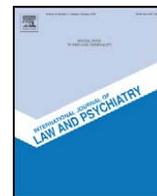




Contents lists available at ScienceDirect

International Journal of Law and Psychiatry



A school peer mediation program as a context for exploring therapeutic jurisprudence (TJ): Can a peer mediation program inform the law?

Nicky McWilliam*

Faculty of Law, University of Technology, Sydney, P.O. Box 2063, Bondi Junction, NSW 1355, Australia

ARTICLE INFO

Available online xxxx

Keywords:

Therapeutic jurisprudence
Peer mediation
Peer relations
Legal processes
Well-being
Problem-oriented courts
Conflict resolution
Bullying
Mediation
Procedural fairness
Cognitive behavioural skills

ABSTRACT

This paper reports an exploratory study of a school peer mediation program implemented as an alternative way to manage bullying and other destructive conflict. The study explores the effects of the program on the well-being of members of the school community by examining perceptions of students, staff and a sample of parents and former students. Drawing on therapeutic jurisprudence (TJ) the study explores whether the component parts of the program, separately or together, promote intended or unintended therapeutic effects. The preliminary findings of the study emphasise the importance of peer mediation training and suggest that existing scholarship in the area of school conflict resolution and peer mediation, when viewed through a TJ lens, may provide valuable insights into how to optimally configure programs for development and adoption in schools and other community settings. The study highlights the lack of attention paid by the legal system to valuable scholarship in the area of school conflict resolution and peer mediation, which may have implications for the understanding and development of legal processes and the law in general.

© 2010 Elsevier Ltd. All rights reserved.

1. Introduction

A study¹ of the peer mediation program (the Program) at Brookvale Public School² (the School) was conducted to explore the effects of the Program on members of the School community, e.g. staff, students, parents and former students (Constituents). The study examines perceptions of all students and staff at the school, as well as a sample of parents and a sample of former students (Study Participants). Data from Study Participant perceptions of the Program, and from the author's observations of Study Participants, were collected in order to identify and examine the component parts of the Program (and also specific elements which comprise each component part).

The study draws on therapeutic jurisprudence (TJ), a framework which posits that the proper design and operation of processes can have a therapeutic effect (direct or indirect) on the well-being of constituents³

(whether intended or not).⁴ The Program incorporates critical elements of processes which have been suggested in TJ literature⁵ to be therapeutic, and there appear to be parallels between the Program and therapeutic processes described in TJ literature,⁶ such as problem-solving courts, mediation⁷ and other creative problem-solving processes.⁸ TJ may explain how therapeutic effects on Constituents enable the Program to achieve outcomes (especially those distinct from traditional school discipline). Management or resolution of conflict via the Program, in itself, creates benefits for Constituents and the School if it can generate conflict resolutions which are agreeable to all parties. Less obvious are the advantages that the Program and its component parts can confer on Constituents (over and above the outcome of the peer mediation process), if optimally configured.

2. The Program under study

The Program is a modified version of a peer mediation and social skills program called "Empowering Kids".⁹ It was developed as an anti-bullying

* Tel.: +61 416051631.

E-mail address: nickym@sydneymediation.com.au.

¹ Doctoral Study (unpublished) Nicky McWilliam Brookvale Public School 2004–2006.

² Brookvale is a co-educational New South Wales (Australia) public primary school which conducts classes from kindergarten (5 years old) to year 6 (12 years old). It is a multicultural school community where approximately 65% of the students are from non-English speaking backgrounds, the largest group being 20% Tongan. It is a transient community with many students spending only six to twelve months at the school and some of them returning for brief periods from year to year. There are significant numbers of students with emotional, learning and social issues.

³ Michael S King & Steve Ford, Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime 1,5 (2005) also at <https://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf> (last visited September 27, 2010).

⁴ Michael S King & Steve Ford, Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime 1,5 (2005).

⁵ Michael S King, Should Problem-Solving Courts be Solution-Oriented Courts? 2,5,7,9,19 (2009); Bruce J Winick & David B Wexler, Judging in a Therapeutic Key 7–9 (Carolina Press. 2003).

⁶ King, *Ibid.* at 3.

⁷ Mediation is described as "conflict resolution in a therapeutic key" in Ellen A Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 *Mq L R*, 160 (1998–1999).

⁸ King, *supra* note 5 at 19–20.

⁹ Sue Berne, Empowering Kids (1999/2000) at <http://www.sueberneconsulting.com> (last visited June 20, 2005).

program and tailored according to staff feedback and experiences of the Program, as well as staff perceptions on how the Program was working for the students.¹⁰

2.1. Components and constituent groups of the peer mediation program

Fig. 1 shows the components and Constituent groups of the Program (students, teachers, non-teaching staff, parents and former students).

The entire student body at the School participate in the Program; however, not all students necessarily participate in a peer mediation process. Participation in a peer mediation process is dependent on whether students experience conflict and whether they choose to participate (the peer mediation process is voluntary).

2.1.1. The training component

All students and staff at the School take part in the training component of the Program. The training sets out the framework and cooperative¹¹ context of the Program, and establishes a consensus of acceptable and constructive responses to conflict. This is reinforced by the day-to-day running of the processes and procedures of the Program, which are also infused into the School curriculum.

The training of skills, behaviours and strategies is based on an experiential and “building block” approach to learning; where basic ideas, attitudes and values are built upon through group dialogue, practice and review. Most importantly, students are given the opportunity to apply and integrate learned training in actual conflict situations which they experience. This provides meaning and a connection for students. As with any educational program, the training component is designed to meet the specific needs of the School community with respect to the age and development of students.

The training concentrates on teaching students and staff about conflict,¹² effects of conflict, how to identify conflict, constructive responses to conflict and the consequences of behaviour in response to conflict. Students are taught a repertoire of skills, behaviours and strategies in order to positively assert their needs while constructively creating realistic solutions to conflicts, which will preserve ongoing relationships in the School community. Specific teaching techniques are utilised in the Program, such as cognitive training, values learning, constructive assertiveness training, impulse control, critical thinking and cognitive problem-solving.

Training is mainly experiential, involving role play, modelling, simulations, games, reasoning exercises and group discussion. Skills, behaviours and strategies taught include integrative negotiation, empathy, communication of feelings and needs, perspective taking and role reversal, acknowledgement, apology, brainstorming, active listening, preserving relationships, impulse control, anger management and accountability.

Students also learn the rules and stages of, and how to participate in, the peer mediation process, including confidentiality, being impartial, note-taking, following a process, and the importance and implications of a behavioural contract. Students are taught when and how to voluntarily avail themselves of the peer mediation process in relation to conflict they experience.

There is a separate training component which caters to a cadre¹³ of the student body, Year 6 students (the oldest students at the School,

¹⁰ Peer mediation training commonly involves drawing out successful practices through feedback and advice. See Cindy H White & Robert R Ange, *Managing Client Emotions: How a Mediator Can Help*, 56 *Disp. Resol. J.*, 84 (2009).

¹¹ See generally Morton Deutsch, *The Resolution of Conflict* (Yale University Press. 1973).

¹² The Program was originally set up to concentrate on bullying behaviour amongst students, overt and covert.

¹³ Structurally, peer mediation models can be described as cadre or total student body programs. A cadre approach to mediation involves training a small number of students as peer mediators to serve the student body. See DW Johnson & R Johnson, *Teaching Students to be Peacemakers* (Interaction Book 3rd ed. 1995). See also Tricia S Jones, *Conflict Resolution: The Field, the Findings, and the Future*, 22 *Conflict Resol. Q.*, 243 (2004), which describes models as cadre, curriculum or class linked, or mentoring.

11–12 years old), who are trained as peer mediators. This peer mediator training component takes place over one school day at the commencement of the academic year. Additional training takes place in individual year 6 classrooms and at additional training sessions throughout the year. Peer mediator training includes feedback and debriefing sessions about mediations, which take place at School. Year 6 students are taught skills, behaviours and strategies necessary to facilitate a mediation process as co-mediators, including how to be impartial, maintain confidentiality and follow a learned delineated structure in facilitating the mediation.

Staff members serve as mediators for the year 6 students.

2.1.2. The peer mediation process component

The peer mediation process is both a process and a forum for the peer mediation to take place. Students voluntarily avail themselves of the peer mediation process, and apply and practice learned skills, behaviours and strategies in resolving and managing their own conflicts. The peer mediation process also operates as an alternative to the school discipline system (where appropriate)¹⁴ and students can be referred to peer mediation by the school discipline system (although, importantly, participation is voluntary). The referral system takes a different approach to the traditional school disciplinary system, in that students are afforded the opportunity to engage in peer mediation as an alternative to having a decision imposed on them.¹⁵

The peer mediation process emphasises, among other things, procedural justice, future-focused problem-solving, accountability for behaviour and behaviour change. The peer mediation process aims to identify, manage and resolve issues underlying and contributing to each conflict situation.

