in the ADR organisation and in the training organisation (if they are not identical) have also to be taken into account. These might conceivably impose limitations on the training, whether on the type, the length, the method, or the selection of trainers.

Non-Acceptance of the Need for Training

If, on the other hand, one does not agree with, or accept, the statement that training is the way of achieving a satisfactory level of expertise for practitioners of the service concerned, there are of course other issues to be considered, and other decisions to be made. One would then need to consider carefully why any form of training is not necessary, and justify whatever takes the place of training to achieve competence. In this regard, it is worth recognising that qualifications in other fields do not necessarily ensure competence in this field, and in fact may prove a hindrance.

There is yet another side to the training/no training debate: even if it is decided that training is important, and necessary, there may not be available the means to achieve that training at that time, whether the strictures be economic, practical or otherwise. One must look carefully, then, at what can be done to ensure competence and satisfy management and legislative structures of a reasonable standard from practitioners.

THE NEED FOR QUALITY CONTROL

Another word for this "reasonable standard from practitioners" is of course the "quality" of the service rendered. Practitioners having achieved this standard through training, it seems reasonable to expect that the quality should somehow be maintained in the future. One could argue strongly that if you do not maintain quality, there is no future.

This introduces the notion of monitoring or supervision, and forms the basis of the second main area to be investigated in this paper: the need for quality control.

Acceptance of the Need for Quality Control

Acceptance of the need for quality control gives rise to the same sorts of issues and decisions as acceptance of the need for training. The main factors to consider would seem to be:

(a) the body that should set the standards, whether it be the funding body, the parent body, or the organisation's management and/or staff;

(b) the type of quality control to be undertaken, whether it be by in-service or continuing training, or by de-briefing sessions with peers and/or with staff;

(c) the method of monitoring quality, whether by interviewing users of the service, by taping sessions or by documenting successes (or failures);

(d) the timing of the quality control, whether it be on-going, a phase at the start and finish of each training session, three months after training, or at such time or times as is deemed necessary;

(e) the selection of those to monitor this function or to supervise, whether staff, management, or one's peers;

(f) the selection of those to be monitored.

The single most important factor would be to agree on:

(g) what the standards should be.

One needs to examine these mechanisms of quality control in much greater detail. One also needs to consider whether there are times or programmes where it is not possible to quality control, or desirable to do so.

Non-Acceptance of the Need for Quality Control

Rejection of the need for quality control is obviously a decision for programme planners. However, bearing in mind the question of accountability in ADR programmes, one must wonder somewhat whether quality in those instances is therefore not deemed essential, or whether it is that other procedures have taken the place of this form of control.

ACCOUNTABILITY: THE NEED FOR EVALUATION

Quality control is linked closely to the last of the three areas under discussion in this paper: the need for evaluation. They are further linked in that second-class evaluation is as damaging to ADR credibility as is second-class quality.

If one has accepted the argument that training is a necessary and sufficient condition of achieving competence, or of reaching a certain standard of quality, one has to think in terms of evaluation. If one accepts that trainig is neither necessary nor

sufficient, once again one has to think in terms of evaluation. For how else can one demonstrate that the lack of training is not detrimental to achieving the standards that are acceptable? And indeed, how does one even measure those acceptable standards?

As an educator, I am very conscious that I am accountable in my job. From this perspective, there is a necessity for evaluation. Otherwise there is no way of knowing whether the teaching or training I have given has been successful. There is also no way of knowing whether I need, therefore, to improve or update my content, presentation or methodology. The difficulty lies, however, in deciding what criteria are most important in assessing success, and whose criteria should be the gauge.

Questions arise whatever side of the fence one is sitting - as trainer or as practitioner. Perhaps these questions cannot be completely answered, but in workshops such as have been organised for the seminar on Alternative Dispute Resolution, participants should be able to explore, in a practical sense, the theoretical problems posed in this paper and come up with possible solutions that may help overcome the shortcomings of one preferred modus operandi.

MEDIATION

Mediation is one area of alternative dispute resolution which has had to face the three main issues discussed in this paper: those of the need for training, the need for quality control, and the need for evaluation.

The Community Justice Centres were set up as a pilot project in 1980. They operated under the control of a management committee, and under specific legislation. Part of the original charter for the operation of mediation as practised by CJC's was the requirement of a specific training course. Thus, the training for CJC mediators was governed by both management and legislative structures. It was also governed by the structures and strictures of the training organisation, ie. TAFE.

There is to my mind, however, no argument about the need for training. To the first question posed: "Is there a need for training?", the answer - even without the statutory requirement that CJC mediators must be trained in this manner - is an unqualified "Yes". I state this for the following reasons:

(i) there is a definite process and a structure to be followed in mediation if it is to be successful: both the process and the structure must be learned;

(ii) skills such as active listening, summarising, communication and conflict-handling, must also be

acquired or honed;

(iii) mediators always work in pairs, and can take on the roles of either Chairperson or Co-mediator, with their specific functions;

(iv) mediators can work in more than one Centre, and with many different partners;

(v) mediation is a labour-intensive industry, with a recognised attrition rate;

and finally

(vi) mediators are trained into the philosophy of mediation as well as its process.

Development of Training

The original "CJC Mediators' Training Course" was a standard 54-hour, one semester TAFE certificated course. It was held over 18 weeks on one night per week by TAFE at TAFE colleges. The three centres - Surry Hills, Bankstown and Wollongong - trained separately with different teachers. However, the course outline was the same for all centres, and the programme offered what was perceived to be important in training. These perceptions have changed over the past six years, and the course has altered substantially in the three main areas of content, process and methodology. Further, the venue for training has changed, as has the way the 54 hours was first structured.

Other changes have been the centralising of training, and the standardisation of the training programme. These training changes have again been in part a response to management and legislative changes. Community Justice Centres no longer operate as a pilot programme, and all centres are now under the control and supervision of a Director who oversees and is responsible for all facets of the centres' operation. In addition, because of the nature of the CJC mediation service and its wide catchment area, there is a large and diverse panel of "lay" mediators who can be asked to work anywhere: all centres now need to train to the one standard.

The CJC looks on the 54-hours training - although a luxury in comparison with other ADR services - as basic training only. In other words, 54 hours of specialised mediation training is the base level one needs in order to become a CJC mediator. Once this pre-training is done, there is on-the-job training. This is accomplished by having newly-accredited mediators work with experienced mediators.

There is, additional to the pre-training and on-the-job training, in-service and on-going training for mediators. For instance:

(i) any trainee who is not up to the required standard at the end of basic training (though assessed as having the ability to achieve that level with little additional practice) is asked to come in for specific training for a period of time before being assigned to a mediation session;

(ii) any mediator not having mediated for six months or more must satisfy the Director by means of a simulated mediation that s/he is competent to mediate;

(iii) new developments in mediation procedures or processes necessitate re-training and/or continuing training;

(iv) workshops are held on specific skills and techniques important for mediation, such as "Feedback - What It Is and How To do It".

Limitations of Training

Mediators are expected to mediate in all types of disputes with the same basic training. They are matched to the dispute and to the disputants. The Community Justice Centres circumvent the necessity for specific training by looking for specific qualities and attitudes in mediators, and by putting the appropriate mediators into specific disputes. This is what is occurring presently at the various centres, and with demonstrable success. This of course avoids the question of specialisation for mediators, and by-passes the problem that would occur when a specialist mediator simply is not available at a particular time for a particular dispute. However, perhaps the next step for CJC's to consider might be a specific training component at the end of basic training, on specialist techniques for neighbourhood/multi-party/EEO/family/or property settlement disputes.

Assessment of Training

If one were to question whether CJC training was improving, the answer would have to be that we assume that it is, for these reasons:

(a) the drop-out rate during training is less than it was;

(b) there are very few complaints from users of the CJC service; on the contrary there are many compliments and thanks from grateful users.

Mechanisms of Quality Control

One informal mechanism is that stated in (b) above. However, quality control is in fact built into all aspects of the development of a mediator's training, from the initial intake of trainees to the end result of trained mediators. Selection procedures ensure that, as far as is possible, people are not accepted for training unless the CJC staff is reasonably confident that they are suitable, judged according to relevant criteria. During training, if it is decided that certain trainees will not make the grade, they are asked to consider whether they want to continue with the course as they will not be accredited as CJC mediators at the end. Conversely, trainees are free to leave during training if they decide that the course does not fulfil their needs either.

Accountability of Evaluation of Performance

The formal mechanism of evaluation is the "de-briefing session" that takes place at the end of every mediation session. The process of de-briefing requires each mediator to examine his/her own and his/her partner's performance - and the teamwork - in that mediation, and to make constructive criticisms about what happened during the session. The mediation process is examined stage by stage, and a form is completed by both mediators. The de-briefing forms are collected by the co-ordinators of each centre, who read every form and can contact both or either mediator in a mediation to discuss that particular session in greater detail. The completed forms are placed in each mediator's personal file, and over a period of time patterns of mediating can emerge that uncover deficiencies in attitude or technique or application of the process, for any mediator. These forms thus provide the basis of continued and on-going (and sometimes specific) training for some mediators.

Limitations of Evaluation

The formal mechanism of compulsory de-briefing relies on the articulateness of the mediators and their willingness to be honest with each other and with themselves. It also relies on the competency and diligence of each co-ordinator to maintain records and to collate the information on each mediator.

The informal mechanisms, such as telephone calls, Christmas cards and the like, - the "word of mouth" congratulations or complaints - rely on the energy or motivation of users of the service voluntarily to inform staff at the centres of their satisfaction or otherwise with the service offered.

CONCLUSION

The overview of training and its development over the past six years at the Community Justice Centres may help participants at the Seminar to be familiar with the issues under consideration as they affect one area of alternative dispute resolution, how these issues have been addressed, and the partial way the problems encountered have been resolved.

