

Children and ADR

14 Sep 2016

This paper was settled jointly by the members of ADRAC.

Children are involved in ADR processes in five main contexts:

- learning about dispute resolution
- during criminal or disciplinary proceedings
- in the course of 'care' proceedings or processes involving welfare authorities
- during family law proceedings.

Children's involvement in such processes may be as participants (i.e. where a young person disputes an outcome or legal process) or as constituents in a dispute between others.

Children's learning about and participation in ADR

Children are exposed to many of the principles, values and practices of ADR throughout their school education. Indeed, teachers are almost routinely involved in various forms of engagement with children which are closely analogous to DR processes such as mediations, facilitated conversations, adjudication, diversionary counselling etc. Children are used to the involvement of third parties in their disputes.

Throughout Australia there are various educational and participatory programs including the SCRAM (Schools Conflict Resolution and Mediation) program which integrates the principles and process of mediation into a theatre sports setting. Mediators coach, and experienced mediators adjudicate, each mediation, awarding points according to a list of competencies resulting in top teams 'playing off' in a grand final.

There are also some programs in schools and communities where children are trained, and perform roles, as mediators – for instance in dealing with schoolyard bullying.¹

DR/ADR processes involving children: do exceptional principles/values apply?

Any DR/ADR process involving adults and children may involve significant power dynamics particular to the age, role and responsibility differences of the participants. The efficacy of children may warrant adjustment of the principles and values which normally inform DR/ADR processes involving adults.

For instance, it is generally recognised that legal and dispute resolution processes involving children should be conducted, wherever possible, on a therapeutic basis – that is, by express reference to their overall wellbeing and best interests. By way of contrast, DR/ADR processes involving adults do not necessarily have a therapeutic dimension, let alone an express one; and the ‘standards’ applicable to DR/ADR processes involving adults are more likely to be directed to securing procedural fairness than outcome fairness.

Despite the general recognition of a therapeutic dimension to DR/ADR processes involving children, there is less consensus as to what this means or requires in particular contexts, at an operational level.

This is in part due to the fact that whereas the rights of children may be easily stated and relatively static, their needs, interests, and wellbeing at an operational level may vary widely, according to individual circumstances and such matters as their age.

The proposition that ‘one size fits all’ is particularly inapt in the case of disputes involving children. Indeed, the notion that young people necessarily bring with them ‘special vulnerability’ may not be either true or always helpful. ADRAC understands, for instance, that the anecdotal experience of some DR practitioners is that young people often have, and wield, power, both more subtly and more brazenly than some adults. Hence, the critical importance of well-directed intake processes, including to

identify special needs and interests (including need for any specialist input), sound process, and sought-after outcomes.

The identification of sought-after outcomes is particularly important in order to properly assess the success or otherwise of DR processes involving children.

The pre-eminent need for 'integrity of process' when children are involved also has implications for the adequacy of systems of monitoring, training, data collection, and probity review.

DR/ADR and child offenders

Children's courts nowadays regularly borrow from or deploy models of therapeutic jurisprudence when dealing with child offenders. They recognise the need for multiple pathways and inter-disciplinary approaches to engagement with child offenders; and they attach a very high premium to the quality of procedural justice when dealing with child offenders. They subscribe to 'problem-solving' or 'solution-focussed' approaches, including by exercising coercive power in ways informed by the behavioural sciences.

Children's courts now appear to embrace (without apology) the proposition that coercive power can be exercised therapeutically. 'Judicial leverage' is considered a legitimate tool.

Indeed, the intersection of children with the legal system is increasingly seen as an opportunity 'to do good' – an opportunity which should not be foregone.

However, practices and approaches differ across and within jurisdictions, and a cohesive set of organising principles has not yet been developed.² Much appears to depend upon the attitudes and philosophies of particular judicial officers.

Youth justice conferencing, a true form of ADR in the strict sense, is used in all Australian States and Territories to deal with juvenile criminal offenders,³ but also varies within and between jurisdictions.

These conferences bring together the juvenile offender, the victim and their family or supporters to discuss the offence, its effects, and ways to repair the harm it caused. Police officers and lawyers may also participate in these conferences; they are run by objective convenors. Costs are paid by the court or responsible department.

The purpose of these conferences is to agree on an 'outcome plan' that the juvenile offender must follow. The outcome plan may be reflected in court orders. If agreement cannot be reached, or the juvenile doesn't complete the outcome plan, the matter can be referred back to court.