The peer mediation process has a significant impact on student interpersonal conflict, which would have been considered too trivial¹⁶ to warrant the attention of the traditional school discipline system¹⁷ and would have otherwise remained unresolved or been mismanaged at the point of detection. If left unresolved, the residual, underlying relational issues may be externalised in more destructive forms of conflict.¹⁸ Although outside the scope of this paper (and under-researched),¹⁹ it is important to note the limitations of peer mediation programs in general and the potential for liability. These issues have been recognised by the School and by commentators of peer mediation programs.²⁰ For example: student conflict may be a surface manifestation of deeper social or emotional problems which require professional or medical attention, rendering some conflict situations inappropriate for mediation²¹; student mediators (in particular, primary students) may lack the cognitive and emotional maturity required to deal with conflict which is referred to them²²; there are conflict situations which are inappropriate for peer mediation²³ and may put mediators and disputants at emotional and/or physical risk²⁴; and ethical issues may arise about the power balance and

¹⁴ A peer mediation process is not an appropriate forum for resolution of certain conflict situations, for example, cases involving extreme violence, drugs and risks to a person's safety. See Richard Cohen, *Students resolving Conflict* 134 (GoodYear Books, 1995).

¹⁵ Jennifer P Maxwell, *Mediation in the Schools: Self-Regulation, Self-Esteem, and Self-Discipline*, 7 *Mediation Q.* 152–154 (1989).

¹⁶ Jan Cameron & Ann Dupuis, *Lessons from New Zealand's First School Mediation Service: Hagley High School, 1987–1989*, 2 *Aus. Dispute Resol. J.*, 84–85 (1991).

¹⁷ Jan Cameron & Ann Dupuis, *The Introduction of School Mediation to New Zealand*, 24 *J. R. D.*, 10 (1991).

¹⁸ *Ibid.* at 9, contains comments from students, including a comment from one student: “if we hadn't gone to mediation we'd probably still be fighting because the problem wasn't solved.”

¹⁹ R Hall, *The Implementation of School Peer Mediation Programs*, 13 *Aus. Dispute Resol. J.* 45 (2002).

²⁰ *Ibid.*, at 45.

²¹ Hall, *supra* note 19 at 45.

²² Hall, *supra* note 19 at 45–46.

²³ Cameron & Dupuis, *supra* note 17 at 12.

²⁴ Hall, *supra* note 19, at 45.

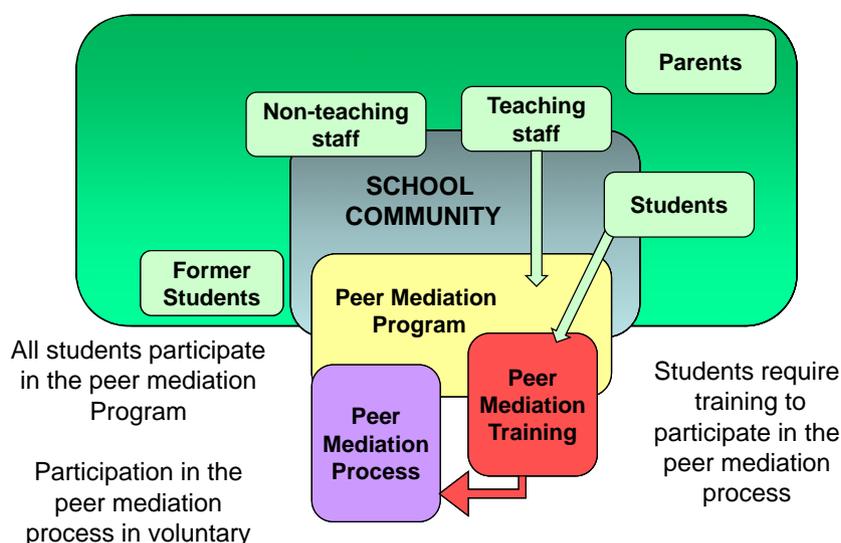


Fig. 1. Components and Constituent groups of the Program.

the limits of confidentiality, voluntarism and neutrality. These concerns have been addressed in the design and operation of the Program, for example, by implementing staff screening and monitoring processes, and by closely assessing the types of conflicts best suited to peer mediation (and identifying conflicts which should be excluded from the Program).²⁵ The study addresses the issue of age appropriateness of the Program in the staff written survey and 100% of teaching staff answered in the negative to the question: “Do you think that primary school students are too young to learn about conflict resolution and conflict management?”

2.1.2.1. How does the peer mediation process work? The peer mediation process component is based on a problem-solving, co-mediation model of mediation. It is a structured, non-disciplinary process which involves two or three impartial and non-authoritative trained peer mediators who facilitate the expression of grievances among students who are experiencing conflict. During peer mediation, peer mediators follow a learned, structured process and attempt to elicit and explore underlying issues. By employing learned skills, behaviours and strategies, peer mediators open lines of communication to enable parties to brainstorm, problem-solve and negotiate in order to craft mutually satisfying solutions. Parties are given a “voice” in the resolution of their conflict and are active participants in a process that will affect relationships with fellow students and their lives in the School. At the conclusion of the peer mediation process, an agreement regarding future behaviour, ideas and goals is drafted by the peer mediators in the parties' own words.

2.1.3. Therapeutic jurisprudence

The Program incorporates critical elements of processes, which have been suggested in TJ literature to be therapeutic.²⁶ For example: participant involvement in decision-making²⁷; cognitive training procedures²⁸; participants having a “voice”²⁹; communication for understand-

ing and engagement³⁰; attempting to detect and address underlying issues which may be the cause of conflict, dysfunction or anti-social behaviour³¹; a problem-solving approach³²; participant motivation³³; adopting a non-disciplinary approach³⁴; procedural fairness of the process³⁵; creative and personalised responses to problems³⁶; importance of self-regulation and self-determination³⁷; behavioural contracting³⁸; emphasising accountability for behaviour³⁹; supporting positive behaviour⁴⁰ and personal change⁴¹; emphasis on preserving relationships⁴²; the role of apology⁴³; and the educative,⁴⁴ preventative,⁴⁵ healing⁴⁶ and rehabilitative⁴⁷ potential of the process.

The TJ approach suggests that processes which feature elements such as those listed in the previous discussion are more likely to positively affect

³⁰ Des Rosiers, *supra* note 27, at 56; See generally D Tannen, *The Argument Culture: Moving from Debate to Dialogue* (1998).

³¹ Michael S King & Camillio L Tatasciore, *Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications*, 1 eLaw Journal, (2006) at <https://elaw.murdoch.edu.au/archives/issues/special/promoting.pdf> (last visited August 7, 2010); King & Ford, *supra* note 3 at 5.

³² For example Donald J Farole, et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts Justice System Journal* at http://www.findarticles.com/p/articles/mi_qa4043/is_200501/ai_n13638871/print (last visited September 8, 2005).

³³ King, *supra* note 5, at 1, 5, 6; Winick & Wexler, *supra* note 5, at 8.

³⁴ Arie Freiberg, *Problem-Oriented Courts: An Update*, 14 J. Judi. Admin., 198 (2005).

³⁵ Tyler, *supra* note 29, at 439–440.

³⁶ Astrid Birgden, *A Compulsory Drug Treatment Program for Offenders in Australia: Therapeutic Jurisprudence Implications*, 30 Thom. Jeff. L. Rev., (2008); Wexler, *supra* note 28, at 96.

³⁷ King, *supra* note 5, at 3–6.

³⁸ King, *supra* note 5 at 1–3; Peggy F Hora & William G Schma, *As Demonstrated by Drug Courts, Judges can Improve the Psychological Well Being of People Subject to the Legal Process and, in Turn, Make Their Own Jobs More Rewarding*, 82 Jud. 12 (1998).

³⁹ Arie Freiberg, *Non-adversarial Approaches to Criminal Justice*, 16 J. Judi. Admin., 210 (2007).

⁴⁰ King, *supra* note 5, at 2–5.

⁴¹ James McGuire, *Maintaining Change: Covering Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework*, 4 Western Crim. Rev. 111 (2003).

⁴² Des Rosiers, *supra* note 27, at 55.

⁴³ William Schma, *Therapeutic Jurisprudence*; Daniel W Shuman, *The Psychology of Compensation in Tort Law: A Limited Subjective Standard of Care*, in *Law in a Therapeutic Key* 457–459, (David B Wexler & Bruce J Winick eds., 1996).

⁴⁴ King & Tatasciore *supra* note 31, at 3, 10.

⁴⁵ Wexler, *supra* note 28 at 93–100.

⁴⁶ Michael S King, *Innovation in Court Practice: Using Therapeutic Jurisprudence in a Multi-Jurisdictional Regional Magistrates' Court 1* (2003).

⁴⁷ King & Ford, *supra* note 3, at 5; Michael S King & C L Tatasciore, *supra* note 31, at 1, 3, 9, 14.

²⁵ Cameron & Dupuis, *supra* note 17, at 12.

²⁶ King *supra* note 5; Winick & Wexler, *supra* note 5.

²⁷ Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority–Majority Conflicts*, 37 Spring Ct. Rev., 55 (2000); King, *supra* note 5, at 20.

²⁸ David B Wexler, *Just Some Juvenile Thinking about Delinquent Behavior: A Therapeutic Jurisprudence Approach to Relapse Prevention Planning and Youth Advisory Juries*, 69 UMKC L. Rev., 94 (2000).