One must always bear in mind, however, that mediation's problems are its own, and mediation's solutions may - or may not - be the solutions suitable for any other programmes. That said, it is obvious that participants need to know what is being done in all the other programmes, so that we can all share knowledge, expertise and insight. Only in this way can the programmes we separately and collectively advocate be seen to be valid, and our roles as practitioners be - and be seen to be - ours by virtue of competence and not simply ours by "right" or - even worse - ours by default.

ROLE OF THIRD PARTY NEUTRAL

IMBALANCE OF POWER BETWEEN DISPUTANTS - MATCHING DISPUTES WITH DISPUTE RESOLUTION METHODS - CONFLICT OF ROLES WHERE MORE THAN ONE RESOLUTION METHOD IS EMPLOYED

Ms Wendy Faulkes
Director
Community Justice Centres (NSW)

The New South Wales Community Justice Centres Act describes people as being in dispute "on any matter if they are not in agreement on the matter".

Invariably discussions between ADR practitioners demonstrate many disputes, where participants are not in agreement on a matter.

One of the exciting things about ADR is that practitioners are generally relatively comfortable with conflict as a reasonable, stimulating, and growth-promoting factor in life. Conflict in itself is not bad - what a dull and unchanging world it would be without it.

Unresolved conflict, or denied conflict, is unproductive and is stressful to all involved. I believe it is a serious drain on the nation's productivity.

We are familiar as well with the destructive side of conflict in its resolution or attempted resolution through the imposition of power. This is what we see in violent international conflict (commonly called war) where the power-brokers throw more and more "cannon fodder" at each other. Where conflict is resolved by violence (physical power), or economic means the imposition of greater power is clear to see. Where the source of power used is emotional, the result can be as devastating even though the use of this power is rarely described in these terms (more likely it will be termed "emotional blackmail"). These conflicts may be family disputes fought out over the kitchen table, or they may be disputes with national or international implications where the lever is the love and esteem of the population, rather than the love and esteem of the children. The degree of privacy may be different, but the currencies are the same - guilt, self-esteem, popularity.

ADR brings together people with a willingness to find the best solution, and practitioners who can help them to do this.

It has been said that ADR is not concerned with rights. I say ADR is vitally concerned with rights - but not perhaps the same rights that might generally concern lawyers -

- right to own and manage your own dispute
- right to make decisions based on your needs, your criteria, your ideas
- right to enter into or exit from dispute resolution processes
- right to access to dispute resolution processes
- right to high quality service
- right to dispute resolution processes that will not embroil you in escalating litigation.

I also maintain that legal rights of disputants to ordinary rights and remedies must be maintained.

ADR is not overly concerned with legalities of a particular dispute, offering instead, processes that will resolve the dispute, perhaps even at the expense of specific legal rights. The difference however, is that the disputants are making the decision to relinquish those rights.

Ideals of "what am I entitled to" must, in most aspects of life, be tempered with "what can I get".

ADR is in conflict with the body of professionals that say "people will have their legal rights, whether they want them or not". The underlying belief in this seems to be "we know best". Related to many areas of disputing - indeed many areas of living, I reject this belief.

It is ironic that, when CJC's were being established, they were seen by some as being an "unwarranted intrusion into the private lives of people". These same critics appear to cheerfully accept such time honoured practices as lawyers negotiating out-of-court settlements without too much reference to the disputants.

ADR gives people more opportunity to take control over decisions affecting their lives, not less. I believe that ADR now has enough runs on the board to demonstrate that people can and do negotiate and make decisions based on what is right for them, and what is possible, rather than insistence of all their legal rights. What is more, the people are satisfied, the disputes are resolved, civilization hasn't crumbled, the legal profession remains employed.

In an ideal world, there would be no need for ADR - and not because everyone could afford a lawyer. In my ideal world there would be no need for police, courts or lawyers. Everyone would be committed to creative and co-operative resolution of conflict, and able to negotiate competently on their own behalf. All would be suitably assertive - never aggressive - and would be articulate and committed to the best solution for the common good.

However our less than ideal world has developed a complex system of laws and regulations and a formalised system of resolving disputes. Both systems have been shown to be inappropriate for many disputes. I don't therefore see greater access to this unsuitable system as being "ideal". Nor can I see universal access as being "possible".

WHO ARE THIRD PARTY NEUTRALS?

ADR does not have a monopoly on third party neutrals. The judge or magistrate is of course a very visible third party neutral. Less obvious perhaps is the role of police as third party neutral.

There are of course many third party neutrals operating in all communities even less formally than ADR programmes. This seems to be so in all societies. It is often assumed that, because it has been going on for so long it must be effective - or good for the community.

Many people assume that CJC mediation is "going back to village ideas" or "just like the aborigines did". ADR - and CJC mediation - has some similarities with these traditional mechanisms, but what is forgotten is that many of these village or tribal mechanisms relied heavily on adjudication by leaders or elders, and on community sanctions. They certainly had little in common with the highly legalistic and formalised judicial structures - but it would be wrong to equate them completely with ADR.

I would not presume to comment on the effectiveness or value of these traditional mechanisms. Very little is known about informal dispute resolving mechanisms in Australia.

One study, however, is worth consideration. In 1981/82, Dr. J. Fitzgerald of La Trobe University conducted a survey of 1019 homes in Victoria. The survey sought to provide an analysis of the legal and non legal processes in Victorian society and of their respective consequences.

Referring to neighbour disputes, results from the Fitzgerald survey sample (taken from a cross-section of country and city populations) revealed that local government, police, lawyers and

estate agents/landlords are approached in 86% of the grievances. Satisfaction with the role of third parties was found to be low among those surveyed, with over half the respondents claiming that their dispute had received no outcome or only part of one.

Details on the role played by third parties is also worth considering.

The following table reveals how a grievance can escalate to a violent dispute. After some neutral or passive assistance approximately 29% of third parties attempt or suggest the use of force or threat to resolve the dispute. Only 7% of the third parties were perceived as acting to facilitate an agreement between the disputants in a conciliatory way.

ROLE PLAYED BY THIRD PARTIES APPROACHED BY SURVEY RESPONDENTS (FIGURES REFER TO NEIGHBOUR DISPUTES ONLY)

Type of Role	%
No Assistance	7.9
Neutral Preliminary Information Provided	27.1
Passive Public Assistance Provided	44.3
Active Public Assistance Provided	6.4
Acted to Facilitate Agreement between Disputants	7.1
Adjudicated matter	2.9
Attempted to use force/threat	28.6

This research demonstrates the potential for inappropriate third party intervention to aggravate the dispute.

I am unaware of any other study on the effectiveness or otherwise of other "traditional" third parties - family elders, church leaders, personnel managers, supervisors and other.

Those of us working in ADR have enough anecdotal material to believe that, like the agencies referred to in the Fitzgerald research, "traditional" third parties should not be assumed to be impartial, effective, or even fair.

CONFLICT OF ROLES:

Within the broad field of ADR, the degree of decision making for the third party neutral varies from the arbitrator who makes decisions or arbitration awards for settlement, to the most passive role of simply bringing the parties together and leaving them to it. It appears that few programmes provide a "pure" form of any form of dispute resolution. ADR practitioners need to come to grips with the implications of this merging of roles and the possible confusion resulting from a multiplicity of roles.

Perhaps the most usual conflict of roles is where the programme is offering a service for dispute resolution whilst being an advocate for, or protector of, a particular group. The practical problems for the practitioner are one aspect, the public perception and credibility of the organisation are another. It raises the question of dual roles within an organisation, dual roles expected of one practitioner and the possibility of more effective use of other third party neutrals. I suggest that often the line between an organisation being an advocate and a third party neutral may be very fine, but crossing the line changes roles to a degree which makes the alternate role impossible.

To give an example: In 1982 I spoke with mediators in the US who were employed by the Race Relations Bureau. Their role was to improve relations between different racial groups, predominantly through mediation of disputes. They had no confusion about their roles. They were there to improve relations - which implied fighting against prejudice or discrimination in any form. They could and did enter a dispute without a request from either side. Also in 1982 in Liverpool, England, I met with people from the Race Relations Board. Their role was to protect the rights of the minority groups and to fight against prejudice and discrimination. Again, there was no confusion, but unlike the US Race Relations personnel they saw themselves as advocates for the racial minorities. They would welcome opportunity for many disputes to be resolved by mediation, but recognised that the third party neutral role was inappropriate for them. They recognised that as advocates they had an important role that was not compatible with the (equally) important role of mediator.

However, in these days of shrinking resources, we must consider how ADR practitioners can provide the best service in perhaps difficult circumstances. It is up to us to consider whether a confusion or doubling-up of roles is in the interest of the users, the community, or ADR.

ENTRY INTO DISPUTE

It is worth considering the differing roles of the third party neutral in terms of the timing of entry to the dispute.

I apologise in advance for the shower of terms - but language of ADR has to emerge if we are to discuss and understand the processes of disputing and dispute resolution.

I refer to a paper by Abel, Sarat and Felstiner, from the Dispute Processing Research Project. Written in 1981, it provides a framework for considering appropriate ADR roles at different points of entry.

Their paper deals with the emergence and transformation of disputes - a process, they call "Naming, Blaming and Claiming".

The first stage in a dispute is an Unperceived Injurious Experience (UnPIE) - where a person has an injurious experience, but because of lack of knowledge or understanding of rights and norms, does not perceive it as injurious.

Recognising that the experience is injurious is the "Naming" part of the process - which turns the UnPIE into a PIE. At this stage the injured person feels wronged and believes something can be done to remedy the wrong.

"Blaming" - attributing the injury to the fault of another person or social entity - transforms the PIE into a Grievance. At this stage the injured person wants the person responsible to remedy the wrong. (At this stage also the terms become more recognisable.)