In most States and Territories legislation sets out what offences can be dealt with by these kinds of conferences. The juvenile offender must admit that they committed the offence and agree to participate in a conference. (See Criminal justice and ADR.)

ADR and disciplinary action involving children in schools

'Community accountability conferencing' is also used in schools across Australia to deal with behavioural issues like bullying and drug possession.⁴

Participants in these conferences include the 'offending' child, his or her victims(s), the families and supporters of the offending child and victim(s), and appropriate school personnel. The conferences are conducted by a trained facilitator, generally a teacher or counsellor.

Possible benefits/downsides of these sorts of DR/ADR conferences; issues arising

There may be a number of benefits of using ADR in juvenile offending or disciplinary contexts:

- the availability of such processes may encourage a juvenile to take responsibility for their actions such processes involve, and may empower, victims
- they may improve relationships between participants
- they may promote innovative thinking about behaviour management⁵

- they may reduce the experience of harm directly caused by particular behaviour, and reduce so-called 'recidivism' (repeat behaviour).

However, risks can arise. For instance, a young person may admit to an offence which they did not commit, as a means of avoiding a court-imposed sanction and/or the burden of an appeal.⁶

Empowerment of the victim presupposes, of course, that the young person did commit the offence.

It is also sometimes observed that the success of such conferences depends heavily upon the skills of particular convenors, and the appropriate selection of candidate cases, both of which may vary to a considerable extent.

Further, these kinds of ADR conferences are rarely conducted on a wholly neutral basis. They may be geared overtly or covertly to achievement of particular outcomes, not all of which can be aligned cohesively – let alone justified by reference to the best interests of the child.

What does a focus on better outcomes for the juvenile offender, the victim, and the community mean in a particular case? What 'trade-offs' are justified and what are not?

Is it permissible to trade-off, or strike a balance between, the needs of children and risks to the community? Is it practicable or realistic to expect that such trade-offs would not occur when outcomes are formulated in a restorative justice context?

Is any form of 'shaming' (even when carried out within a continuum of respect and support) a legitimate dynamic within such processes? To what extent are forms of shaming still used?

How is constructive and destructive victim input best managed when children are involved?

These kinds of issues demand attention when children are involved, otherwise so-called therapeutic processes may not only forego an opportunity to do good – they may do real harm.

Interestingly, some research suggests that youth justice conferencing is no more effective than traditional court processes at reducing recidivism.⁷ This may be regarded as somewhat surprising, and can be contrasted with the position concerning adult offenders.⁸ Of course, non-recidivism is only one measure of success.

Another, perhaps better, measure of success may be completion of treatment for matters such as underlying drug or alcohol abuse, or mental health issues. The experience in the United States suggests that, for adult offenders, the rate of treatment completion for therapeutic justice attendees is 6 times higher than for voluntary attendees.⁹ That is an impressive statistic. ADRAC is not aware of the position in Australia for children (or adults) with who attend treatment as part of a restorative/therapeutic justice plan.

Children's participation in ADR in family law and care proceedings

In the family law context, participation in Family Dispute Resolution is required, subject to some exceptions, where a dispute involves the living arrangements and/or spending time arrangements for children.¹⁰ Children are usually legally represented in contested hearings involving their interests, but not in ADR processes. The legal representative in contested hearings is not bound by instructions in the usual way, reflecting the fact that the interests of a child may not align with their wishes.

Some jurisdictions, notably NSW and WA, have also implemented models of ADR in the care and protection areas of law. This allows families to work with community services and actively participate in decision-making about a child's care.¹¹ Research supports continued involvement of ADR processes in care and protection proceedings.¹²

How children should best participate in such processes is a vexed issue. The desirability of giving children a say in decisions that affect them must be balanced

against concerns that they may be traumatised by the process, or be unduly influenced by the adults involved, or assume a care-reversal role in relation to an adult.

The use of ADR in disputes involving family violence is particularly controversial, because of safety concerns and power dynamics. ADR is usually conducted in private, enabling participants to (amongst other things) be more frank and to make situation-specific safety arrangements. Work is being done to develop methods of ADR, and pre-intake processes, which better protect and assist vulnerable parties including children.¹³

Research suggests that it is important to children to know that their voice has been heard and considered in the decision-making of adults. ADR can improve communication between those involved in making decisions about children, and can help children and other participants understand how and why decisions are made.¹⁴

Where to from here?