²⁹ Tom R Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. Rev., 439–440 (1992).

the well-being of those directly or indirectly involved in the particular process, regardless of whether such outcomes were intended, initially sought or desired.⁴⁸ Well-being is defined very broadly in TJ literature⁴⁹ and can refer specifically to one area of well-being or to multiple areas, e.g., improved anger management; satisfaction in, or enjoyment of, a process; improved communication skills; and preserved and enhanced relationships.⁵⁰

Problem-solving courts which employ some or all of these elements have achieved tangible results,⁵¹ including positively affecting offender behaviour,⁵² and evidence the therapeutic potential of (legal) processes.⁵³

There are parallels between the Program and problem-solving courts. Both:

- are innovations in their field, challenging traditional paradigms and recognising that conflict, including anti-social behaviour, often requires social and personal⁵⁴ rather than punitive and disciplinary solutions⁵⁵;
- create an environment for dialogue and problem-solving, seeking to promote a more comprehensive resolution or management of conflict;
- draw on the behavioural sciences to use processes and skills to orient, educate, facilitate, motivate, inspire and support individuals to achieve constructive outcomes to problems; and
- lack an underpinning narrative⁵⁶ to inform their creation.

Similar to problem-solving courts, peer mediation programs are generally isolated programs based on principles,⁵⁷ forms and models⁵⁸ which are modified for use by individual institutions.⁵⁹ Although problem-solving courts may not have been designed with the principles of TJ in mind, TJ is regarded as the underpinning theory of these legal processes, providing an explanation as to how these legal processes confer beneficial effects⁶⁰ (particularly in contrast to traditional processes).⁶¹

In the same way, TJ may be seen to provide some explanation as to why the Program achieves any success and how it confers therapeutic effects on the well-being of Constituents. Moreover, if TJ can help us to

understand and better implement peer mediation programs in schools,⁶² then this study may:

- enable better understanding of the mechanics of processes which also appear to be a practical application of the TJ approach⁶³; and
- assist in the development and adoption of peer mediation programs in other community settings.

It is important to note that TJ emphasises that therapeutic potential is not the only factor to be considered⁶⁴ when evaluating or developing a process; therapeutic concerns should be considered and weighed up in the particular circumstances⁶⁵ but are “only one category of important factors that should be taken into account”.⁶⁶ It is becoming increasingly clear from the literature that the therapeutic potential should be considered when processes may have preventative potential⁶⁷ and especially when processes relate to more vulnerable and dysfunctional members of society.⁶⁸

3. What the study explored

3.1. Therapeutic effects perceived by Study Participants

The study identifies the various components that make up the Program, how each component has a therapeutic value, and how they, separately and in concert, are perceived by Study Participants to confer therapeutic effects on Constituents (directly or indirectly, and whether intended or not). Component parts are also examined to see if each can be fine-tuned to enhance their therapeutic value. It also investigates whether certain peer mediation process elements result in a promotion of well-being for process participants (see Fig. 2).

Three elements are explored in this study, though it recognised that other elements have been considered in the literature as potentially underlying a therapeutic process. The three elements and their application in the peer mediation process are:

- *Participation*—participants in the peer mediation process are able to participate in the decision-making process and are actively involved in deciding the outcome;
- *Representation*—the peer mediation process allows all parties to give their version of reality without fear of interruption, and parties are expressly asked how they feel about what has occurred; and
- *Validation*—the peer mediation process validates all parties' versions of reality, does not ascribe blame and works to solve disputes cooperatively in a manner acceptable and respectful to all parties.

The study looked for any indications that Participants perceived other elements of the process as affecting their well-being. Elements which became evident from the study findings are voluntarism and transparency, and these will also be examined.

The study examines the therapeutic potential of the peer mediation process component for all students regardless of whether they have experienced the mediation process in regard to their own disputes.

⁴⁸ Warren Brookbanks, *Narrative Medical Competence and Therapeutic Jurisprudence: Moving Towards a Synthesis*, 20 *Law in Cont.* (2002). King, *supra* note 5 at 19–20.

⁴⁹ David B Wexler, *Reflections on the scope of therapeutic jurisprudence*, in *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* 811–812, (D B Wexler & B J Winick eds., 1996).

⁵⁰ King & Ford, *supra* note 3, at 5–8.

⁵¹ Winick & Wexler, *supra* note 5, at 85.

⁵² Michael S King, et al., *Non Adversarial Justice 3* (The Federation Press, 2009); Troy A Gilbertson, *Systems Modelling for Drug Courts: A Policy Research Note*, 19 *Crim. Jus. Pol. Rev.* 1(2008); Scott Senjo & Leslie A Leip, *Testing Therapeutic Jurisprudence theory: An Empirical Assessment of the Drug Court Process* *Western Crim. Rev.* at <http://wcr.sonoma.edu/v3n1/senjo.html> (last visited June 12, 2008).

⁵³ In King, *supra* note 5, at 3, King states that “research on drug courts is more extensive and persuasive than research on other problem-solving courts nevertheless there is evidence to support their approach”.

⁵⁴ See generally James McGuire, *What Works: Reducing Reoffending*. Guidelines from Reserach and Practice (John Wiley and Sons 1995). There is increasing evidence of the systemic failure of the traditional legal and government mechanisms as well as traditional jurisprudential methodologies which have not been able to effectively address the complexity of certain human conflict and resulting social problems. See generally Paul Bentley, *Problem Solving Courts as Agents of Change*, 15 *Commw Jud J.* (2004); Freiberg, *supra* note 39 at 206–207.

⁵⁵ Freiberg, *supra* note 39, at 206–210.

⁵⁶ Freiberg, *supra* note 39, at 205–206. David W Johnson, *Role Reversal: A Summary and Review of the Research*, 1 *Int'l Rev. Grp. Tensions*, 459 (1971).

⁵⁷ See at http://www.problem-solvingcourts.org/ps_char.html (last visited August 7, 2008).

⁵⁸ Troy A Gilbertson, *Systems Modelling for Drug Courts: A Policy Research Note*, 19 *Crim. Jus. Pol'y Rev.*, 239–240 (2008).

⁵⁹ David W Johnson & Roger T Johnson, *Conflict Resolution and Peer Mediation Programs in Elementary and Secondary Schools: A Review of the Research*, 66 *REV. EDU. RES.*, 487, 490–495 (1996).

⁶⁰ King & Tatasciore, *supra* note 31, at 1–5; Peggy F Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 *Notre Dame L Rev* 445–447 (1998–9).

⁶¹ Susan K Knipps & Greg Berman, *New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, 72 *J.N.Y.S. Bar Assc.* (2000). Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement 1–2* (2005).

⁶² A common criticism of peer mediation programs is that they lack theoretical basis, rendering it difficult to comparatively analyse programs employed at different institutions given there is no formal mechanism to do so. This limits their potential for widespread adoption and propagation. This is unfortunate as peer mediation has been shown to be effective in reducing the severity and rate of conflicts, and the incidence of destructive escalations of conflict.

⁶³ TJ is recognised as informing a diverse range of established and developing legal processes, most of which form part of the comprehensive law movement (in the United States) or non-adversarial justice (in Australia).

⁶⁴ Wexler & Winick, *supra* note 4, at xvii.

⁶⁵ Michael S King, *Therapeutic Jurisprudence in the Commonwealth*, 16 *Commw Jud J* 19 (2006).

⁶⁶ Wexler & Winick, *supra* note 4.

⁶⁷ See generally Dennis P Stolle & David B Wexler, *Therapeutic Jurisprudence and Preventative Law: A combined Concentration to Invigorate the everyday Practice of Law*, 39 *Ariz. L. Rev.*, (1997). See generally Dennis P Stolle & David B Wexler, *Preventive Law and Therapeutic Jurisprudence A Symbiotic Relationship*, 16 *Prev. L. Rep.* (1997).

⁶⁸ King & Ford, *supra* note 3 at 4–6. King, *supra* note 5, at 5, 6, 7, 20.

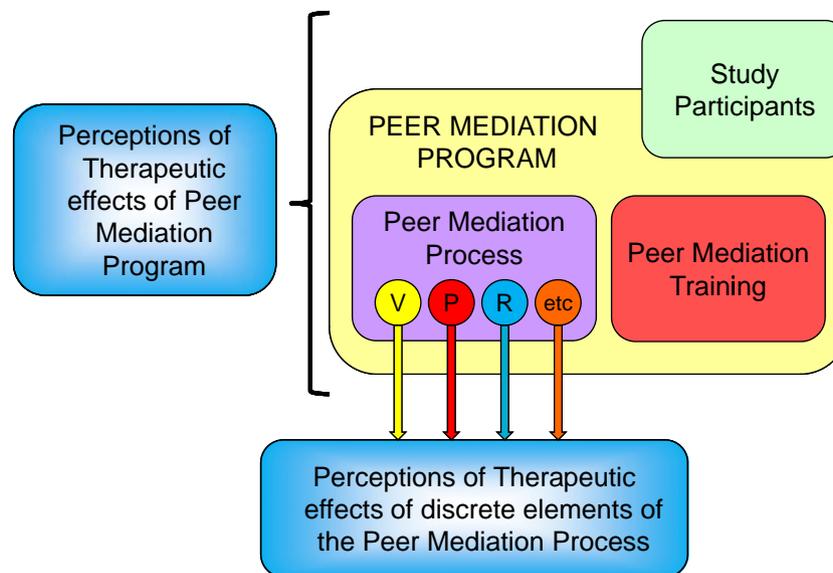


Fig. 2. What the study is exploring and the areas under study.