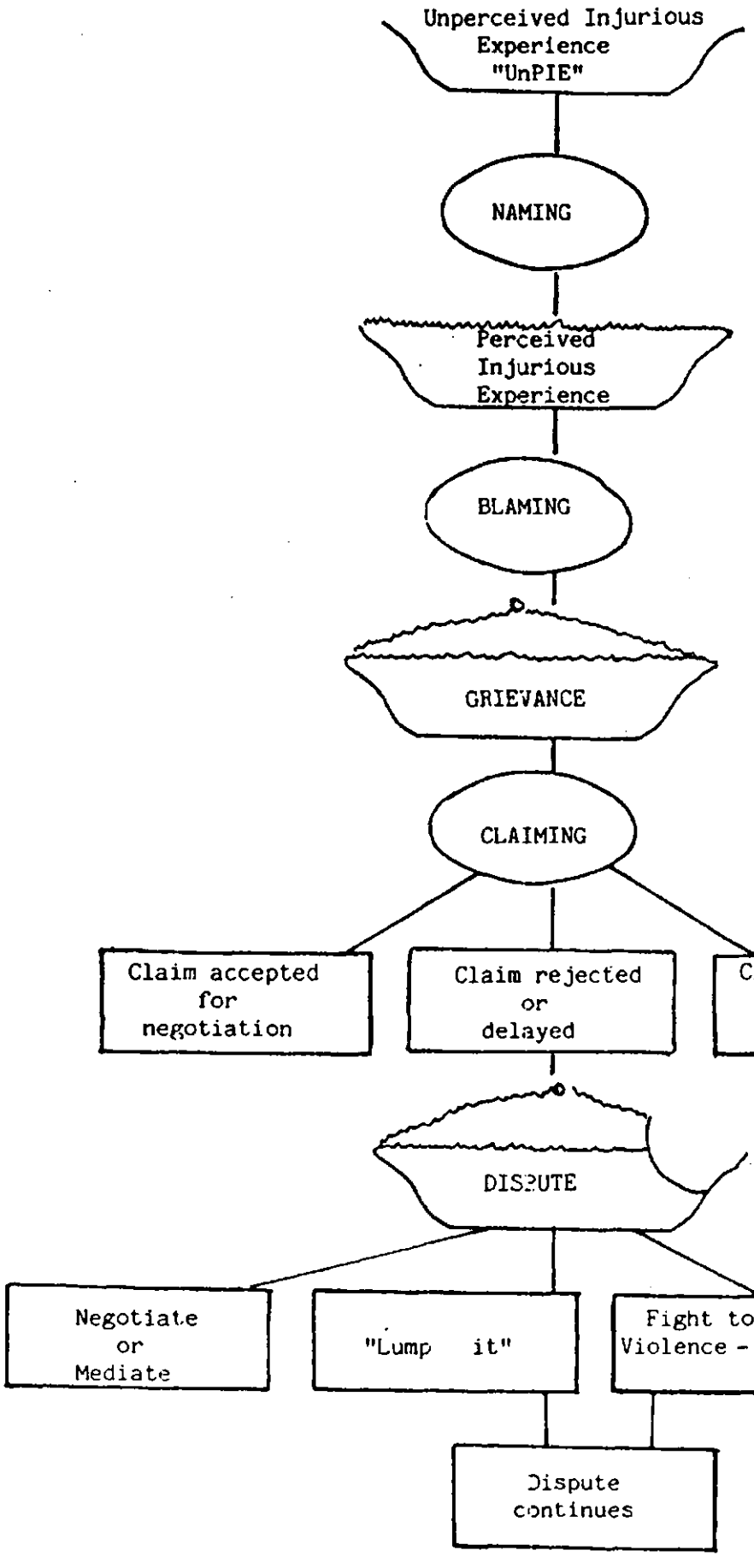
In "Claiming" the grievance is conveyed to the person believed to be responsible, and a remedy is asked for.

The grievance is not transformed into a dispute until the "claim" is rejected or delayed.

This description provides one theoretical framework within which we might see and consider the role and merit of different modes of dispute resolution. It also accommodates what we might call ADR associated roles at each end of the process - from education on rights at one end to litigation at the other.

Education - on human rights, and legal rights - and a raising of expectations is necessary if the first stage of the transformation, the "naming" stage is to be accomplished. At the "blaming" stage, grievance handling personnel might make the injured person aware of options, and act more as support and encouragement to seek a remedy. This role may include counselling, education or even

EMERGENCE AND TRANSFORMATION OF DISPUTES



- Difficult to establish who in the population had an UnPIE.
- Saying to onself that an experience has been injurious.
- Injured person feels wronged and believes something can be done to remedy wrong.
- Attribute injury to fault of another individual or social entity.
- Injured person wants person responsible to remedy the wrong.
- Grievance voiced to person believed responsible and remedy asked for.

W. FAULKES 1986

Based on "Emergence Transformation of Disputes: Naming, Blaming & Claiming". Abel, Sarat and Felstiner, 1982.

investigation.

At the "claiming" stage where the grievance is voiced to the other person, the third party role is more likely to be as a conciliator - or in some circumstances as an advocate.

The third party's role after the grievance is transformed into a dispute may be one of those we probably have less trouble defining - mediator, arbitrator or adjudicator.

The researchers also point out that as the experience becomes transformed into a dispute, the range of behaviour narrows.

I would add that if the dispute becomes locked into one mode of resolution, especially into litigation, the options narrow further and are harder to expand.

Another useful observation of the researchers is that public commitment to legal equality is concentrated at the "narrow" end - this commitment increasing as the dispute moves into higher courts.

This poses the question - central to these discussions - can one agency or one person fill all roles:

Do we, in ADR, also have less commitment to the earlier stages of the dispute?

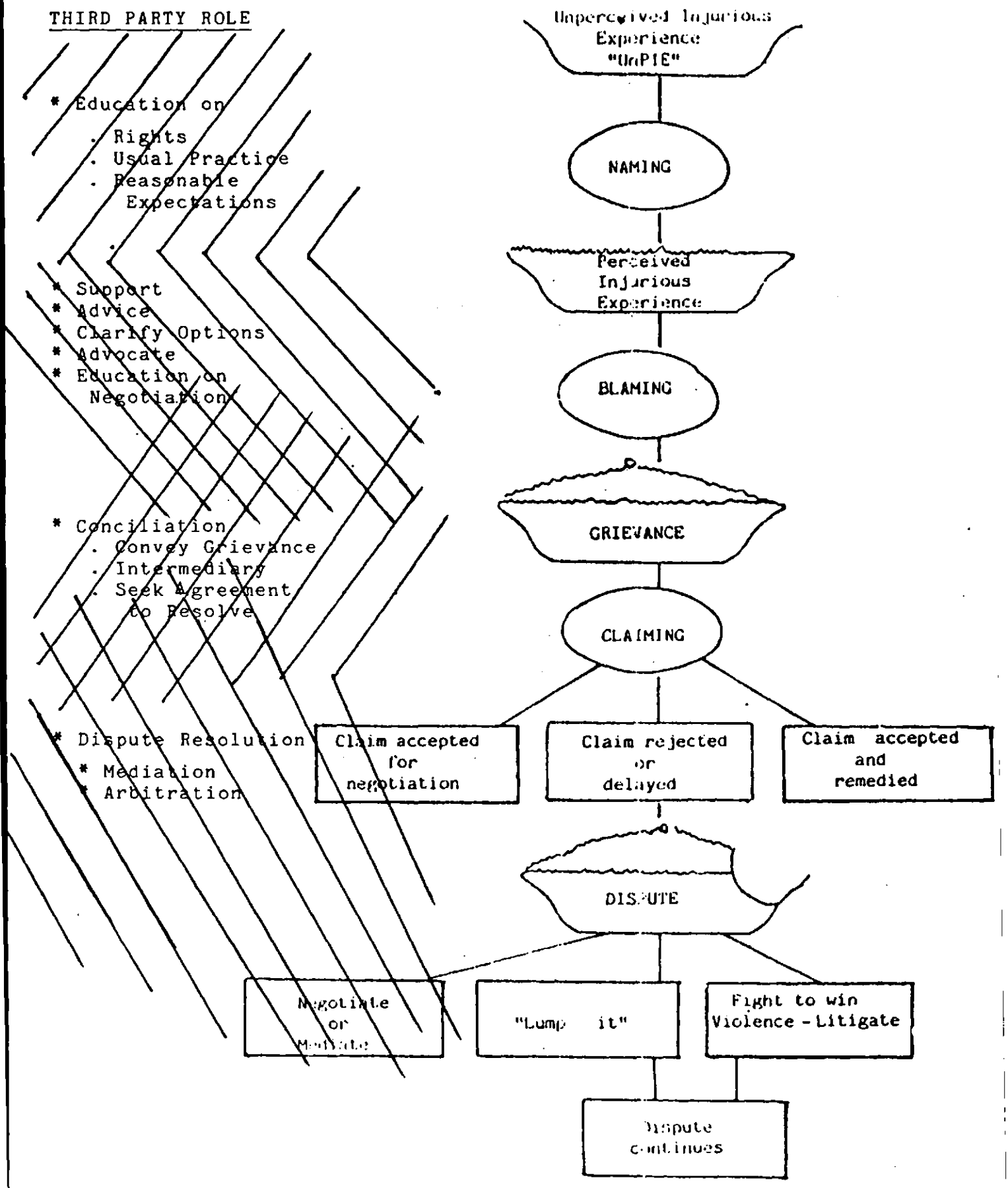
I suspect we do - consider for a moment the resources put into the actual dispute resolving processes - like mediation or arbitration - compared with the resources we devote to education and pre-session contact.

The role of the third party neutral at "Intake" - or the pre-session (pre-mediation) processes - is probably the one subject to greatest confusion and misunderstanding.

There is a substantial conciliation role - that is, to get the parties to agree to participate in the dispute resolution processes, and to agree to the practical aspects of this. Some pre-session agreement on issues may be necessary as evidence of good faith.

