



MONASH University

**DECISION MAKING ON THE SUITABILITY OF DISPUTES
FOR STATUTORY CONCILIATION:**

**ENABLING APPROPRIATE ACCESS, PARTICULARLY FOR
PEOPLE WITH DISABILITIES**

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ABSTRACT

DECISION MAKING ON THE SUITABILITY OF DISPUTES FOR STATUTORY CONCILIATION:

ENABLING APPROPRIATE ACCESS, PARTICULARLY FOR PEOPLE WITH DISABILITIES

The research addressed the question of how decision making on the suitability of disputes for statutory conciliation can enable appropriate access to these processes as a means of resolving disputes, particularly for people with disabilities. The findings are based on empirical research conducted with 17 statutory complaint bodies with legislative remit to conciliate complaints about health or disability services, or discrimination. On the basis of these findings, an ‘enabling model of decision making’ is proposed to address the important issues of equal and effective access to conciliation.

The agreement of all nominated statutory bodies to participate in the research was in itself a significant finding, indicating a high level of interest in the research question. The research explored the statutory bodies’ models and approaches to conciliation, their decision-making processes, criteria used in decision making, legislative and contextual factors affecting referrals to conciliation, and approaches to power imbalances, capacity and participation of people with disabilities. The findings are based on an analysis of survey and interview responses, and a review of relevant legislative provisions and documentation on conciliation.

This thesis identifies the significant disconnection between the common legislative requirements for statutory complaint bodies to determine the likelihood of success and suitability of matters for conciliation, and the lack of reliable, empirically validated criteria for referrals to Alternative Dispute Resolution (ADR). It also shows the complex variables and potential influences on these decisions and the limited guidance in the statutes or standards which can inform these decisions.

This research found a diversity of applications of conciliation and a number of significant legislative and contextual factors which affected referrals to conciliation, such as the impact of preliminary assessment processes and the availability of other complaint-resolution options. A significant finding was a clear trend towards the adoption of a ‘presumptive’ approach to suitability and ‘early conciliation’ models or other ‘early resolution’ processes. The research also found party characteristics and attitudes towards conciliation to be key factors considered in decision making on suitability.

This thesis also highlights the need for statutory bodies to articulate their model of conciliation, particularly with respect to addressing issues of power, rights and interests of parties and the advisory, evaluative and potentially interventionist roles of conciliators. The findings on approaches to power imbalances and issues of party capacity point to the need for these to be informed by contemporary rights-based concepts of capacity and supported decision-making for people with disabilities.

Most significantly, this thesis highlights that decision making on the suitability of disputes for conciliation should be recognised as an interactive and interdependent process which is influenced by the capacity of the statutory body or officer to work with the particular challenges associated with the characteristics of the parties or nature of the dispute and to facilitate the parties’ participation in conciliation. It proposes the need to rethink approaches to determining suitability for conciliation and assessing parties’ capacity, by turning around the question from *‘Is this matter suitable for conciliation?’* to *‘How can we make this matter suitable for conciliation?’*

STATEMENTS BY CANDIDATE

Declaration

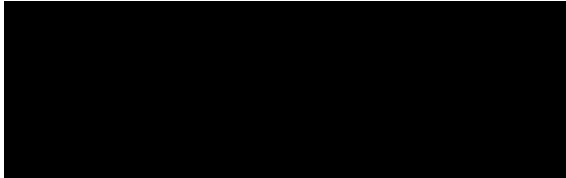
This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or equivalent institution, and that to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis. This thesis does not incorporate work previously submitted for any of the four coursework units for the Graduate Diploma of Law which contributed to the coursework component.



LYNNE COULSON BARR 1 July 2016

Ethics Statement

All ethics requirements involved in undertaking this thesis have been met.



LYNNE COULSON BARR 1 July 2016

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

This research is about the efficacy of decision making on the suitability of disputes for statutory conciliation. It is premised on the recognition that such decisions determine a person's access to justice through this form of dispute resolution, and are part of statutory processes which can affect people's rights and entitlements under relevant laws.¹ The findings and conclusions outlined in this thesis are based on empirical research conducted with 17 statutory complaint bodies with legislative remit to deal with complaints and disputes through conciliation processes.²

The research addressed the question as to how decision making on the suitability of disputes for statutory conciliation can enable appropriate access to these processes as a means of resolving disputes, particularly for people with disabilities, including mental illness. The literature on assessing the suitability of disputes for mediation and conciliation commonly refers to capacity to participate and power imbalances as key factors to consider in such decision making.³ The inclusion of a specific focus on people

¹The question of appropriate referrals and use of statutory mediation and conciliation and the impact on people's rights and entitlements under law has been raised in critiques of statutory complaint and dispute mechanisms: see, eg, Claire Baylis, 'Statutory Mediators and Conciliators: Towards a Principled Approach' (2002) 20(1) *New Zealand Universities Law Review* 101. Tracey Raymond, writing on the model of conciliation adopted by the Australian Human Rights Commission, summarises the criticisms of conciliation for human rights complaints in a number of articles: see, eg, Tracey Raymond, 'Alternative Dispute Resolution as a Tool for Social Change: A Discussion of Issues and Evidence' (2008) 2–5, Australian Human Rights Commission <<https://www.humanrights.gov.au/publications>>.