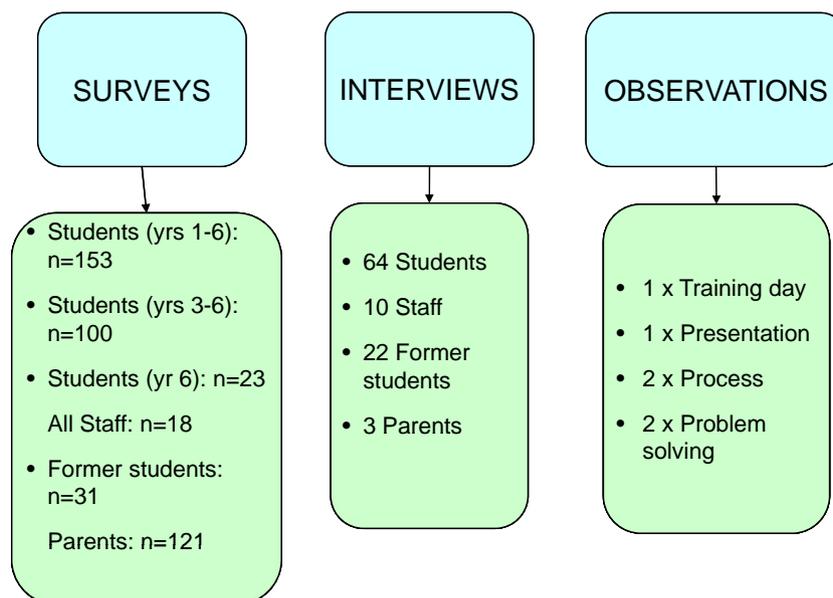


Fig. 3. Overview of the study.

4. Methodology

The study was conducted by the author⁶⁹ by way of written surveys, video-recorded interviews and video-recorded observations (see Fig. 3). The written surveys and recorded interviews provided data on Study Participant opinions, perceptions and feelings about the Program and its components. The main purpose of the observations was to observe the functioning protocols and dynamics of the Program and the component parts of the Program.

⁶⁹ The School deputy principal and the School in general provided assistance and support to the author throughout the Study. The author was given access to the Study Participants during School hours in order to conduct the Study.

4.1. Study Participants

Study Participants ($n = 323$) comprise of: all students at the School ($n = 153$), all staff at the School ($n = 18$), a sample of parents ($n = 121$) and a sample of former students ($n = 31$). The student body was made up of students from kindergarten to year 6, of which 53% ($n = 81$) were male and 47% ($n = 72$) female. The age range of students was 5–12 years. The staff body was made up of teaching staff ($n = 16$) and non-teaching staff ($n = 2$). All students and staff at the School at the time of the study volunteered to participate after being given the option to decline participation. The response rate for staff and students was 100%. 80 former students were contacted randomly from School record lists (by the deputy principal) and invited to voluntarily participate in the study. The response rate for former students was 38.8%. 300 surveys were distributed to parents via the

students with an accompanying information letter inviting parents to participate in the study. The response rate for sample parent Study Participants returning completed surveys to the School was 40%.

For the purposes of the study, the students were further divided into those who voluntarily availed themselves of the peer mediation process component of the Program in relation to their own disputes at school and those who did not. In order to differentiate between these two populations of students, one of the written surveys (Questionnaire 1) asked the students if they had participated in one or more peer mediation processes during the last school year. The answers to this question enabled the students to be separated into two subgroups:

- i. peer mediation process participants ($n = 74$); and
- ii. peer mediation process non-participants ($n = 79$).

The two subgroups were treated as two distinct populations.

Another subgroup of students was the Year 6 cadre of peer mediators ($n = 23$) who administrated the peer mediation process component of the Program for the students.

Study Participant groups and subgroups were treated separately in order to examine how each was distinct in regard to its relationship to, and experience of, the Program and components of the Program.

4.2. Written surveys

The surveys were developed, written and administered by the author⁷⁰ specifically for the study.⁷¹

The six written surveys (see Fig. 4) undertaken were:

- Peer Mediation Student Survey completed by 100% of students in years 1–6 ($n = 153$)
- Year 6 supplementary questions completed by 100% of students in year 6 ($n = 23$)
- Students' Questionnaire completed by 100% of students in years 3–6 ($n = 100$)⁷²
- Teachers' Questionnaire completed by 100% of teachers ($n = 16$) and 100% of non-teaching staff ($n = 2$)
- Former Students' Questionnaire completed by 38.8% of former students ($n = 31$) and
- Parent Questionnaire completed by 40% of parents ($n = 121$).

The written questionnaires allowed Study Participants to be surveyed, eliciting a structured response from individuals and allowing a standardised approach to analysing findings. This was important given the ages of the respondents ranged from 5 to 12 years.

The written surveys completed by Study Participants comprised closed and open-ended questions. Multiple-choice questions were employed so as to standardise answers for all respondents and allow data to be easily coded and analysed. Responses to open questions (such as "how did you feel after peer mediation?") were standardised by giving subjects a range of answers to choose from, including a "none of the above" or a "don't know" response, or by asking a more specific question and allowing a range of graded responses. The open-ended questions gave Study Participants the opportunity to add anything they wanted on the subject of the peer mediation program that they felt the multiple-choice questions had not addressed, or to reiterate or opine on any points in the survey(s).

The data collected from multiple-choice questions was coded and entered into a statistical software program.⁷³ Data was analysed using descriptive statistics, namely frequencies, for relevant questions and

cross-tabulations. Respondent answers were analysed for evidence of therapeutic effects. Where appropriate, a Pearson's chi square statistical test of significance was conducted to ascertain whether the responses collected were indicative of a therapeutic effect being experienced by the population under study or if it could be ascribed to chance.

Answers to the multiple-choice questions were categorised by reference to each therapeutic value, and analysed separately to examine whether they were complementary and to investigate the evidence for the existence of each therapeutic value.

Answers to the open-ended questions were categorised, in the first instance, in terms of being positive, negative or neutral towards the peer mediation program, and then analysed for consistency with the overall findings from the data from the multiple-choice questions. It was recognised that the answers to these open-ended questions could potentially constitute evidence and shape the conclusions applicable to other processes. As such, they were given like consideration to the responses to interview questions.

4.3. Recorded interviews

Interviews were developed and written by the author and conducted by the author at the School with all Study Participant groups. Broad overall questions as well as more specific questions were formulated for each of the different Study Participant groups⁷⁴ and interviews were different for each of the Study Participant groups. Interviews for all Study Participant groups included a mixture of open-ended, scaled, unscaled, binary and fill-in-the-blank style questions. However, the interviews for each of the Study Participant groups were very informal, following a semi-structured protocol in order to give individual Study Participants latitude to raise issues, to put them at their ease (especially students), and to allow them, where possible, to talk about what was important to them. The interviews were designed to generate information on attitudes, perceptions, opinions, personal experiences and feelings concerning the Program and its component parts. It was recognised that some viewpoints or opinions on unexpected aspects of the Program could potentially affect conclusions drawn from the research, and that allowing Study Participants some freedom to discuss that which they felt was important or relevant would help effectively capture this kind of information.

The structures of interviews with the Student Study Participants and Former Student Study Participants were individually tailored during the course of each interview according to age and the author's perception of the individual respondent's understanding of the subject matter. This flexibility in structure would allow each respondent to comfortably answer questions without feeling burdened or embarrassed.

All of the interviews were video-recorded and transcribed. This material complements the written survey data and provides for a greater understanding of the mechanisms that underpin the efficacy and outcomes of the Program. (Some previous studies in the area of TJ only make use of verbal anecdotal evidence.)⁷⁵

4.4. Observations

Recorded observations made by the author included peer mediation training, execution of peer mediation processes, class presentations on students' perceptions of peer mediation, and two students spontaneously attempting to resolve a dispute constructively using the skills they had learned at training.

The main purpose of these recorded observations was to observe the actual Program process and protocols in practice to ensure, as much as possible, that the information that the author had been given by the

⁷⁰ Practical assistance and advice was given to the author by the School deputy principal when developing the surveys, in terms of the educational standards of the Study Participants and their ability to understand and answer written surveys.

⁷¹ Raw data from surveys were supplied to the School for a separate School evaluation and research report. This was separate and not connected to the Study conducted by the author set out in this paper.

⁷² Students' Questionnaire geared solely towards older students (years 3–6).

⁷³ SPSS (Statistical Package for the Social Sciences).

⁷⁴ Students, Former Students, Parents and Staff.

⁷⁵ See generally Farole, et al., *supra* note 32.

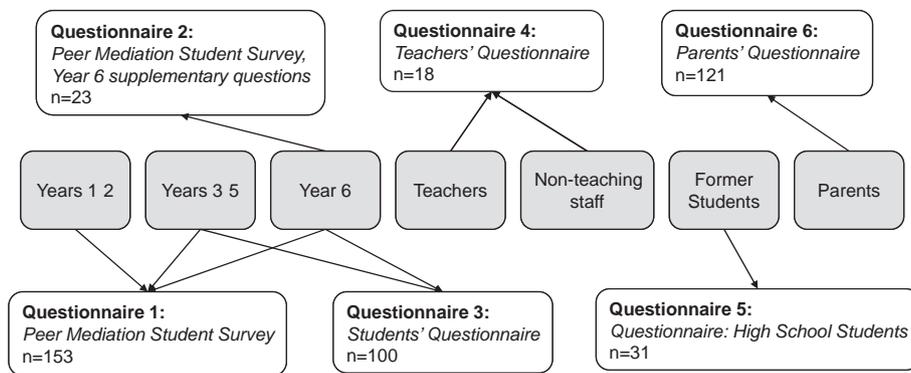


Fig. 4. Summary of written surveys.