There is a diagnostic role in determining who is to be included in, or excluded from, any planned session. It is essential that this diagnostic aspect be applied consistently with the philosophy of the programme - and this means more consultation with, and negotiation with the parties.

There is a practical organisational role, to get everyone together.


THIRD PARTY ROLE
* Education on
. Rights
. Usual Practice
. Reasonable Expectations
.
* Support
* Advice
* Clarify Options
* Advocate
* Education on Negotiation
* Conciliation
. Convey Grievance
. Intermediary
. Seek Agreement to Resolve
* Dispute Resolution
* Mediation
* Arbitration
Unperceived Injurious Experience "UnPIE"
NAMING
Perceived Injurious Experience
BLAMING
GRIEVANCE
CLAIMING
Claim accepted for negotiation
Claim rejected or delayed
Claim accepted and remedied
DISPUTE
Negotiate or Mediate
"Lump it"
Fight to win Violence - Litigate
Dispute continues

There may be an information or referral role to ensure that the parties are able to negotiate from a basis of knowledge.

Is it appropriate for the third party neutral's role to extend to advice, therapy, support or personal development of one party?

WHEN DOES THE ROLE OF THE THIRD PARTY NEUTRAL CEASE?

Another area where we must seriously question our practice is in exiting from a dispute.

It is with some shock that I have recognised recently that we (at the CJC) have adopted a practice - established early in our history with due consideration of philosophy - and have not seriously questioned this since. Other factors, like level of resources, have since rendered any other practice unworkable, so the practice has become set - almost an article of faith. This practice is based on the idea that disputants retain control over their own dispute and that they take responsibility for the dispute and for the keeping of their agreement. Consequently, we rejected any suggestion of being "agreement police", or "therapists", or "parents" and following the mediation session we have not played any significant part.

In all cases, disputants are made aware that they can come back if there are any further problems, or for other assistance, but effectively we were saying "its now your responsibility".

Aftermath of some large and complex community disputes involving many households have led us to question whether this is good enough.

More recently, the issue was raised again in a summary of the history of third party interventions in the Philadelphia/MOVE conflict. This conflict disrupted the entire city for over 12 years, resulted in 12 deaths and vast property damage and destroyed many political careers.

This report details the many attempts by third party neutrals to resolve the dispute, and analyses the successes and failure. On more than one occasion, agreements were reached, partly complied with but finally broke down. The report details several possible factors in the failure of a significant agreement. The report comments -

> Another possibility is that no one was in charge of the implementation period. Intervenors were too exhausted from the ordeal of reaching agreement to retain vigilence over this key period. In a situation where trust was so low and verbal duelling

> so high, post agreement oversight is a crucial issue. (Conflict Resolution Notes 1986).

This is of course only one of many possible reasons for failure, but its significance demands our attention in considering the termination of third party intervention.

Can we continue to deny resources to the "fragile" period of the relationship that seems to follow dispute resolution processes? Does our exit at this point place at risk the investment made in the resolution of the dispute? Would further intervention or oversight of agreements take away from disputants the control and responsibility we have diligently handed back to them? Can we exit and remain consistent with our ideal of resolving "the whole dispute"? Can we remain in and be consistent with our philosophy of the disputants being in control?

BALANCE OF POWER AND THE THIRD PARTY NEUTRAL

There is often concern expressed about the difference in power between parties involved in negotiating resolution of a dispute with the assistance of an ADR programme. Most vocal in this concern are often people who do not question the myth that people go to court as equals.

This is a concern of ADR practitioners, and in many programmes it is given weighty consideration, in training, in development of guidelines, and in supervision. Efforts have been made within Community Justice Centres in NSW to develop skills in recognising, analysing and equalising power differences. There is still much for us to learn.

It does, however, provide a major philosophical dilemma - eminently suited to thoughtful discussion around a log fire, or over the fourth

> Can a third party neutral use techniques to equalise power between the parties, and still remain neutral?

I have heard impassioned argument from both sides of the question. As ADR is so young, it is in my view appropriate that this argument should rage for many seminars to come.

It may seem like a futile argument; that it is insoluble, or has no purpose and is to be scorned by the "real practitioners".

But it is a very basic issue - and can be put in these terms -

> What do we treasure more - our impartiality, or a "fair go"?

It is an uncomfortable question, and it won't go away.

It is only by open and honest discussion of these issues that we will develop greater understanding of our role in the dispute resolution process. At this stage in the development of ADR we cannot afford to ignore issues or assume easy answers.

Like ADR, we need a full exploration of the issues, and principled negotiation. We need to look towards the future, and recognise that, like many interpersonal disputes, any agreement may need to be re-negotiated from time to time.

Fruitful discussion at this and future gatherings will ensure that ADR and third party neutrals as we know them will play an increasing role in disputes processing in Australia.

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IMBALANCE OF POWER BETWEEN DISPUTANTS

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My favourite joke about the imbalance of power between disputants involves Moses and his trip up the mountain. For 3 days and 3 nights his followers saw dark clouds and heard great rumblings. Finally, when Moses came down with the commandments under his arm, he said:

> Well, I have some good news and some bad news. The good news is that I've been able to negotiate him down to 10. The bad news is that adultery is still in there.

The mechanisms we have developed to survive, thus far, involve the public and private ordering of disputes.

The public ordering of disputes involves the application of law so that all may understand that consequences flow from certain actions. Law and order enable all of us to be far more secure than we would otherwise be if the principle of 'might makes right' were prevalent in our local communities. We have great pity for people caught in conflict in Northern Ireland or Beirut to name just two places where 'might makes right' prevails.

Those of us who have responded to the United Nation's call for 1986 to be the International Year of Peace have our efforts blessed and sanctioned by the world's nations sitting in it's highest and most popular forum.

We need only look to that communication and negotiation centre of our planet to see that imbalances of power between disputants is a natural fact of life. Our country is at the moment in the chair at the United Nation's Security Council where the superpower veto reigns supreme. Power imbalance is the name of this negotiation game and the epidemic of the armament contest is the penalty for negotiation failure.

It is time for some improvements which can revitalise the art of practical peacemaking. These improvements come from one of our planet's best centres of knowledge and wisdom. Roger Risher and his colleagues at Harvard University's Negotiation Project have developed some new negotiation concepts which seem to be easy to learn and simple to apply.

And yet the results are more satisfactory for any participant than other ways of balancing the imbalances. In many ways the Harvard Negotiation Project is building into the method of negotiation certain sine qua non factors to create a 'see-saw' effect which automatically balances itself out.

The method involves mutual interest or principled negotiation. These names could become as well known as the Marquis of Queensbury Rules or the Geneva Convention. They may even help us to 'lift our game' as a new profession: 'citizen diplomats'.

I believe that the techniques of mutual interest negotiation should be explained to any client entering any of our conciliations, mediations or even our arbitrations.

I have seen this explaining done by my colleague and friend Dr Isolina Ricci, a mediator who has strong concerns about promoting equal empowerment. Her recent work on this subject bears some scrutiny as it can also shed light on the imbalance of power between the disputants.

In a paper presented for a conference Dr Ricci concentrated on empowerment for women within a relational mediation context. Many of her major concepts can be examined and utilised for a much wider range of disadvantages in empowerment than the sole criteria of gender.

She quotes Mnookin's (1979) list of unfavourable circumstances: lack of legal knowledge and experience; inability to bear associated costs and anti-risk socialisation. To this Isolina quotes Weitzman (1983) and adds a feeling of entitlement depending upon the particular social circumstances of the least secure person.

The entitlement of belief in a legal claim to something is separated from the empowerment or ability to exercise these claims. This ability is composed of the negotiation skills of preparation and presentation of proposals, analysing circumstances, withstanding power plays and negotiating in one's best interest.

It is here that I maintain that significantly more of the imbalance could be swept away with the higher ability to practise mutual interest negotiation. This has proven to eliminate the use of many 'power plays' and goes to the heart of the preparation and presentation of proposals stage.

We may have a moral and ethical obligation to teach a short course in negotiation along with presenting a legal question and answer period as part of any lead up to dispute resolution. Insisting that people at least be equally exposed to the same information (in separate sessions if necessary) can go a long way toward restructuring relationships and interaction.

Principles such as separating people from the problem and focusing on interests not positions can lead to the inventing of options for mutual gain. With mutual interest principles expected by the intervenor the quality of dispute processing should be greatly enhanced.

As third party practitioners we are supposed to intervene to promote fair negotiations and equitable settlements. Since the balance of power can ebb and flow depending upon many factors it is virtually impossible to presently give very exact directions on how to balance power.

This is further complicated by the fact that not all conflictual situations are 50/50. Most of us adopt the stance that what is considered fair and equitable by the parties is of paramount importance.

Ricci (1984) states that the mediator is responsible for 4 assessments: firstly the disputants' ability to identify entitlements and negotiate for themselves and those that depend upon them; secondly being able, as a mediator, to change perceptions of imbalance into descriptions of patterns and premises; thirdly to identify where and when to employ any interventions and lastly, to know which interventions are appropriate to promote fair and equitable negotiations and agreements.

Quoting Becker-Haven (1983) who specifies four intervention models, Dr Ricci focuses on the educational mode. This begins with a conflict exploration and includes the identification of participant fears as well as the facts. At this point traded assurances are negotiated.

The next task is to check for the need to know more about rights or entitlements. However, to send someone away to get advice and have them not return because they have been encouraged to go to law with their problem is not uncommon. A legal advice intervention at this point could be easily secured by the mediator or at least they can be given a list of legal practitioners who understand and support mediation efforts and who will not sabotage the process.

Then the mediator is to identify dysfunctional communication and dispute resolution patterns as well as their negative interactions. It is at this stage that mediator intervention with proposed rules for process are negotiated and agreed to by all the parties to the dispute, including the mediator.

One simple rule that I utilise in all of my mediations is that the participants are to speak to and through me. They are to educate me regarding the items at issue. They are to do this in the presence of the other(s).