The Australian Law Reform Commission has recommended that children's participation in ADR be determined based on the needs and wishes of the child involved. The Commission has also recommended that research be undertaken into children's participation in family law ADR processes, and what methods and practices are most effective and appropriate.¹⁵ It appears that this recommendation has yet to be implemented.¹⁶

ADRAC considers that the absence of a solid evidence-base to measure the success (or otherwise) of ADR processes involving children is particularly regrettable.

Interestingly, data collected in relation to adult experiences of DR processes, including court processes, suggests that adults attach most weight to so-called procedural justice – that is, being heard is perceived as more important than achieving a particular result.¹⁷

This may have implications for ADR processes involving children, particularly those which only give them an indirect voice – for example through a legal representative or via a report presented to the court.

ADRAC also considers that more work needs to be done in relation to expectations of DR practitioners in processes involving children. For instance, in mediations involving adults it is sometimes suggested that it is OK for a DR practitioner to acknowledge something said by a disputant ('I hear what you say'), but it is preferable for DR practitioners not to empathise (engage emotionally) with either disputant. In the United States, restorative justice aims to be 'warm'.¹⁸ Is such an approach appropriate where children are involved? Does it depend on any, and if so what, factors? What are the dangers, and limits? ADRAC welcomes feedback concerning the risks, benefits, concerns and issues canvassed above.

Other relevant topics: [Principles of ADR](#), [Restorative Justice](#).

1. <http://www.cyh.com/HealthTopics/HealthTopicDetailsKids.aspx?p=335&np=287&id=2507>.
2. By way of contrast, ADRAC understands that so-called 'drug courts' in the United States have published a very comprehensive set of 'Best Practice Standards', referred to in a Public Presentation by former Californian Superior Court Judge, Peggy Hora, on the topic of *Smart Justice*, ACT, 8 March 2016.
3. Australian Institute of Criminology, *Restorative justice in Australian criminal justice system*, Research and Public Policy Series 127 (2014) 6-22. See further: *Young Offenders Act 1997* (NSW) Part 5; *Youth Justice Act 1992* (QLD) Part 3; *Children, Youth and Families Act 2005* (Vic) s 415; *Youth Justice Act 1997* (Tas) Part 2 Division 3; *Young Offenders Act 1993* (SA) Part 2 Division 3; *Young Offenders Act 1994* (WA) Part 5 Division 2; *Youth Justice Act 2005* (NT) Part 3; *Crimes (Restorative Justice) Act 2004*.
4. Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report number 84 (1997) 10.73; Margaret Thorsborne, *School violence and Community Conferencing: The Benefits of Restorative Justice*, available at <http://www.thorsborne.com.au/papers/>.
5. Australian Institute of Criminology, *Restorative justice in Australian criminal justice system*, Research and Public Policy Series 127 (2014) 23-28.
6. ADRAC understands that for this and other reasons, restorative justice conferencing is only available in New Zealand for adult offenders.
7. Bureau of Crime Statistics and Research, *The Effect of Youth Justice Conferencing on re-offending* (15 March 2012) NSW

Justice http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2012/bocsar_mr_cjb160.aspx.

8. See the Senate Legal and Constitutional Affairs References Committee report on Access to Justice, December 2009, page 11.
9. Public Presentation by former Californian Superior Court Judge, Peggy Hora, on the topic of *Smart Justice*, ACT, 8 March 2016.
10. *Family Law Act 1975* (Cth), s 60I(7).
11. NSW Government, *Alternative Dispute Resolution*, Keep them Safe, http://www.keepthemsafe.nsw.gov.au/initiatives/acute_services/alternative_dispute_resolution.
12. Australian Institute of Criminology, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court*, Research and Public Policy Series 118 (2012).
13. Australian Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper Series 1 (2010) Section 11; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Part F.
14. Australian Law Reform Commission, 'Children's involvement in family law proceedings', *Seen and heard: priority for children in the legal process*, Report 84 (1997) [16.18]-[16.19].
15. Australian Law Reform Commission, 'Children's involvement in family law proceedings', *Seen and heard: priority for children in the legal process*, Report 84 (1997) [16.19]-[16.22].
16. Australian Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper Series 1 (2010) Section 11 'Dispute resolution in child protection'.
17. Public Presentation by former Californian Superior Court Judge, Peggy Hora, on the topic of *Smart Justice*, ACT, 8 March 2016.
18. Public Presentation by former Californian Superior Court Judge, Peggy Hora, on the topic of *Smart Justice*, ACT, 8 March 2016.