School and from Study Participants⁷⁶ was accurate and representative of actual events. As the events being observed were mostly process-driven (e.g. training and peer mediation process), the effect of the author observing these events was minimal. All observations were transcribed. Observations were useful for the purpose of checking for compliance with training procedural protocols supplied to the author.

5. Findings

Where appropriate, a statistical test of significance was conducted to see if respondent answers to written survey questions were indicative of a therapeutic value being experienced by the Study Participant group under study, and all the findings that were tested were found to be statistically significant. Data from recorded interviews and observations complemented the written surveys, which was beneficial during analysis.

5.1. Short summary and discussion of the preliminary findings

5.1.1. Perceived therapeutic effect of the Program on Constituent groups

5.1.1.1. Students

5.1.1.1.1. Key findings from written surveys.

- 74.3% felt happy for some reason after participating in the peer mediation process. 10.8% indicated that they felt sad after peer mediation for some reason.
- 100% of students thought that talking about how they feel made students feel better at least some of the time.
- 93.8% of teaching staff stated that they had noticed some degree of positive change in student behaviour due to the Program.
- 81.3% of teaching staff stated that they had noticed some degree of positive change in students' moods due to the Program.
- 100% of teaching staff thought that the students enjoyed learning about peer mediation at least some of the time.

5.1.1.1.2. Sample comments from teaching staff in relation to students.

- "Students who are bullied, isolated or unable to communicate effectively will have low self-esteem and will be very quiet or unable to complete work, or sometimes complete all work but not well, and will perhaps not be able to present to the class as they are very nervous of the reaction of their peers. Conflict in the playground always presents as conflict (obvious or hidden from teachers) in the classroom."
- "We are now dealing with conflict before it becomes bullying."
- "Kids love to be empowered to resolve conflicts."

⁷⁶ For example: literature relating to the Program, internal School reports on the Program and information from interviews with Study Participants.

- "I have been teaching at this school for 16 years. I have seen the code of ethics change in the playground. Where once this was a tough school where the strongest ruled, it is now a calm place (sometimes) where all children are respected. The children feel happy, safe and secure. They know they will be listened to."
- "While it's highly valuable, it needs to be understood it's not the full solution and some children—while they do need to be included fully in the program—do not have the mindset to understand mediation. However the value of the program as a whole to them is still of immense importance."
- "She [a student] could not get herself together because of the fight so I sent her to peer mediation and when she returned to class she was calm and could learn.....no-one can learn if they are all angry and upset."

5.1.1.1.3. Sample comments from parents in relation to students.

- "The peer mediation program has made [my child] more confident in himself."
- "[The program has] increased her self-esteem and her capacity to mediate a variety of situations. Skills to be extrapolated to many areas of life now and in the future."
- "As parents we think it's very successful. It's especially good to see the older kids taking time out for the younger students. It makes them feel less alienated especially in the first few years."
- "Good to see older kids taking time out for younger students. It makes them feel less alienated."
- "The peer mediation program has helped my son a lot with his anger management and to deal with conflict with friends and other students."

5.1.1.1.4. Observations. While at the School, the author observed two students spontaneously attempting to resolve a conflict that had occurred between them. They told the author, "we've been having a little bit of a fight and we just need to sort it out because it's getting a little bit too hard for us to cope with." They invited the author to observe and make a video recording of their discussion.

The students then proceeded to go over their respective versions of events and tried to discover the root of the dispute. The students were actively engaged with each other and made a genuine attempt to solve their problem independently of a peer mediation process, using the skills they learnt in the Program. The problem was discussed and a strategy was agreed as to when they should play together, and the students both reported feeling much better for resolving the dispute.

5.1.1.2. Year 6 peer mediators

5.1.1.2.1. Findings from written surveys.

- 60.9% of peer mediators felt that the role would help them in other areas of their lives.
- 52.2% of peer mediators thought that the role would help them when they were older.

- 78.3% of peer mediators felt that they had helped students to talk out their problems.
- 69.6% of students believed that they had helped students to talk about their feelings.

Some therapeutic effects that were consistently mentioned by the peer mediators were:

- Feeling proud and responsible for helping their peers
- Feeling good about themselves as they are making the school safer and more fun
- Increased empathy
- Decreased stress
- Increased satisfaction with school processes
- Improved communication skills
- Preserved and enhanced relationships between students
- Mediation skills that can be applied to different situations
- Enhanced school environment

Parallels can be drawn with teen courts; studies confirm that teen attorneys take their role very seriously, learn respect for the system and learn from the experience overall.⁷⁷

5.1.1.3. Teaching staff

5.1.1.3.1. Findings from written surveys.

- 100% of teaching staff thought it was beneficial for them to learn about conflict resolution and management.
- 75% of teaching staff felt that they had benefited from learning about conflict management in terms of understanding the students.

5.1.1.3.2. *Interviews.* Interviews addressed the well-being of teaching staff and how this is affecting the Program at the School.

5.1.1.3.3. Sample comments from teaching staff.

- “Having the students deal with their conflicts allows you not to take on board that baggage.”
- “There’s no doubt that empathy has improved as a result of the peer mediation program, there has been an increase in the level of confidence and performance of the children in a wide range of areas, etc.”
- “I am employed to teach them to read and often they are bad at communicating and there’s a lot of frustration and anger, so my time is spent sorting out behaviour issues rather than teaching them to read.”
- “Peer mediation gives students power to solve problems and takes it away from me, which is a good thing.”
- “It’s good for teachers as we’re no longer embroiled in these disputes. They’re developing a whole new range of skills to deal with it.”
- “We’re able to pass responsibility onto peer mediators. This takes the burden off teachers.”
- “Having to sort out fighting kids can be stressful.”
- “I will sometimes lie in bed and think about how I dealt with a conflict situation at school.”
- “The peer mediation program has definitely decreased my workload.”
- “The peer mediation program reduces the burden on us teachers to an extent.”
- “In the past, severe behavioural problems have affected me quite seriously.”
- “Conflict resolution skills that children can use will improve significantly the teaching/learning environment.”

The evidence collected suggests that therapeutic effects for the teaching staff exist due to the Program. Teaching staff generally felt

that teaching would be more enjoyable if students solved their own conflicts without teacher intervention. Parallels can be drawn with judicial officers in problem-solving courts who consider a problem-solving approach in a court setting to have increased their levels of satisfaction with their work.⁷⁸

Consistently mentioned therapeutic effects were:

- Reduced emotional burden
- Reduced workload
- Increased job satisfaction
- Decreased stress
- Benefit from learning about conflict resolution and its applicability to their own lives
- Enhanced school environment

The data from teaching staff strongly indicates that the Program has become a strong presence in the School. All teaching staff were of the opinion that the mere awareness of the existence, availability and operation of the peer mediation process seems to have a positive effect on students and teaching staff.

5.1.1.4. *Non-teaching members of staff.* The evidence collected suggests that non-teaching members of staff experience therapeutic effects due to the Program. As members of the school community, they will benefit from any improvements in the school environment and will be aware of how the students interact in a constructive way as a result of the Program. They report that they have noticed a therapeutic effect on students due to the Program. Data from non-teaching members of staff indicates that they enjoy working in the School most of the time. The non-teaching members of staff appear to derive a therapeutic effect from the positive effect that the Program has on the School environment. Non-teaching members of staff are not directly involved in the Program; however, they report that they are inspired by the training component and have benefited from being indirectly exposed to the Program. Consistently mentioned therapeutic effects on non-teaching members of staff were:

- Benefit from hearing about conflict resolution and applicability to their own lives
- Enhanced school environment

5.1.1.5. Former students.

- 100% of former students thought that students were happier if they could talk about issues at least some of the time.
- 66.6% of former students believed that they sorted out fights or disagreements in a different way to students who had not participated in peer mediation.
- 70.8% of former students felt that the Program has helped them with school work, getting along with students, anger management and understanding others in general.
- 87.5% of former students felt that the Program had helped them to get along with students and 83.3% felt it had helped them to understand others in general.
- 70.8% of former students felt that they were better able to understand other students as a result of the Program.

The data collected demonstrates that the majority of former students feel that the peer mediation program has benefited them in later life and confirms existing research in the area of school peer mediation,⁷⁹ namely, that the training and knowledge can be retained and applied in different situations.

⁷⁷ Allison Shiff & David B Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, in *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence 295*, (David B Wexler & Bruce J Winick eds., 1996).

⁷⁸ Peggy F Hora & D Chase, *Judicial Satisfaction When judging in a Therapeutic Key*, 7 *CIL*, 1–13 (2004).

⁷⁹ David W Johnson, et al., *Teaching Students to be Peer Mediators* Edu. Lead. at <http://www.ascd.org/readingroom/edlead/9209/johnson.html> (last visited March 20, 2008).