In the process I use, the participants may have as much time as it takes to relate their side of the situation whilst their counterparts take notes and refrain from interrupting.

Another factor which influences my own style is the 'rules for future behaviour' concept. As a peacemaker I can do nothing about the events of the past. When there is a mutual decision to work out terms of mutually acceptable agreement on how each party will act in the future, then everyone is usually disposed to be conciliatory. An agreement on this and other appropriate procedural rules which are negotiated by the disputants can balance power before the power is used.

Third party neutrals can and should ask questions of each participant which enhance the educational and protection role of the intermediary. In rephrasing participants' statements as part of the active listening role the mediator can act as a social translator and hostility baffle thus demonstrating for each side the skills of conflict management.

Of course one of the most powerful reasons for the intervention of a third party is the guidance that can be obtained in the generating of options. In conducting an alternatives search Roger Fisher (1981) provides a useful four step circle chart involving the problem, the analysis, the approaches and action ideas which all tend to keep the inventing of the options separate from the decision making process.

The most crucial phase of conflict resolution involves encouraging the will to settle and the assistance in the crafting of trust enhancing and self enforcing consequences into any written agreement. The monitoring and follow up stage can be built in here to increase chances of adherence.

More philosophically perhaps, we should look at the concepts of Bacharach and Lawler (1981), who built upon the power dependence theory of Emerson (1972) which examines the workings of dependence in determining bargaining power relationships. The theory holds that there is a two way flow of benefits which vary in importance and availability.

They have recently (1986) made modifications to their theory which we can explore. Over time the bargaining power can change in the same direction thus meaning that an increase is not necessarily at the expense of another and that tactical action can alter the power balance.

There are four paradoxical statements which affect the acquiring and use of power in an ongoing bargaining relationship. They are:

1) Power is based on giving
2) To use power is to lose it
3) Tactical manipulation of the power relationship may have integrative rather than disintegrative effects, and
4) An inferior power position can provide a tactical advantage.

An understanding of these paradoxical statements can assist third party neutrals in the friendly interference which we strive to practise when we act as peacemakers and healers of conflict. We who have control over the process of dispute resolution derive our mandate from the disputants. It is they who have the real power. We are but the fulcrum which balances their burden.

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MATCHING THE DISPUTE TO THE DISPUTE RESOLUTION PROCESS: ITEMS FOR CONSIDERATION

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INTRODUCTION

Much of the emerging debate about who should be involved as third parties in what kinds of disputes, can be put into a more helpful framework by framing the question as matching various kinds of disputes with the growing variety of dispute resolution processes. This kind of framework could also serve as a useful basis for the development of a range of alternative dispute resolution service options and policies.

This paper briefly outlines some of the considerations in matching disputes and dispute resolution methods which affect program designers and service deliverers. It includes several worksheets for the workshop participants. These worksheets can be used to help clarify certain issues, promote discussion, and possibly can help in initial planning of alternative dispute resolution services. They represent initial formulations, and it is expected that workshop participants will use them to help trigger their thinking about the specifics of their own situation.

In order to begin planning for initiating, adapting, refining or abandoning alternative dispute resolution programs, there are several interlocking kinds of decisions which need to be addressed.

An outline of the items considered is presented below. (Those with stars have attached worksheets and will be addressed in the workshop).

1. Basic philosophy

   - Nature of conflict/dispute *
   - Nature of conflict/dispute resolution *

2. Problem area

3. Population served

4. Goals of program - Definition of service

5. Forum/sponsorship/aegis

6. Reality constraints

In decision-making, #1 interacts constantly with #2-6. These six points, therefore, do not represent strictly sequential steps. One may, for instance, decide first what population is to be served, then go on to specify goals; or one may set goals (e.g., community empowerment), then decide which kind of population to concentrate on (e.g., new immigrants).

7. Role of third parties *

8. Training, supervision

9. Evaluation, quality control

10. Ancillary services (information giving, referrals, etc.)

As can be seen, the role of third parties depends on decisions and clarity in #1-6. It is not functional to decide on implementing a `flavour of the month' like mediation without first deciding WHY and TO WHAT END? If third parties are to have new roles - that is, to engage in new processes (like mediation), or in old processes with a new focus (like counselling aimed at assisting specific decisions; or a lawyer doing arbitration), training and quality control are necessary areas for planning.

Then, after these sorts of items have been worked out, there comes the more specific business of deciding which particular kinds of disputes, conflicts or situations fit your particular kind of service in individual cases. This involves:

11. The nature of the dispute *

12. The nature of the disputants *

13. Availability of other community services

14. Matching # 4 and # 7 with # 11-13

(It is, of course, possible to decide first on #11-12 and then work out goals, population, etc.)

What is not suggested is to decide first on #7 (Role of the third parties). That is, it is here deemed legitimate to decide that one wants to develop a service in dispute resolution, for example, for parties who have long-standing, intractible civil disputes -- then to work out the philosophy, goals, etc. What

is not deemed legitimate is to decide that one wants to offer mediation or arbitration, then work out why.

The role of the third party (the actual process used in dispute resolution) must depend on the aims sought -- not the other way round.

Below there is a brief discussion of some of the items outlined above. Those with stars (Nature of conflict/dispute, Nature of conflict/dispute resolution, Role of third parties, Nature of disputes, Nature of disputants) are the subjects of this workshop and worksheets are attached to serve as a basis for thinking and discussion in the workshop.

PROBLEM AREA

This will probably be partly determined by the nature of the planner's current employment, that is, commercial law, family welfare, probation, etc. It is fairly common in program planning to assume that everyone has the same definition of the problem area, when in reality, there are usually multiple possibilities for program focus.

For example, in family welfare, one could develop alternative dispute resolution programs in restructuring families after separation; prevention of family breakdown; managing teenage discipline; preparation for marriage; teaching children conflict-resolution skills; etc. In commercial law, alternative dispute resolution could aid in merger negotiations; intra-business disputes; contract disputes; etc. The possiblities are enormous, and concrete decisions, at least about where to begin, need to be made.

POPULATION TO BE SERVED

Who is to be served by the proposed program? This decision may come before or after or along with the next item -- goals of the program. Is the emphasis on serving an ethnic population; single parents; lawyers; families of prisoners; minor civil case offenders; or other.

Again, this may partly be determined by the area of work of the planner, and/or the population currently serviced by the planner and/or her/his agency.

Often it is assumed that this is clear, but it needs to be made the subject of explicit discussion and decision by the planners.

GOALS OF PROGRAM - DEFINITION OF SERVICE

Program goals are basically a matter of philosophy, but they need to be clearly thought out. Some possible goals could include:

1. Prevention of litigation
2. Education in conflict resolution methods
3. Empowerment of participants
4. Reducing dependency on authority to settle conflicts
5. Reducing community dependency on 'experts'
6. Avoiding industrial disputes
7. Saving of costs and time
8. Servicing a court by a pre-trial settlement program
9. Improvement of on-going working relationships between disputing parties.

Many more goals could be listed.

Goals will have a profound effect on the direction of the program. Emphasis on avoiding litigation or on saving court costs, for example, can lead to great pressure on the third parties to achieve a settlement, with consequent higher priority being given to finding an agreement than to modeling a dispute resolution process, for example. Emphasis on empowerment of parties indicates less of a role for the third parties in originating options, as another example.

The goals sought will largely determine the role of the third party and specification of the specific dispute resolution process to be used. Very little can be accomplished in the way of quality service delivery without clarity as to basic goals. The goals will, of course, closely interrelate with the problem area and the population served, as well as with basic philosophical considerations.

Again, often assumed rather than planned, explicit goals provide the basis for service evaluation and for informed next steps in developing a new area of service delivery. Accountability is closely tied to clear goals.

FORUM FOR DISPUTE RESOLUTION/AEGIS OR SPONSORSHIP

Funding considerations as well as philosophical convictions will influence this decision, as well as workplace of the planner. Is it to be private or public; in-court, court-related, or non-court related; connected with a religious institution; in a new setting devoted to conflict resolution only. Many settings and sponsorships are possible.

REALITY CONSTRAINTS AFFECTING PROGRAM PLAN

The real world does not always cooperate with new ideas. Turf considerations; politics of all kinds; funding; availability of suitable persons as third parties; training personnel and time; projected numbers; building space -- these and many more factors can put an indelible imprint on a program. This is particularly true where goals, problem area, philosophy, and population have not been carefully worked out.

When planners have done their homework, many of the reality constraints can be taken into account in the basic decisions so that a realistic program plan results. When steps in planning are skipped or ignored, the program is much more vulnerable to running into unexpected brick walls.

WORKSHOP DISCUSSION

It is not planned that the points discussed above will be the focus for this brief workshop. Rather, five topics from those listed at the beginning of the paper are suggested to workshop participants. They are, first:

Two basic philosophical considerations:

1. Nature of conflict/dispute, and

2. Nature of conflict/dispute resolution.

These topics are important for program designers, as they are not often considered per se -- yet the assumptions they involve usually underlie basic decisions about dispute resolution methods. If one believes, for example, that conflict or dispute is always harmful to a relationship, one's dispute resolution methods are likely to be focussed on quickly quashing overt signs of disputes.

3. Nature of the dispute

4. Nature of the disputants

These two worksheets list characteristics of disputes (such as intensity and duration) and of disputants (such as willingness to negotiate) which some research suggests may be related to success or lack of success in reaching agreements in alternative dispute resolution. On the worksheet, these characteristics are listed under plus or minus signs, to indicate their suggested relationship.

5. Role of the third party (parties)

A listing of various roles third party neutrals may play is given on the worksheet.

Note -- Each worksheet has a list of suggested items, followed by blank spaces which can be filled in. The worksheets are intended to stimulate participants' thinking about characteristics of disputes, disputants, etc., in their own area of work -- and to serve as a basis for discussion. The author feels that in order to get to the specifics of matching presenting disputes with the actual service one is offering, it is at least helpful (if not necessary) to have as much of a grasp as possible of elements suggested here.

