Confidentiality

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

Confidentiality of communication is an important characteristic of most forms of ADR. Indeed, it can be argued that confidentiality is a key factor that distinguishes ADR from other forms of dispute resolution. Traditionally ADR processes were considered an 'alternative' to litigation dispute resolution processes in large part because the process was confidential and the outcomes consensual. Litigation in contrast was usually public and determinative. While contemporary definitions of ADR include determinative and advisory processes (such as arbitration and conciliation), confidentiality of both the process and outcome remain key distinguishing characteristics. Exceptions to this rule will be discussed below.

While there is widespread agreement[1] about the importance of confidentiality in ADR, there is no single definition of the concept of confidentiality. Most commonly, confidentiality of process refers to the non-disclosure of information, communication and documents that have been exchanged during an ADR process. However, inconsistencies in interpretation and application occur between jurisdictions and between forms of ADR. For example, in some instances confidentiality is considered to be protection from disclosure, not from use. In some jurisdictions ADR practitioners are prohibited from disclosing information provided in the ADR process (e.g. *Farm Debt Mediation Act 1994* (NSW)). In the Family Law context (Federal and WA) confidentiality is limited to protecting communications, whereas in the *Commercial Arbitration Act 2010* (NSW) the protection is given only to 'confidential information' rather than the entirety of the proceedings or of the information exchanged. Similar inconsistency occurs when identifying who is bound by confidentiality rules, varying from 'a person' (*Farm Debt Mediation Act*

1994 (NSW)), the ADR practitioner (*Family Court Act 1997* (WA)), to the parties and the ADR tribunal (*Commercial Arbitration Act 2010* (NSW)). Significant variance also occurs when exceptions to confidentiality obligations are considered. These will be discussed in more detail below. Despite these inconsistencies, confidentiality in ADR can be regarded as designed and applied to protect the communications that occur within the process from disclosure outside the process.

Why is confidentiality important?

Confidentiality is important in ADR for a number of related reasons. Firstly, ADR processes rely on full and frank disclosure of relevant information in order to derive a consensual outcome. Unlike litigation, an ADR process does not usually involve mechanisms that compel disclosure, nor is it an evidentiary process. ADR does not take evidence - such as sworn testimony or expert evidence. The provision of information is reliant on participants' willingness to disclose. Confidentiality of the process and communications assists disclosure as participants can be reassured that any information provided will not usually be disclosed outside the ADR proceedings.

Secondly, and for similar reasons, the assurance of confidentiality encourages participants in ADR to genuinely negotiate in order to reach a resolution. Genuine negotiation would normally involve making concessions, revealing bottom lines and underlying interests, and disclosing potential options and compromises. These behaviours may not be forthcoming if the participant feels they will subsequently be disclosed outside the ADR process, particularly if a resolution isn't reached in ADR. Indeed, the participant may feel their negotiating position in future DR processes will be undermined if these ADR communications and strategies are subsequently revealed.

Thirdly, confidentiality of the ADR process and outcome protects privacy. Although in some special circumstances litigated cases can be kept confidential, an overriding principle of court processes is that proceedings and outcomes are open to public scrutiny. ADR allows for the resolution of disputes that involve sensitive and commercial-in-confidence information without the public exposure of that information

or the resulting agreements (or indeed continuing disagreements). The possibility that confidentiality in ADR may conceal unsafe or unjust processes or outcomes will be discussed below.

Exceptions to Confidentiality

Statutory

In some instances, it is considered inappropriate to keep communications confidential in ADR. Most jurisdictions identify a series of circumstances under which confidentiality may or must be overridden. In the family law jurisdiction, a significant number of exceptions are described in the *Family Law Act 1975*. An FDR practitioner 'must' disclose a communication if they reasonably believe it is necessary to comply with a law – the most common example being to report child abuse. An FDR practitioner 'may' disclose a communication:

> if he or she reasonably believes that the disclosure is necessary for the purpose of:
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> i. protecting a child from the risk of physical or psychological harm
> ii. preventing or lessening a serious and imminent threat to the life or health of a person
> iii. reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person
> iv. preventing or lessening a serious and imminent threat to the property of a person
> v. reporting the commission, or preventing the likely commission, of an offence involving intentional damage to the property of a person or a threat of damage to property
> vi. assisting an independent children's lawyer to properly represent a child's interests.
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> *Family Law Act 1975*, section 10H

Other jurisdictions have similar exceptions relating to the prevention of harm or minimising the danger of injury. A number also include exceptions to allow for research and evaluation and ‘as reasonably required’ to allow for the purpose of referring to another ADR process. All jurisdictions allow for confidentiality to be waived by consent of the parties – however many are silent as to whether the ADR practitioner can or needs to also provide consent. Some interpretive issues attend these exceptions. For instance, would ‘preventing or lessening a serious and imminent threat to the health of a person’ extent to allowing a person to obtain psychological counselling?

In commercial ADR if a disputant is a corporation subject to relevant stock exchange rules it is important to avoid subsequent conflict, and to comply with obligations at law, that it has the ability to comply with those rules by disclosing to the exchange whatever is necessary to fulfil its obligations at law in that regard.

Privately agreed exceptions

If an ADR process is not subject to a statutory confidentiality regime, the disputants (with or without inclusion of the ADR practitioner) can always agree upon a confidentiality regime, which may vary depending upon the nature of the dispute, the disputants and the process in question.

ADRAC understands that confidentiality agreements often provide for ‘blanket’ confidentiality. Such agreements may not serve the interests of disputants particularly well because, for instance, the agreed regime may preclude disclosure for the purpose of reporting an ADR practitioner to a relevant regulatory, professional or accrediting body.

ADRAC is interested in receiving feedback on the kinds of confidentiality regimes which operate in particular areas of dispute (including agreed exceptions to confidentiality obligations).

Issues with Confidentiality

Despite many compelling benefits of confidentiality in ADR, there have also been a number of concerns raised.

Confidentiality inhibits the ability of a disputant to register a complaint if they are unhappy with the manner in which the ADR process was carried out or wish to challenge the competency of the ADR practitioner or allege misconduct of the ADR practitioner.

Confidentiality can restrict access to important information that cannot be released under the designated exceptions. Recently the Chief Justice of the Family Court has argued that confidentiality in FDR should be reconsidered and that the information provided by parties in FDR should available to the court as it would assist the court to make decisions in the best interest of the children involved.[2]

1. This agreement is not unanimous. Some Family Court and Federal Circuit Court Judges are arguing that confidentiality obligations in FDR should be reviewed.

2. Maintaining and enhancing the integrity of the ADR processes - From principles to practice through people: NADRAC, Altobelli, T and Bryant, D, ‘Has confidentiality in family dispute resolution reached its use by date?’ Paper delivered at Seen and Heard: Children and the Courts (Conference held in Canberra, 7-8 February 2015), 204.