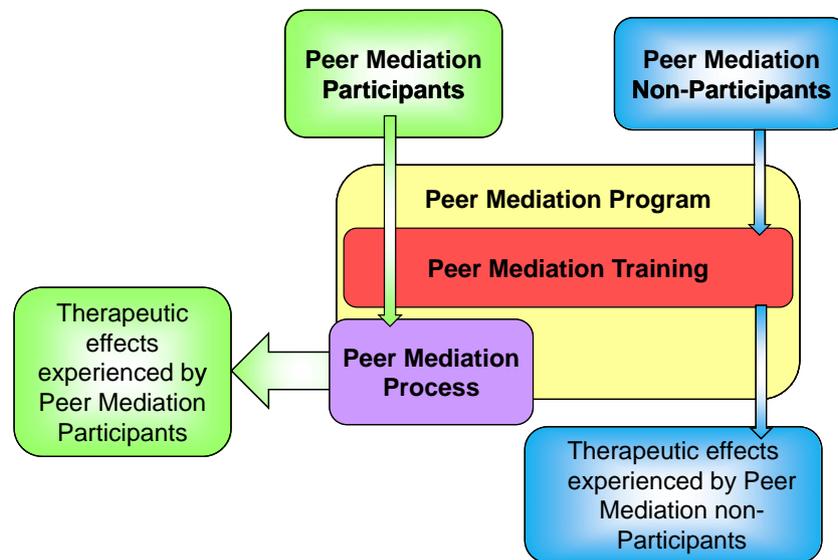


Fig. 5. Therapeutic effects of the Program for students.

The therapeutic effects that were consistently reported were:

- Increased empathy
- Enhanced anger management skills
- Enhanced mediation and conflict resolution skills
- Increased communication skills.

5.1.1.6. *Parents.* The evidence collected suggests that the majority of parents are positive about the Program and feel that it has enhanced the well-being of their children. Parents seem to especially value the skills learnt by Year 6 peer mediators. Therefore the Program appears to have a therapeutic effect on parents as it has a beneficial effect on people closely connected to them: their children.

Parents are affected by the well-being of their children. If parents believe that the Program is beneficial to their children, or if they perceive any positive effects on their well-being due to the Program, this will in turn enhance their well-being.

5.1.2. *Therapeutic effect of the peer mediation process*

Fig. 5 illustrates the two subgroups to which the students belong (see Section 5.1): either peer mediation process participants or peer

mediation non-participants. Peer mediation non-participants still participate in the Program. Both subgroups were predicted to experience therapeutic effects from the Program. However, it was also predicted that the therapeutic potential of the peer mediation process would be greater for those students who had availed themselves of the mediation process for their own disputes (peer mediation participants) compared with those students who had not (peer mediation non-participants).

Fig. 6 charts the different responses of both peer mediation process participants and peer mediation process non-participants to questions from one of the written surveys. Questions relating to students' well-being from Questionnaire 1 are plotted along the x axis and the percentages of students who reported these effects on the y axis.

It reveals that, as a general trend, a greater proportion of peer mediation process participants report a perceived benefit to their well-being than peer mediation process non-participants. In general, the therapeutic effects conferred upon both subgroups of students are similar in nature but different in magnitude. However, most values rise above the 50% mark, indicating that non-participant students benefit indirectly.

For example, 88.6% of peer mediation process non-participants, as opposed to 100% of peer mediation process participants, thought that students felt better when they talked about feelings at peer mediation at least some of the time (see Fig. 7). 51.9% of peer mediation process non-participants thought that students felt better if given a chance to talk about how they feel, compared to 63.5% of peer mediation process participants. These findings support the literature on the therapeutic implications of mediation⁸⁰ and highlight the indirect effect on peer mediation process non-participants.

The study found that the success of the peer mediation process is measured subjectively by both subgroups of students (peer mediation participants and peer mediation no-participants), relative to how they feel about the process, the degree to which they enjoy (or how they perceive) the benefits, and their perceived fairness of the process and resolution. The study indicated that students could judge the peer mediation process as fair even when the outcome of the process was unfavourable from their standpoint. Students reported that being given the opportunity to voice their opinions and ideas in relation to issues, at peer mediation, was a very satisfying feeling (or they perceived it to be so).

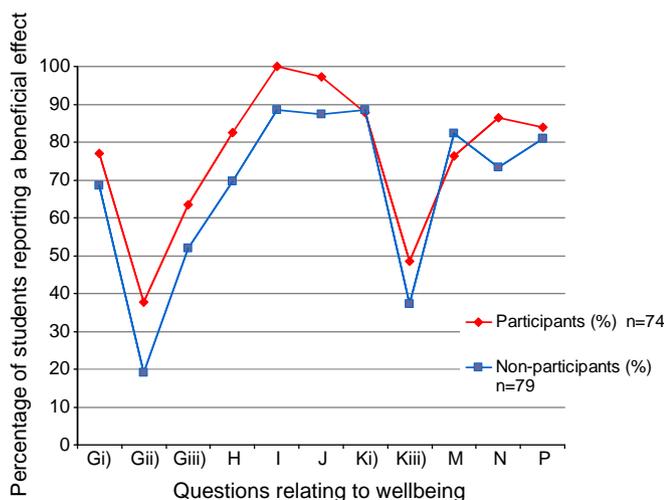


Fig. 6. Peer mediation process participant and non-participant responses to questions from Questionnaire 1 relating to students' well-being.

⁸⁰ Ellen Waldman, *Therapeutic Jurisprudence: Growing Up and Looking Forward*, 30 Thom. Jeff. L. Rev., (2008); Waldman, *supra* note 7 at 160-163.

Question I – Do you think students feel better when they talk about feelings at peer mediation?		
Answer	Frequency	Percentage
All the time	23	31.1%
Most of the time	31	41.9%
Sometimes	20	27.0%
Not really	0	0%
Never	0	0%

Fig. 7. Frequency table of peer mediation process participant responses to survey question I from Questionnaire 1.

According to Study Participants, many different outcomes may be regarded as successful conclusions to a peer mediation, such as the venting of emotions, being acknowledged, constructive dialogue, identification of issues, validation of opinions, establishment of lines of communication, formation of an in-principle agreement, or the resolution of some or all issues. These findings are confirmed by scholarship in the area of mediation, which indicates that success of the mediation process depends on the parties' views of the process, their experience of the process and their purpose in participating in it.⁸¹

Peer mediation process participants learn more skills, learn experientially, and assume primary responsibility for decision-making, accepting responsibility for their actions and creating solutions for future behaviour during the peer mediation process. Peer mediation process participants build on existing skills and derive greater benefit from the Program as a whole compared to those who do not participate in the process, even if the outcome of the process is inconclusive or unfavourable to them. King emphasises the importance of participation with respect to problem-oriented courts, and states that participants derive benefit if they are recognised and respected as sources of creative solutions.⁸²

Students also reported they liked problem-solving. By following the protocols of the peer mediation process the students have the opportunity to engage in dialogue and problem-solving. Deborah Tannen explores the need to create a culture of dialogue (as opposed to a culture of argument or critique) to bring about effective creative problem-solving⁸³ and Wexler draws on her work with respect to the legal system and TJ as an alternative model to the argument culture.⁸⁴ Tannen cites mediation, problem-solving and alternative dispute resolution as positive approaches to interaction which bring about positive results.⁸⁵ Tannen also mentions the increasing support for problem-solving and mediation generally in the community and in the legal system. According to Wexler, this represents “a growing dissatisfaction with the argument culture”.⁸⁶

Another interesting perception from students is that the peer mediation process is regarded as a venue where they can feel safe and good about themselves: “Peer mediation makes everyone happy and confident”. King describes the problem-solving court as “becoming a

therapeutic venue” and states that there is evidence it promotes participant self-esteem.⁸⁷

Therapeutic effects of the peer mediation process that were consistently reported for peer mediation process participants were:

- Increased empathy
- Increased satisfaction with school processes
- Decreased stress
- Enhanced anger management skills
- Improved communication skills
- Preserved and enhanced relationships between students
- Conflict resolution skills that can be applied to different situations
- Enhanced school environment

Peer mediation process non-participants indicated that they were aware of the therapeutic benefits of the Program, although to a lesser extent than peer mediation process participants. The comments from the students indicate that both peer mediation process participants and non-participants were affected by the peer mediation process.

Therapeutic effects of the Program that were consistently reported for peer mediation process non-participant were:

- Increased empathy
- Enhanced anger management skills
- Improved communication skills
- Conflict resolution skills that can be applied to different situations
- Enhanced school environment

5.1.3. Therapeutic effects associated with discrete process elements

Data was collected in relation to each of the three elements: participation, representation and validation, to explore if discrete elements of the peer mediation process component of the Program are perceived by Study participants to have associated therapeutic value.

If beneficial therapeutic values exist which are not directly due to the outcome of the peer mediation process, then these may explain any difference in efficacy between the peer mediation process and a process without these characteristics when the outcome of each process may be identical.

5.1.3.1. Participation. Allowing students to participate and be involved in decision-making in all stages of the peer mediation process clearly helps them to take ownership of the process and apply themselves to generating a positive outcome for all parties. Participants appear to take responsibility for making the outcome positive for everyone; they realise that they have the power to determine the final result and naturally tend towards the best result for everyone overall.

⁸⁷ King & Tatasciore, *supra* note 31, at 5.

⁸¹ What constitutes success in mediation within the legal system is controversial. See Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 Pepp. L Rev, 268 (2008).

⁸² King, *supra* note 5, at 20.

⁸³ See generally Tannen, *supra* note 30; David B Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 Journal of Contemporary Legal Issues 263–264 (1999).

⁸⁴ Wexler, *Ibid.*, at 263, 266, 275.