WORKSHEET 1

PHILOSOPHICAL CONSIDERATIONS

(Basic concepts, values, which are the subject of individual conviction or belief. Often based on professional training or other such experience)

NATURE OF CONFLICT/DISPUTE
(in chosen problem areas)

1. Intra-personal elements most important
2. Inter-personal elements most important
3. Is a matter simply of different perceptions between people
4. Requires a winner and a loser/can be win-win
5. Involves a threat to self interest
6. Is a cry for help, or a symptom
7. Is based on power struggles; need for affiliation; personal gain; other
8. Should be controlled or stopped/can be managed
9. Can be constructive/is always destructive
10. _____
11. _____
_____
12. _____
_____
13. _____
_____
14. _____
_____
15. _____
_____

WORKSHEET 2

PHILOSOPHICAL CONSIDERATIONS

(Basic concepts, values, which are the subject of individual conviction or belief. Often based on professional training or other such experiences)

NATURE OF CONFLICT DISPUTE RESOLUTION
(requirement for effective conflict dispute resolution)

1. Negotiation directly between the parties/need go-between
2. Address underlying issues/only look to the future
3. Attention to emotional components of conflict
4. Attention to specific options and agreements
5. Equality of power between the parties/or, not important
6. Third parties 'matched' to disputants/or use of 'experts' (however defined) as third parties
7. Threat of litigation or sanctions if agreement not reached/totally voluntary participation
8. Unlimited time for discussion, negotiation/ sessions limited
9. Privacy/open sessions
10. Confidentiality/reportability
11. Parties `own' the conflict and the resolution/content of the resolution should be guided by an expert (however defined)
12. Imposed decisions are necessary in some situations/never used
13. Neutral setting
14. Referral by authority/self-referral
15. _____
    _____
16. _____
    _____
17. _____
    _____
18. _____
    _____
19. _____
    _____

WORKSHEET 3

NATURE OF THE DISPUTE
(in chosen problem area)
(Characteristics which may influence the possibility of effective resolution)

+ (may help resolution)	? (effect uncertain)	- (may hinder resolution)
1. Duration: early days		Duration: long standing
2. Intensity: mild		Intensity: severe
3. Ability to find common ground		No common ground
4. All parties present or available at negotiations		Important parties not present or available
5. Amenable to problem-solving techniques		Not amenable to problem-solving
6. Clear issues		Muddy/global issues
7. Flexible positions		Hardened positions
8. Joint decision-making possible		No joint decision-making
	9. Outside ability to force a decision if agreement not reached	
	10. Existing litigation	
	11. Existence of legislation	
	12. Arena or forum in which the dispute occurs	

	+	?	-
13.			
14.			
15.			
16.			
17.			
18.			

WORKSHEET 4

NATURE OF THE DISPUTANTS
(Characteristics which may influence the possiblity of effective resolution)

+ (may help resolution)	? (effect uncertain)	- (may hinder resolution)
1. Open communication patterns		`blaming' communication patterns
2. A wish to settle		A wish for revenge/ to punish
3. Ability to cooperate		Lack of ability to cooperate
4. Conflict resolution/ negotiation skills		no skills
5. Low hostility		high hostility manifestly unequal power
6. Relatively equal power		fear of outcome unfavourable to `best interests'
7. Hope of outcome favourable `best interests'		no trust in negotiation process
8. Trust in negotiation process		at different points in the (separation), (negotiation), (etc.) process
9. At the same point in the (negotiation), (separation), (etc.), process		
	10. Adequate cognitive ability	Lack of cognitive ability (`incompetence')

WORKSHEET 4 Continued

+ (may help resolution)	? (effect uncertain)	- (may hinder resolution)
	11. Adequacy of resources	
	12. Constituency, and its effects	
	13. Presence of a crisis	
	14. Good faith	
	15. Definition of 'best interest'	
	16. Willingness to litigate if necessary	
17. _____	_____	_____
_____	_____	_____
18. _____	_____	_____
_____	_____	_____
19. _____	_____	_____
_____	_____	_____
20. _____	_____	_____
_____	_____	_____
21. _____	_____	_____
_____	_____	_____

WORKSHEET 5

ROLE OF THE THIRD PARTY (PARTIES)
(A listing of possibilities, depending on philosophical considerations)

Folberg and Taylor (1984) suggest these kinds of `styles' of the third party (parties):

1. labour - negotiators for other parties; neutral; active in helping them define positions and understand each other's positions
2. therapeutic - teaches communication skills; attention to emotions
3. lawyer - information re: law; may note potential legal outcomes
4. structured - has specific steps to follow
5. court-connected - often referred by court; may need to have started litigation to receive service
6. community - often a panel of trained community members; matches neutrals to parties
7. shuttle - there may never be face-to-face contact; neutral as the go-between
8. celebrity - famous or notable person to use good influence
9. team - usually professionals; may be from different disciplines

Milne (1984) adds:

10. muscle - aims for agreement above all; active in getting parties to find options; may suggest options, solutions
11. scribe - simply writes down what happens; no input

Becker-Haven (1984) adds:

12. educator - gives information; helps parties learn how to solve problems
13. rational-analytic - uses and teaches strategies to maximise joint profits
14. normative-evaluative - makes evaluation of options or agreements in line with some (possibly own) standard, e.g. best interests of the children

Other possibilities are:

15. advocate - usually for children
16. decider - the neutral makes the decision
17. enforcer - the neutral may be a judge or magistrate

18. _____

_____

19. _____

_____

20. _____

_____

21. _____

_____

22. _____

_____

23. _____

_____

24. _____

_____

WORKSHEET 6 *

MATCHING DISPUTES WITH DISPUTE RESOLUTION METHODS: (Some considerations)

CHARACTERISTICS OF DISPUTE RESOLUTION METHOD IN MY PROGRAM	CHARACTERISTICS OF INDIVIDUAL CASE, DISPUTE AND DISPUTANTS
1. Degree of voluntariness	1. Are both (or all) parties willing
2. Process - role of third party (directive, educative, enforcer, therapeutic, etc.)	2. Is dispute amenable to this process (for example, abduction of children not a matter for problem-solving)
3. Time available (for example, is there provision for several sessions)	3.
4. Characteristics of third parties	4. Do they match with dispute type: state of the disputants
5. Available ancillary services (for example financial or legal information)	5.
6. Availability of other community services	6. Do they need dispute resolution or some <u>other</u> service.
7. _____	7. _____
8. _____	8. _____
9. _____	9. _____

* Worksheet 6 was developed after the workshop, and briefly suggests several items which need to be considered when one is attempting to match an individual presenting dispute with the specifics of one's service.

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CONFLICT OF ROLES WHERE MORE THAN ONE RESOLUTION METHOD IS EMPLOYED

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INTRODUCTION

Alternative dispute resolution may provide a service where no service previously existed; or it may provide a service where existing services are methodologically limited or inappropriate; or it may provide a service where existing services are overloaded or proving to be too expensive. In addition, alternative dispute resolution is not the same process across agencies and may not be the same process within an agency. This is a complex situation, from which it is often not possible to distinguish a role for the practitioner which involves 'pure' mediation, or conciliation, or arbitration. Practitioners find themselves applying a mix of methods as befits the situation, and these methods potentially conflict one with another, or with the established legal system.

In this paper an attempt is made to examine the assumptions which underlie a range of dispute resolution situations. It is suggested that a continuing awareness of these and how they relate to the subject of the dispute and the values expressed by the client is the key to handling dispute situations successfully and to reducing the potential for a conflict of roles. The analysis derives from a working paper presented to workshop participants at the seminar. Results of a practical exercise, designed to assess the conceptual framework within which practitioners operate, are incorporated together with general participant feedback (whilst gratefully acknowledging this input the author takes full responsibility for the final draft).

THE PRESENT ALTERNATIVE DISPUTE RESOLUTIONS CONTINUUM

Current rationales for supporting alternative dispute resolution services include:

1. Providing relief for an existing structure
2. Cost saving
3. Time saving
4. Methodological limitations of existing dispute resolution structures
5. Inappropriateness of existing structures
6. Absence of existing structures

7. Increasing consumer satisfaction
8. Encouraging greater personal investment in solutions
9. Obtaining better quality solutions
10. Obtaining more enduring solutions

The emphasis each organisation places on elements such as the above, significantly influences the type of alternative dispute resolution it practises. Major emphasis on elements 1-3 for example, is likely to result in a process which has a strong prescriptive component. The prescriptions are likely to stem from assumptions contained within the dominant framework to which the process is said to be providing an 'alternative'. The 'mediator' may for example suggest that:

> A legal decision in your case would generally be along the following lines. You are therefore urged to agree to a resolution along those lines.

On the other hand, major emphasis on elements 7-10 points to a form of mediation which pays more attention to empowering clients to discover solutions appropriate to <u>their</u> particular circumstances. For example mediators working at this end of the spectrum might suggest the following:

> You know your family situation better than anyone else. You are therefore likely to come up with a solution superior to anything an external expert or authority might suggest.

If there is disagreement within an organisation about where the emphasis should be placed, tension and conflict between mediators or between mediators and management is likely to result. Tension and conflict will also occur if management officially espouses a self empowering philosophy, but feels itself constrained by resources or political pressures which push it in the direction of speedy prescriptive mediation.

As a methodology, mediation is in competition with more established dispute resolution procedures. These tend to be sustained by vested interests and by deep seated myths about how conflict is or should be resolved. Myths which support conventional dispute resolution procedures include:

> - quality dispute resolution is costly (you only get what you pay for
> - resolution requires experts
> - disputants require representation
> - clients prefer authoritative answers
> - resolutions should be legally enforceable
> - problems are more complex than clients realise (the mystique maintainence syndrome)
> - an adversary approach maximises the chance of arriving at the truth.