² The statutory complaints bodies in this research used the terms 'complaints' or 'disputes' to refer to the matters subject to conciliation. As the term 'dispute' is used more commonly in the literature dealing with the suitability of ADR, it has been used in this thesis as a generic term which includes complaints.

³ See discussion of perspectives on mediation suitability by Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2011) 324–5; see also Tania Sourdin's discussion of standards under the National Mediator Accreditation System (NMAS), assessment of power issues, referral screening for ADR processes and mediator competencies: Tania Sourdin, *Alternative Dispute Resolution* (Thomas Reuters, 4th ed, 2012) 86–7, 446–7, 475–6.

with disabilities was driven by the author's former position and experience with the Victorian Disability Services Commissioner,⁴ and a concern that decision making on the suitability of matters for conciliation may unwittingly limit the access to these processes for people with disabilities. In addition to the concern about ensuring appropriate access for people with disabilities, this research examined the efficacy of decision making on the suitability of disputes for statutory conciliation in terms of the extent to which these decisions addressed issues of rights, power and people's interests in disputes.⁵

The research identifies key themes and issues in current decision-making practices and associated legislative provisions, and proposes a framework for what the author has called an 'enabling model of decision making'.⁶ This framework is proposed to address the important issues of ensuring equal and effective access to conciliation, as well as the appropriate referral of disputes more broadly to Alternative (or Appropriate) Dispute Resolution (ADR). The need for specific attention to the issues of access and participation of people with disabilities in conciliation, and in ADR processes more broadly, is highlighted in Chapter Six of this thesis.

1.2 Background to the issue

Over the last decade, ADR has received increasing emphasis and attention by policy makers, government and the judiciary as a way of resolving disputes in our society. Reports such as the Federal Attorney-General's *Access to Justice* report⁷ and the report

⁴ When this research started, the author was the Deputy Commissioner with the Victorian Disability Services Commissioner, whose statutory functions include conciliation of complaints about disability services. In April 2014 the author was appointed to the new role of Victorian Mental Health Complaints Commissioner, with similar statutory functions to conciliate complaints.

⁵ The extent to which ADR processes consider rights, power and people's interests in disputes is considered in various frameworks for conceptualising ADR: See, eg, Boulle, above n 3, 138–9; see also Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 5th ed, 2016) 30. These frameworks are further discussed in Chapter Two of this thesis.

⁶ This term has been conceived by the author and is discussed in Chapter Seven of this thesis.

⁷ Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) Australian Government Attorney-General's Department <<https://www.ag.gov.au/LegalSystem/Pages/AccessToJustice.aspx>>. Chs 4 and 5 outline the conclusions about the current status of access to justice in the federal civil justice system and recommendations for improving access.

in the same year by the Victorian Parliament's Law Reform Committee on its inquiry into ADR and restorative justice⁸ have focused attention on the merits of improving people's access to ADR. These reports described the rise of ADR or 'non-adversarial justice' as a way of improving people's access to justice.⁹ The Productivity Commission's 2014 report on its inquiry into access to justice also concluded that more legal problems could be resolved through ADR processes and put forward that greater use of such processes would lower costs and lead to faster resolutions.¹⁰ Proponents of the benefits of ADR highlight the key strengths of these processes as being 'flexibility, cost effectiveness, diversity, inclusiveness, accessibility and creativity'.¹¹

Conciliation is one form of ADR which has a long history in Australia and is associated with diverse applications and processes, including those similar to mediation.¹² Over the past few decades, legislation has been enacted in a wide range of jurisdictions which provides for complaints or disputes to be referred to conciliation, with associated requirements for decision making on the suitability of such matters for conciliation.¹³ There are more than 25 pieces of legislation at a Commonwealth or state level which

⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009). See Ch 6 for discussion and recommendations for 'Resolving more disputes through ADR'.

⁹ See *ibid* 6–9 for discussion on the context of this Parliamentary Inquiry and what is described as a broader movement towards alternative means of dealing with disputes to the adversarial model of justice; see also Michael King, Arie Frieberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (The Federation Press, 2nd ed, 2014), and see Chs 1 and 7 for a comprehensive outline of the emerging trend in Australia and overseas of the use of non-adversarial justice and the position of ADR within this paradigm of justice.