⁸⁵ Tannen, *supra* note 30, at 163.

⁸⁶ Wexler, *supra* note 83, at 276–277.

It is important to note that, without the appropriate training and information, a participant cannot optimise their experience of the process. Slobogin supports this, stating that “empowering people to make choices implies making sure they have complete information.”⁸⁸ This demonstrates that components of the process are complementary and, while separate beneficial effects may exist, the whole is greater than the sum of its parts.

5.1.3.2. Representation. Research shows that allowing participants the opportunity to express their feelings and give their versions of reality is satisfying⁸⁹ and increases their willingness to accept an outcome.⁹⁰ The importance of fair procedure and giving individuals a “voice” has been recognised as important in the American legal system.⁹¹ In the context of resolving conflicts between hospital patients⁹² it was found that patients perceived the dispute resolution process as fair when they were able to tell their story, and when they felt that the outcome was affected by what they had said.⁹³

The majority of students felt it was important to express how they felt about the dispute. This is illustrated by Fig. 7 which is a frequency table of peer mediation process participant responses to a written survey question. The data from these responses were plotted on the graph in Fig. 6. From this question, 100% (74) of peer mediation participants think that talking about how they feel makes students feel better at least some of the time.

It became apparent, from answers to open-ended questions and from interviews, that the method of expression was also important. The study revealed that students would like to be given the opportunity to relay their version of events in their preferred way. A small number of students from the study reported that they did not feel better for having expressed their feelings during peer mediation. This element of the process, designed to enhance their well-being, has instead been iatrogenic⁹⁴ for these students—it has made them feel worse.⁹⁵ However, in light of the other evidence generated in the study, it is clear that most students value being able to express their feelings and versions of reality at peer mediation.

It is possible to infer that the students who ultimately felt worse following the mediation dislike talking about how they feel and would rather not participate in a process they find intrusive. Facing one's peers may be more embarrassing and unpleasant than being disciplined by a teacher or an administrator. Another possible inference is that, while all people will feel better if able to express themselves, the preferred methods for doing this will differ from person to person.

Existing research on peer mediation programs has shown that young people are more likely to be honest with their peers⁹⁶ than with authority figures, and are more likely to take responsibility for their

actions when they feel their peers understand the context of a conflict and the complex feelings resulting from the conflict. This is supported by research on adolescent interpersonal negotiation⁹⁷ and teen courts.⁹⁸

Younger students reported that they “looked up” to the year 6 mediators and that they wanted to be like them. Results from research on teen courts indicate that “confronting defendants with a jury of their peers helps promote the acceptance of responsibility.”⁹⁹

The findings of the study suggest that all individuals will derive benefits from being able to express themselves but that each individual will have their own preferred methods of doing this. The data helps us to understand these complexities and could potentially assist in identifying and developing the process most likely to be therapeutic. Ideally, a process would provide options for participants to tailor the process to their personal preferences. This would increase well-being and consequently affect the efficacy of the process.

The following are some sample comments taken from student interviews and observations made during the study. The comments illustrate that students are able to identify elements of the process that they feel affect their well-being:

- “Peer mediation works by making people feel better.”
- “Peer mediation makes everyone happy and confident.”
- “When you get upset by talking about it you will feel better.”
- “Talking is good. It really helps.”

5.1.3.3. Validation. This element is seen to be crucial to the Program, and students recognise that peer mediation would not work if it was not a fair process and if all parties were not able to give their side of events without fear of interruption or being trivialised.

During the interviews students were asked questions in order to try to gauge how being able to participate in all stages of the peer mediation process made them feel. Some sample comments relevant to this therapeutic effect are reproduced as follows:

- “Peer mediation is a good way for kids to solve their problems themselves.”
- “Now it has been happening quite a lot some children know how to solve problems between themselves.” (Peer Mediator)
- “It makes students feel good to have a say in the peer mediation.”
- “Peer mediation makes people feel better because you get to solve the problems you had.”
- “Peer mediation works by making people feel better.”
- “I think it is helpful because it made me sort out things and it made me happy again.”
- “It makes me feel better that I have somewhere to go if I feel sad or unhappy.”
- “It makes me feel good if I can go (to the peer mediators) if I feel sad or unhappy.” (Student)
- “If one of the kids made me feel sad, I would go and ask one of the year sixes if I can have peer mediation.”
- “Peer mediation has helped us because you feel better afterwards.” (Peer Mediator)
- “Peer mediation works by making people feel better.”
- “I think peer mediation is a good program because it helps people feel better about themselves.” (Peer Mediator)
- “It helps little kids to talk to big kids.” (Peer Mediator)
- “With peer mediation at primary school there was always someone to tell.” (Former Student)
- “Sometimes people don't want to tell the teachers their feelings but would rather tell their friends.”

⁸⁸ Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 Psy. Pub. Pol. & Law, 202 (1995). Slobogin also states at 202, in relation to decision-making, that “[g]iving people multiple options may cause anxiety and perhaps even be debilitating.”

⁸⁹ Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 Ct. Rev., 4 (2007).

⁹⁰ *Ibid.*, at 6.

⁹¹ Jason Sunshine & Tom R Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L & Soc Rev, 513,517 (2003).

⁹² Jack Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence, in Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence 907*, (David B Wexler & Bruce J Winick eds., 1996). See generally TOM R Tyler, *Procedural Justice Research 1 Soc. Jus. Res.*, (1987).

⁹³ Susman, *ibid.*, at 919.

⁹⁴ In medical terminology, an “iatrogenic effect” describes an adverse consequence for a patient occasioned unintentionally by negative behaviour of a medical professional.

⁹⁵ William Schma, et al., *Therapeutic Jurisprudence: Using the Law to Improve the Public's Health*, 33 J. L Med. & Ethics, 61 (2005).

⁹⁶ Bonnie Benard, *A Case for Peers at* http://www.nwrc.org/pub/library/c/c_case.pdf (last visited May 20, 2008).

⁹⁷ Robert et al. Selman, *Assessing Adolescent Interpersonal Negotiation Strategies: Toward the Integration of Structural and Functional Models*, 22 Dev. Psy., 457 (1986).

⁹⁸ Shiff & Wexler, *supra* note 77, at 287.

⁹⁹ Shiff & Wexler, *supra* note 77 at 291.

5.1.4. Further elements suggested by the findings

5.1.4.1. Transparency. Transparency is defined in the study as both the ability of peer mediation process participants to be informed of all the events leading up to the conflict which may be relevant to understanding it (transparency of events or versions of reality), and the ability of participants to understand and be informed of all aspects of the conflict management process being used and the implications of their participation in it (transparency of process).

The therapeutic value of being made aware of other students' versions of reality was strongly apparent from the verbal evidence acquired, especially from the recorded interviews. In interviews, students often identified being able to hear other people's versions of reality as more therapeutic than being able to express their own. This idea of sharing of information seemed to be very beneficial to the students and is an insight that can be applied to other processes. It demonstrates that a common reason for the escalation of conflict to unacceptable levels is knowledge deficiency through lack of communication and miscommunication.

5.1.4.2. Voluntarism. Even though the peer mediation process component of the Program is voluntary (and this was communicated to students in training and in the actual mediation protocols), the study shows that students did not perceive it to be voluntary.¹⁰⁰ It is difficult to see how students could derive a benefit from being able to opt out of a process if they do not perceive that this option is open to them. However, an observation made by one of the teaching staff was interesting in this regard. The teacher commented that students seem to be confused when given a choice of outcomes and that this appeared to make them feel stressed and doubtful about being able to achieve the optimal result for themselves.

The effect of choice with respect to the peer mediation process is interesting especially as the peer mediation process is a voluntary process. The study suggests that giving students the choice of whether to participate in the peer mediation process does not confer any additional therapeutic benefit to them. On the contrary, peer mediation participants experience a greater therapeutic effect than peer mediation process non-participants, so it would appear that students have an advantage if they participate. Entering the process with a clear idea of the likely outcomes and the scope of those outcomes also seemed to be a benefit to students.

The study did not generate any compelling evidence that making a process voluntary will make it more or less therapeutic. The study did, however, indicate that there was therapeutic value in the elements of the protocol itself.

This value of choice is included in a lot of dispute resolution methods practiced in the legal system and in the community as they are voluntary and offered as an alternative to traditional processes.¹⁰¹ The study raises the question of how some choice in terms of potential outcomes may be relevant. It may be that the most therapeutic process would have a

limited range of possible outcomes, which are communicated and understood from the start. Moreover, as therapeutic value may be negative or positive, it follows that if voluntarism can have a negative effect then decreasing it may have a positive effect, and developers of processes would need to be aware of this.

From the study, transparency of process and events seems to have greater impact on therapeutic value than voluntarism.

5.1.5. Training

The impact of the Program on Study Participants highlights the critical importance of training students to participate effectively so as to optimise outcomes for themselves and other Constituents. Although only a cadre of students serve as peer mediators in the Program and receive peer mediation training, all student Constituents receive the training component of the Program.

The study found that the absence of the training component of the Program would compromise the therapeutic effects of the Program for all Constituent groups. Students require training in order to optimise potential benefit from the Program (or realise any benefit at all): they require all necessary information regarding the process, expectations of them made by the process, likely outcomes of the process and how they can influence the process before it begins.