THE NEUTRAL THIRD PARTY

'Pure' mediation tends to espouse strict neutrality, assuming that appropriate solutions are likely to be generated by the disputants themselves. This may be seen as a challenge to the very raison d'etre of professionals involved in conflict resolution. Much of the expertise of such groups is tied to knowledge of particular frameworks and the prescriptive solutions they offer. Such groups may respond to the perceived challenge of mediation by asserting the superiority of their own frameworks or by 'mediating' but only within the framework with which they are familiar and which sets them apart as professionals.

On the other hand, neutrality does not simply consist of the absence of a personal or professional view. We all operate within a personal framework. We cannot not communicate something of our personal framework to others. Good communication requires a level of understanding of the strengths and limitations of our own framework. It requires an openness to receive messages from others whose frameworks differ from our own. It also requires the maturity to recognise that any unwillingness to accept the perspective of another may be telling us something significant about the limitations of our own framework.

Thus for the neutral third party, a continuing awareness of personal values and assumptions is a sine qua non of good mediation. If the mediator's values are in conflict with the subject of the mediation or with values expressed by the client, they should be declared. A way around the impasse may need to be found, or the mediator may need to withdraw.

Awareness of the external constraints, both real and perceived, which are placed on mediators by the settings in which they work, is equally important. Mediating under consumer protection or anti discrimination legislation tends to limit the range of options the mediator may endorse. At the other end of the spectrum are mediation situations constrained by few formalised external expectations. The case described in the Family Conciliation Centre's First Annual Report (1985), in which a teenager and stepfather agree to try to improve their relationship with each other, might fall into this category.

In between are situations in which the degree of external constraint will very much depend on the mediator's particular perspective. For example the Family Law Act has guidelines on property distribution. How closely should a mediator adhere to these guidelines if it is clearly the wish of both former spouses to seek a different sort of solution? Is the primary task of (say) a Family Court registrar acting in the capacity of mediator to transmit and interpret the law and to encourage and endorse a settlement which conforms to the law? Or is it to assist couples come to a resolution they are both prepared to live with?

STYLES OF MEDIATION - A PRACTICAL EXERCISE

Mediators must operate within a conceptual framework. The neutral third party is both constrained and assisted by the framework he or she has developed. Thus at every moment, the interventions of the mediator reflect his or her perspective. A simple but nonetheless useful way to begin to explore these perspectives is to attempt to place ourselves and our organisations at points on behavioural continuums. Workshop participants were able to relate their own practice or knowledge of mediation to a number of behavioural or theoretical dimensions which included the following:

Value Laden.....Value Free
Informative.....Exploratory
Prescriptive.....Non Prescriptive
Interpretive.....Non Interpretive
Agenda closed.....Agenda open ended
Individual focus.....System focus
Contained.....Expressive
Time limited.....Time open ended
Shuttle.....Group

Discussion took place on what each of these dimensions meant to the workshop participants. Participants then physically placed themselves on an imaginary line each end of which represented the extreme ends of the particular dimension being explored. They each recorded their initial positions; they also recorded whether or not, on reflection, they wished to move some distance 'left' or 'right'. The process was then repeated with participants this time representing their organisations rather than themselves; any discrepancy resulting from this second exercise was recorded. All participants were encouraged to ask themselves:

Are these points on the dimensions consistent with my aims as a mediator?
Are they consistent with the aims of the organisation?
Are there inconsistencies between dimensions?
Are there significant variations between workers in the same organisation?
Are there significant variations between the aspirations of mediators and the operations of the organisation?

Time did not permit a detailed plotting of every response. Nevertheless, a number of results clearly emerged.

Firstly, there was a fairly high level of consistency between each dimension for each individual. For example, those who placed themselves towards the value laden end of the spectrum, also saw themselves as providing a service which tended to be informative, prescriptive and so on.

Secondly, it was noted that many participants initially placed themselves at a particular point on each dimension and then adjusted their place 'left' or 'right' according to how they perceived the positions taken up by colleagues. This is a well known psychological and sociological phenomenon. In the discussion and debate which will no doubt accompany the growth of the (for want of a better term), alternative dispute resolution movement, its effect should not be underestimated.

Thirdly, whilst the majority of participants moved only short distances or not at all when comparing how they saw themselves with how they saw their agencies, a minority consistently saw the position of their agencies and their own positions clearly in conflict. There was much good natured laughter at this as participants shuffled back and forth in somewhat cramped circumstances. The chaos at these moments however, provided a useful metaphor for a serious issue which must be addressed if mediation and conciliation services are to develop and gain further public acceptance. Questions which will need to be addressed include: Can one agency tolerate more than one model or point of view? How is a predominant view established? Can different models for different problems achieve equal legitimacy within the same agency?

CONCLUSION

Mediation is in a comparatively early stage of its development. Some writers have observed that it is still seen, like motherhood, as a fairly undifferentiated 'good thing'. There is, however, a growing literature which attempts to critically examine the assumptions which underlie mediation and conciliation as it is being applied to a range of dispute resolution situations. This first national seminar on alternative dispute resolution constitutes a further important step in that direction.

No doubt disagreements will develop both within the mediation 'movement' and between mediators and those engaged in more traditional dispute resolution. Because of the broad range of subject matter they cover, any alliance of mediators is likely to be a fragile one. Yet such an alliance will be important if mediation is to gain public acceptance as a legitimate - perhaps even mainstream - form of dispute resolution. It is suggested that alliances will be enhanced rather than hindered by openly acknowledging the differences as well as the similarities in the various styles of mediation. So long as one particular group or style does not claim exclusive right to the moral high ground, there is every chance that an examination of differences will lead to continued refinement, greater sophistication and more widespread public and professional acceptance.

ISSUES IN ALTERNATIVE DISPUTE RESOLUTION: CONCLUDING OVERVIEW

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INTRODUCTION

This conclusion represents an overview of the issues discussed during the Alternative Dispute Resolution seminar. The seminar participants have been presented with a wealth of information and it would be quite beyond the scope of a concluding overview to summarise this. Rather, the conclusion is intended to raise some of the issues discussed or alluded to and to offer some suggestions as to the progress made during the seminar.

In this context, reference is made again to Auerbach's comment (1983 : 3-4) that the varieties of dispute resolution processes adopted by individuals within particular cultures reflect the ideals that those individuals hold, their perceptions of themselves and the quality of their relationships with others : '[t]hey indicate whether people wish to avoid or encourage conflict, suppress it, or resolve it amicably'. I would suggest that the presentations made during the seminar reflect the variety of values held by people involved in conflict resolution and that some resolution of - or at least acknowledgement of - these differences presents a challenge for all participants.

CONCEPTUALISING 'ALTERNATIVE DISPUTE RESOLUTION'

Definitional Problems

In the first paper Jenny David asked three questions :

1. What <u>is</u> alternative dispute resolution ; what is it alternative to ?
2. What is <u>actually</u> happening in the various alternative dispute resolution programs or services ?

3. Why should we have these, at this time ?

It was noted in the paper that alternative dispute resolution programs are usually compared to court-based systems. However, the processes that might be used to resolve a dispute are more varied than this. They might be conceptualised along a continuum from public processes involving structured third party intervention, to private processes which do not involve a third party, to avoidance. Along the continuum are also included public negotiation with unstructured third party intervention and private and informal processes which involve a third party. Given this description of a range of processes which alternative dispute resolution methods might be alternative to, one might have expected that seminar participants would have broadened their comparative base. By and large, this was not the case. Throughout the seminar participants continued to discuss mediation, conciliation and negotiation as alternatives to adjudication. Counselling and arbitration, which might be seen as the two 'ends' of the mediation/conciliation/negotiation continuum, were discussed only occasionally.

This focus undoubtedly reflects what practitioners in fact see the methods they use as being alternative to. Whether or not such definition is academically 'correct' is not important. What is important is the goal clarification which the discussion has provoked and revealed, viz that alternative dispute resolution is an alternative to adjudication or court-based dispute resolution.

The Processes of Alternative Dispute Resolution

In answering the second question, ie, what is actually happening in the programs being implemented, one is tempted to answer 'anything and everything'. As a somewhat naive observer one might conclude that those involved in the Family Court system certainly know what they are doing, that Community Justice Centre people are absolutely certain of what they are doing, and that Small Claims people seem to know what they are doing. But there remains considerable uncertainty regarding the processes used, in particular the consistency of those processes, and the labels which should be applied to them. It is perhaps not surprising that those practitioners who are most certain of what they are doing are those who have well-defined processes of resolution which their mediators, referees or judges follow. In other instances however, the processes described - in particular those labelled 'mediation' - do not conform to processes

similarly labelled by other practitioners. For some, the distinctions between counselling, mediation and conciliation are blurred. In other instances there was acknowledgement that no labels even exist for what is actually done in the intervention process.

To some extent the confusion and contradiction arose out of problems of labelling. In other instances it appeared to arise out of uncertainty or lack of clarity about the intervention behaviour. In part this uncertainty is a consequence of the private nature of much alternative resolution activity : these are not situations which outsiders commonly sit in on and observe. It is possible that a lot of the actual social interaction which takes place is, as one seminar participant put it, 'by the seat of the pants'. Comments made during the seminar indicated that even the court-based system, which most people thought they understood as their point of departure, was not as rigid and inflexible, or necessarily adversarial, or as inhumane as was commonly believed.

Other, perhaps more important, issues arose from these discussions. For example :

- what is the difference between legal information and legal advice ?
- if mediation is to be seen to be extralegal, informal and noncoercive, can a judge act as mediator in family matters ?
- how easily can a practitioner move between different modes of dispute resolution, for instance between adversarial and inquisitorial modes or between mediation and counselling ?
- what kinds of conflicts do practitioners face between their paid and unpaid work loyalties, for instance as a policeman and a mediator or as a lawyer and a mediator ?