¹⁰ Productivity Commission, *Access to Justice Arrangements – Inquiry Report* (3 December 2014) 7, 12, 36, Australian Government Productivity Commission <<http://www.pc.gov.au/inquiries/completed/access-justice/report>>.

¹¹ National Alternative Dispute Resolution Advisory Council (NADRAC), *National Principles for Resolving Disputes* (April 2011) 16, Australian Government Attorney-General's Department <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

¹² See King et al (2014) above n 9, 114–5; see also the outline of the history of conciliation in Australia and its diversity of applications provided by David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 3rd ed, 2014) 313–330.

¹³ See Spencer and Hardy, above n 12 313–330; examples of more recent legislative schemes which provide for referral of complaints to conciliation include the *Human Rights Commission Act* 2005 (ACT) the *Disability Act* 2006 (Vic), and the *Mental Health Act* 2014 (Vic).

provide for disputes or complaints to be referred to conciliation.¹⁴ This trend and the diversity of applications of conciliation need to be understood within the broader context of the development of ADR in Australia, and will be discussed in Chapter Two.

There have, however, been critics of the increasing trend for governments to legislate for conciliation as a means of resolving complaints and disputes affecting people's substantive rights and entitlements, such as in areas of discrimination and human rights.¹⁵ These critics of what has been described as the 'state sanctioned' and 'institutionalised dispute resolution system' have highlighted concerns about the risk of inappropriate matters being dealt with in conciliation where substantive rights may be affected or where an issue of public interest needs to be addressed.¹⁶ These concerns include the lack of public accountability or systematic reporting of outcomes and risks of complainants

¹⁴ See Bibliography C- Legislation.

¹⁵ These criticisms of statutory conciliation have continued since the 1980s. See generally Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52(6) *Modern Law Review* 733; Rosemary Hunter and Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (University of Melbourne, Centre for Employment and Labour Relations Law, 1995); Claire Baylis, 'The Appropriateness of Conciliation/Mediation for Sexual Harassment Complaints in New Zealand' (1997) 27(4) *Victoria University of Wellington Law Review* 585; Claire Baylis, 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions' (1999) 30(1) *Victoria University of Wellington Law Review* 279; Baylis, above n 1; Anna Chapman, 'Discrimination Complaint-handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22(3) *Sydney Law Review* 321; Claire Baylis and Robyn Carroll, 'The Nature and Importance of Mechanisms For Addressing Power Differences in Statutory Mediation' (2002) 14 *Bond Law Review* 285, 298–9; Mary-Jane Ierodiconou, *Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?* (University of Melbourne, Centre for Employment and Labour Relations Law, 2005); Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18 *Griffith Law Review* 778; Paula McDonald and Sara Charlesworth, 'Settlement Outcomes in Sexual Harassment Complaints' (2013) 24(4) *Australasian Dispute Resolution Journal* 259; see also an overview of these criticisms in Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*. (LexisNexis Butterworths, 2nd ed, 2002) Chapter 11.

¹⁶ The terms 'state sanctioned' and 'institutionalised dispute resolution system' have been used by Baylis, above n 1, 102, Baylis and Carroll, above n 15, 301, and Thornton, above n 15, 738–9, who highlight concerns about the capacity of conciliation to appropriately address issues of substantive rights or public interest. See especially Baylis, above n 1, 102–5 for her discussion of the compatibility of statutory models of mediation and conciliation with the rule of law.

accepting lesser remedies than through adjudicative or determinative processes.¹⁷ While these critics acknowledge the benefits of accessibility, flexibility, cost effectiveness and potentially faster resolution of disputes through ADR processes such as conciliation, they often raise concerns about the potential for these processes to ‘restrict the social reform objectives’ of legislation in areas such as human rights and anti-discrimination, and detract from the development of legal rights through public findings on substantive issues in complaints.¹⁸

Criticisms of statutory conciliation include concerns about the impact of the individualised, ‘consensual’ and confidential nature of conciliation processes, ‘inherent’ power imbalances between parties, lack of specificity or guidance in these statutes on the role of the conciliator, the objectives of the process, and decision making on the suitability of matters for conciliation.¹⁹ Other commentators on statutory conciliation have highlighted the challenges of conciliators in some jurisdictions having multiple roles, including as investigators or decision makers on the referral of complaints to tribunals.²⁰ These challenges reflect the broader tensions which exist for statutory

¹⁷ See, eg, Allen, above n 15, for her critique of the settlement of discrimination complaints through conciliation; see also McDonald and Charlesworth, above n 15, for a discussion of the lack of public accountability and reporting of settlement outcomes in sexual harassment complaints, and how the lack of knowledge of the law and possible outcomes may lead to complainants accepting lesser remedies.