These results also confirm existing research that:

- Constructive and positive resolution and management of conflict is not instinctive.¹⁰²
- Constructive and positive conflict resolution and management requires training, understanding and application of effective procedures plus knowledge and application of certain behaviours and skills.¹⁰³
- Untrained students of all ages either instinctively use reactive and destructive conflict strategies to resolve conflicts¹⁰⁴ or are unable to communicate their feelings, exchange information or orient themselves constructively in a conflict.¹⁰⁵
- Primary school students (elementary school in USA) can be taught to negotiate integratively.¹⁰⁶
- The environment must be structured to allow individuals to employ their skills, behaviours and strategies,¹⁰⁷ and the whole community must possess a shared understanding of procedures and processes in order for the Program to operate productively.¹⁰⁸

This study also confirms research that constructive skills, behaviours and strategies should not be taught while individuals are embroiled in a conflict¹⁰⁹ or when individuals are not receptive to this training. Drug court literature talks of a "teachable moment"¹¹⁰ or a window of opportunity where a drug addict may be receptive to intervention. Waiting to train individuals until they are obliged to participate is not ideal as individuals will not be receptive to training while embroiled in conflict; participants require familiarity with conflict management and mediation skills, behaviours and strategies as soon as the conflict is recognised. The study also highlighted the necessity to structure the

¹⁰⁰ Jeri Beth Cohen, Dade County Court, Florida, USA, and Astrid Birgden, Director, Compulsory Drug Treatment Correctional Centre, NSW Department of Corrective Services, NSW, Australia: both separately commented at the 31st Congress of the International Academy of Law and Mental Health, New York University, 28 June–4 July 2009, that participants in compulsory processes often perceive a process to be voluntary if it is successful.

¹⁰¹ Although school peer mediation programs are couched under the broad umbrella of alternative dispute resolution and share the same values, tools and methods, school peer mediation programs developed for different reasons and stand distinct from mediation and dispute resolution in the legal system. See generally Charles T Araki, *Dispute Management in the Schools*, 8 *Mediation Q* (1990); Johnson & Johnson, *supra* note 59, at 459. However the mediation process is distinctive wherever it is practiced in that the parties themselves voluntarily participate and craft solutions and decide the outcome. See David Spencer & M Brogan, *Mediation Law and Practice* 3,9 (2006).

¹⁰² David W Johnson & Roger T Johnson, *Training Elementary School Students to Manage Conflict*, 135 *J. Soc. Psy.*, 673 (1995); David W Johnson, et al., *Effects of Peer Mediation Training on Elementary School Students*, 10 *Mediation Q*, 95,96,97,98 (1992).

¹⁰³ Johnson et al., *Ibid.*, at 95, 98.

¹⁰⁴ Johnson, et al., *supra* note 59, at 472–476.

¹⁰⁵ Susan Opatow, *Adolescent Peer Conflicts*, 23 *EDU. & URB. SOC.*, 416–420 (1991).

¹⁰⁶ Johnson, et al., *supra* note 102, at 98.

¹⁰⁷ Maxwell, *supra* note 15, at 105–153; Johnson, et al., *supra* note 102, at 98.

¹⁰⁸ Johnson, et al., *supra* note 120, at 90, 98.

¹⁰⁹ Johnson et al., *supra* note 102 at 98.

¹¹⁰ Astrid Birgden, *Therapeutic Jurisprudence and Responsibility: Finding the Will and the Way in Offender Rehabilitation*, 10 *PsyCH. Crim. & L.*, 287 (2004).

environment with a shared community understanding of conflict resolution procedures and processes.

This is supported by many comments made by students in recorded interviews.

For example:

"I don't use peer mediation skills with my brother and sisters at home because it wouldn't work. They don't know the process". (Peer mediator)

The observations also underlined the importance of training, as briefly summarised by the extracts as follows:

Observation 1: peer mediation training day

Observations of the peer mediation training day underlined not only the importance of training to optimise the therapeutic value of the process, but also training to deal constructively with conflict. This further confirms that participants require familiarity with conflict management skills as soon as the conflict is recognised.

Observation 2: the peer mediation process

The students involved as peer mediation process participants and peer mediators responded well to the process as they knew what was expected of them at each step and how they could shape the outcome. The peer mediation process participants were actively engaged in dialogue at all points and made full use of all opportunities to participate in the process.

Observation 3: two students

The author observed two students attempting to resolve a conflict using skills they had learned from the Program without invoking a formal peer mediation process. The two students used integrative negotiation and brainstormed creative solutions in an effort to resolve their dispute. They listened to each other's story and ideas, demonstrating the use of the learned mediation protocols. The students were clearly angry and hurt but were keen to deal with their dispute as they had been trained in the Program. The two students would not have had this course available to them had they not received training as part of the Program. The study found that the training component is crucial to the Program's functioning and, in itself, conferred therapeutic effects on all Study Participants, including those who do not participate in the mediation process.

6. Conclusion

The findings from the study indicate that the Program and its component parts, separately and in concert, enhance the well-being of all Constituents in the school community, directly and indirectly, beyond the management of conflict. The training component of the Program is crucial for the effective functioning of the Program, not only for the management of conflict but also for optimising the therapeutic value of the Program for all Constituents. However, the Program environment must be structured to allow Constituents to employ their learned skills, behaviours and strategies¹¹¹; and the whole community must possess a shared understanding of procedures and processes in order for the Program to operate productively.¹¹²

There appear to be parallels between the Program and therapeutic processes described in TJ literature,¹¹³ such as problem-solving courts, mediation¹¹⁴ and other creative problem-solving.¹¹⁵ These processes have

become a regular part of the legal system (in spite of reluctance among many legal practitioners)¹¹⁶ and are increasingly permeating all areas of public and private disputes.¹¹⁷ The study raises the question of whether participants involved in processes such as problem-solving courts and mediation are capable of optimising or even participating in these processes without training in mediation and conflict management skills, behaviours and strategies, and an understanding of what is required to participate.¹¹⁸

The increase in juvenile conflict leading to involvement in the justice system¹¹⁹ calls for constructive conflict education (involving cognitive/behavioural problem-solving)¹²⁰ at a young age, especially since research reveals that many offenders lack cognitive skills, such as interpersonal problem-solving, which are essential to social adaption.¹²¹ Evidence from offender rehabilitation programs demonstrates that effective training intervention techniques can influence cognitive deficits in individuals.¹²² Findings from the study as well as from school peer mediation research¹²³ reveal that similar cognitive skills can be learned at a young age.

The study confirms that "there would probably be less disputation if a large cross-section of the [wider] community understood the principles of negotiation and the process of mediation",¹²⁴ and highlights the importance of schools as a locus for peer mediation style programs. The earlier students are taught the skills, behaviours and strategies to manage conflicts constructively, the more likely they are to use constructive interpersonal conflict management techniques and mediation in response to conflicts.¹²⁵ Findings from the study may also assist in the development and adoption of programs in other community settings in private and public sectors.

Acknowledgments

Dr Stephen Bush¹²⁶ and Richard Buchanan Brown¹²⁷ assisted with confirming results, advising in relation to statistical and mathematical analysis and interpretation of results.

¹¹⁶ Marilyn A K Scott, *Collaborative Law: Dispute Resolution competencies for the "New Advocacy"*, 8 QUTLJ, 213 (2008).

¹¹⁷ *Ibid.*, at 213; See generally Freiberg, *supra* note 39, at 205.

¹¹⁸ Training legal students and legal actors has been acknowledged in the literature as necessary. See Freiberg, *supra* note 39, at 219–222; Michael S King, *Therapeutic Jurisprudence In Australia: New Directions In Courts, Legal Practice, Research, And Legal Education*, 15 J. Judi. Admin. 138 (2006).

¹¹⁹ The NSW Bureau of Crime Statistics and Research reported that the recorded rate of juvenile offenders proceeded against by the NSW Police Force for violent offences had risen by more than 44% since 2001. NSW Bureau of Crime Statistics and Research, *Crime Fast Fact 03: Is juvenile crime increasing?* (2008), at http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_fastfact_03 (last visited September 20, 2008).

¹²⁰ Wexler, *supra* note 28, at 93–94, 98; David B Wexler, *Therapeutic Jurisprudence: An Overview*, Thom. M. Cool. L. Rev., at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> (last visited September 20, 2008).

¹²¹ Robert R Ross, et al., *Reasoning and Rehabilitation*, 2 Int'l J. Offender Ther. Comp. Crim., 29–30 (1988).

¹²² *Ibid.*, at 29–30.

¹²³ Johnson, et al., *supra* note 102, at 98.

¹²⁴ David Spencer, *Essential Dispute Resolution 45* (Professor David Barker ed., Cavendish Australia 2nd ed. 2005).

¹²⁵ Johnson, et al., *supra* note 102, at 98.

¹²⁶ Dr Stephen Bush BMathFin, BSc (Hons), PhD (UTS).

¹²⁷ Richard Buchanan Brown Bsc (UK).

¹¹¹ Maxwell, *supra* note 15, at 150–153.

¹¹² Johnson, et al., *supra* note 102, at 90.

¹¹³ King, *supra* note 5 at 2,5,7,9,19; Winick & Wexler, *supra* note 5, at 7–9.

¹¹⁴ Mediation is described as "conflict resolution in a therapeutic key" in Ellen A Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MQ L R, 160 (1998–1999).

¹¹⁵ David B Wexler, *supra* note 28, at 93.