From the presentations and the discussions surrounding them it was apparent that more clarification is needed as to exactly what goes on behind closed doors during mediation, conciliation, arbitration, negotiation etc. The seminar provided a beginning to this process, but there is still some way to go. In part the clarification is impeded by an information barrier which exists for two apparently contradictory reasons. Firstly, there is the conviction of some practitioners that <u>their</u> method is the most effective method for resolving disputes. Secondly, there is an apparent insecurity among other practitioners that they actually are not very sure of what they are doing. It is

obvious that the convictions of the first group exacerbates the insecurity of the second. The dialogue which has begun at this seminar therefore needs to continue in a supportive manner.

The Social Context of Alternative Dispute Resolution

The question 'Why at this time?' is at once both easy and difficult to answer. Auerbach (1983) has said that it is no coincidence that alternative dispute resolution arose out of the 'communitarian euphoria' of the 1960s. He has also said, however, that it was the pervading legalisation of western cultures which both provoked and facilitated the institutionalisation of alternative dispute resolution.

The notion of 'institutionalisation' might, in many ways, be the crux of the matter. Is it not somewhat paradoxical that alternative dsipute resolution is becoming - or perhaps has become - an institutionalised reaction to the institutionalised nature of the 'formal' legal system ? It is in this way that alternative dispute resolution must be seen as reactionary, rather than revolutionary and it is for this reason that I do not think alternative forms of dispute resolution are a serious challenge to all the underlying inequalities which characterise our societies. As reactionary agencies they will continue to be palliative, to treat symptoms rather than causes. This is, at least in part, because the 'alternative' system continues to reflect the prevailing state apparatus : it is provoked and facilitated by state control.

The answer to 'Why now?' also refers to the experience of state institutions which most of us in Australia, New Zealand and even America share. Increasingly, the functions and institutions formerly administered or assumed by the state are going into the community. For example, in the health service there has been a re-emphasis of community practice and community care of handicapped and psychiatric patients; in the police in New Zealand a return of community constables; and there are initiatives in community education and community justice. It is perhaps useful to ask what this means.

Setting aside the issue of what is 'community' (see David Bryson's paper) one might examine the relationship between these community initiatives and the state. An idealist might argue that community organisations means giving control of, for example, health, justice or education to the people. A cynic, who might well be a realist, could argue that this

means a return to the people of responsibility for funding. Indeed, one commentator has gone so far as to suggest that for 'community' one should read 'voluntary' (McCormack 1985). That is, governments have relinquished responsibility for administration and funding to lay people, many of whom are volunteers. The existence of such organisations, however, remains under the control of the state.

Herein lies a tension which genuine community-based or community-service agencies have to face. They face compromises in their service in order to secure funding - in some cases using volunteers, who were expected to provide the service, to raise funds to enable the organisation to function. Related to this tension, one needs to again address the question of what alternative dispute resolution agencies are alternative to : are they alternatives to the formal justice system, or are they extensions of it into the community ? Is alternative justice a way for the state to extend the influence of the formal system without meeting its costs ? If the strengths of the alternative systems are seen to be their informality and flexibility, care must be taken to ensure that these are not compromised in order to attain funding or legitimation from the formal system.

EDUCATION AND DISPUTE PREVENTION

If there is uncertainty as to what alternative dispute resolution practitioners actually do, and as to the correct labels to apply to such activities, there is also uncertainty as to where or how alternative programs 'fit' in the conventional system. This might be reduced to a question of who should practise alternative dispute resolution. In the discussions during this seminar it was clear that some participants believed that mediation, arbitration etc. should be practised only within the structure of some recognisable organisation set up for that purpose. I suspect that there were others who believed that these are skills which anyone could practise - reminding me of a mediator trainee whom I heard say, 'Well all parents are mediators, aren't they ?'

It is clear that many practitioners use a variety of techniques, without even necessarily giving them labels. It seems important that people involved in alternative dispute resolution services decide whether it is more important for them to specialise, or to diversify, the skills which they use. Concern has been expressed by seminar participants

about the possibility of untrained people offering alternative dispute resolution services. This applies particularly to mediation services, which currently are predominantly outside the conventional legal system (unlike arbitration or conciliation, which are more closely linked to state-run organisations). It might well be that organisations such as the N.S.W. Community Justice Centres or the Christchurch Community Mediation Service eventually assume a major responsibility as sensitising, training and educational organisations. Such roles would serve a double function of ensuring a means of accreditation and quality-control for mediators who might then employ themselves in other arenas.

Education in conflict management is also an important area for services to contemplate. In this context, the C.J.C. pamphlet 'Got A Prickly Problem?' is especially commended. However, education in dispute resolution needs to tread warily on the line between 'blame' and 'responsibility' for a dispute or a crime. Education in dispute prevention has received little attention during the seminar. Conflict and disputes are not identical : conflict is manifest in disputes when the conflict is not managed. Conflict itself is not undesirable, but disputes and crimes are both undesirable and destructive. One particular initiative, adopted in one New South Wales police district, has been the formation of community consultative groups whose aim is to air issues, interests and potential problems in order to avoid disputes which might be disruptive. The initiative is exciting and worthy of more detailed consideration.

THE COST OF ALTERNATIVE DISPUTE RESOLUTION

During the seminar some participants have raised the question of cost-effectiveness of alternative dispute resolution, in particular by comparison with the court system. It has been suggested that total monetary costs should be investigated, a matter which obviously is of interest to those involved in funding such agencies. Where cost-effectiveness calculations have been attempted however, conclusions are very difficult to reach. The very basis of the comparison is unclear and perhaps even spurious : it has been commented that comparing different forms of dispute resolution is like comparing apples and oranges !

The questions relating to cost-effectiveness are numerous. For example, is effectiveness based on caseloads, outcomes

assessment. Evaluation includes the assessment of need for a service, which might take place before the service becomes operational. It also involves program design, as well as assessment of service delivery, assessment of program effectiveness and impact of the service on the community. The role of an evaluator should include helping to determine the particular needs of the community being served and helping to develop a service which is flexible and responsive to those needs. Because community services need to be responsive in this way, organisers should be warned of uplifting models from elsewhere and applying them uncritically in a new situation. Evaluators can be used to provide this critique. They should be seen to be working alongside delivery staff, as facilitators, resource people and educators, as well as being assessors. Their task is to help practitioners deliver a better service, not to formulate unproductive criticism which will destroy, rather than create.

CONCLUSION

This seminar has indicated that there is an exciting array of alternative dispute resolution processes being planned and implemented in the community. During the course of the seminar a process of dialogue has begun, facilitating sharing of experiences and the giving and receiving of support. It has also facilitated the beginnings of goal clarification and definitional clarification. Participants at this seminar give evidence that they are trying to 'practise what they preach'. They illustrate the principles articulated by Wendy Faulkes, viz,

- communication between disputants
- taking responsibility for one's own action
- co-operative problem-solving
- recognising difference
- mutual understanding.

The process is by no means complete, but must continue through open discussion. We all need to be mindful of the need to support each other in this emerging philosophy.

The second major strength of this seminar has been the emergence of what might be termed a 'national concern'. During workshops there has been discussion of the need for a nationally-recognised system of training, accreditation and quality-control. There has been discussion about legislative

or recidivism rates ? Should court costs be taken as court-processing costs, or costs from the point of entry to the system (which might be via police or lawyers) ? Does one focus only on monetary costs ? It is acknowledged that alternative dispute resolution is very labour-intensive, but this time input is not often translated into monetary-equivalence. For example, at the Christchurch CMS volunteers contributed as much time as did the salaried staff member, a monetary savings equivalent of approximately $20,000 per year (or half the budgetted running costs). Use of voluntary labour makes a number of alternative dispute resolution services appear much cheaper than they in fact are. Given John Ekstedt's observation that only a small proportion of costs of the criminal justice system are spent in legal processing, and a large proportion is spent on salary costs of professionals within the system, one is bound to comment that if judges and magistrates were paid the salaries which justice centre co-ordinators were paid, and if lawyers worked for no payment as many mediators and counsellors do, then the formal legal system would probably be the cheapest form of justice on all counts !

EVALUATION

It is quite apparent from this seminar that alternative dispute resolution is characterised by the 'true believers' among its practitioners. This reinforces the need for evaluation which several participants have referred to. There is a need for data to ensure that new services do not repeat the mistakes of existing services. There is also a need to challenge the taken-for-grantedness that alternative methods are <u>good</u> and perhaps even <u>better</u> than conventional methods. We need to find out if this is so and hence the key questions become 'Better for whom?' and 'Better for what?'

Some practitioners have referred to the problems implicit in evaluating new services. Certainly the task of assessing a service which is in its formative stage is undesirable if this is taken as a definitive assessment. On the other hand, funding agencies commonly require such evaluations as a basis on which to make decisions about continued funding. In the context of such assessment it is clear that many practitioners feel that evaluation is <u>imposed</u> on them, and they feel that they themselves are being judged.

I believe that this perception, while understandable, is unfortunate. Evaluation research involves more than

protection, both for practitioners and for their clients. It has been suggested that any legislation should cover all alternative dispute resolution practitioners, and not be confined to, for example, mediators or counsellors. Any such legislation would require a system of training and a means of registering 'qualified' practitioners. There has also been articulated the desirability of a national lobby, to gain 'official' recognition of alternative methods of dispute resolution. I would conclude that this call for a pulling-together is a very healthy thing for alternative dispute resolution in Australia.

In conclusion, I refer you to David Purnell's summation of the requirements of those involved in alternative dispute resolution. He said that such people need an adventurous spirit, self-confidence, a dose of masochism and a sense of humour. I have enjoyed experiencing all of these traits among the participants at this seminar and I am sure that because of them we will all go away much richer than we were when we came.

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ALTERNATIVE DISPUTE RESOLUTION
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