¹⁸ See Raymond, above n 1, 4. Tracey Raymond provides a summary of the criticisms of the use of statutory conciliation for complaints about human rights issues and discrimination and concerns that the confidential and individualised nature of these processes can detract from ‘the social change objectives of the law’ and ‘the development of legal rights for disadvantaged groups and prevent public declarations that will impact on social change’. Raymond cites the work of Thornton above n 15; see also Chapman above n 15, 322–3 for her summary of benefits and criticisms of the use of conciliation and other ADR processes for discrimination complaints.

¹⁹ See, eg, Baylis above n 1, p108, Baylis and Carroll, above n 15, 306–7; see generally Thornton, Hunter and Leonard, Baylis, Chapman, Ierodiaconou, Allen, and McDonald and Charlesworth, above n 15.

²⁰ See, eg, Tracey Raymond, ‘Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on Theory, Practice and Skills’ (2006) [1.2] 2, Australian Human Rights Commission <<https://www.humanrights.gov.au/publications>>. See also the discussion by David Bryson on the multiple roles of conciliators in the Victorian Workcover Conciliation Service (now called the Accident Compensation Conciliation Service): David Bryson, “‘And the Leopard Shall Lie Down with the Kid’: A Conciliation Model for Workplace Disputes’ (1997) 8(4) *Australian Dispute Resolution Journal* 245;

complaint bodies in balancing their function of resolving individual complaints with a role of furthering legislated objectives such as addressing systemic discrimination or issues of public interest and safety.²¹ In areas such as health and disability services, statutory complaint bodies are often conceived as being ‘watchdogs’ in respect of risk management and quality assurance of service provision, which can result in complainants expecting that their complaint will be investigated rather than conciliated.²² The different ways in which conciliation is defined and conceptualised as an ADR process has also been highlighted in the literature on conciliation.²³ The above criticisms of statutory conciliation, and the concerns about the multiple and potentially conflicting roles of statutory complaints bodies, are important contextual considerations for decision making about suitability of matters for conciliation and will be discussed further in Chapter Two.

The relevant provisions in the Commonwealth or state legislative schemes which provide for statutory conciliation commonly refer, expressly or implicitly, to a determination as to whether a matter is ‘suitable’ for conciliation or ‘likely to be resolved by conciliation’, but do not provide any criteria for determining suitability nor define the approach or type of conciliation model to be used in the particular jurisdiction.²⁴ This raises the question of

Baylis above n 1, 118–120 highlights issues associated with conciliators acting in more than one role in the same dispute, such as being an investigator or subsequent decision maker.

²¹ See Tracey Raymond, above n 20, [2.1]

²² See discussion by Ruth Charlton on the features of statutory complaints schemes: Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, 2000) 588; see also Joanna Manning’s critique of the operation of the statutory complaints scheme in New Zealand for complaints by health consumers: Joanna Manning, ‘Access to Justice for New Zealand Health Consumers’ (2010) 18(1) *Journal of Law and Medicine* 178.

²³ See, eg, Astor and Chinkin, above n 15, 85–8; see also Boule, above n 3, 148–52; Spencer and Hardy, above n 12, 313–30.

²⁴ Examples of legislation which require a decision as to whether a matter is ‘suitable for conciliation’ include *Health and Disability Services (Complaints) Act 1995* (WA) s 34(4), *Human Rights Commission Act 2005* (ACT), *Disability Act 2006* (Vic) s 116; examples of legislation which require a decision as to whether a complaint is likely to be ‘resolved through conciliation’ include *Equal Opportunity Act 1984* (SA) s 95(1), *Anti-Discrimination Act 1991* (Qld) s 158, *Anti-Discrimination Act 1998* (Tas) s 74. The relevant provisions in the legislative schemes for the participating statutory complaints bodies in this research will be discussed in Chapter Four of this thesis; see also discussion by Baylis, above n 1, 110 on the lack of guidance in statutes on the role of the conciliator and conciliation processes. Baylis highlights

how each statutory body or individual officer determines suitability of a matter for conciliation, and thus the access of parties to this form of ADR, as distinct from other more determinative approaches to resolving disputes. It also raises the question of consistency of decision making if clear guidelines are not established, and the risk of decisions being dependent on the level of skill, knowledge and judgments of individual officers, and their views about the appropriateness of conciliation in different circumstances.²⁵ These issues about the lack of specificity and guidance in statutes have been highlighted in the various critiques and commentary in the literature on conciliation in statutory complaints schemes.²⁶

A review of the literature revealed that few statutory bodies have developed explicit policies on the suitability of matters for conciliation²⁷ and that there has been little attention or dedicated research on this issue in Australia.²⁸ This initial review also indicated a lack of a common practice framework or sharing of knowledge between statutory bodies on this process of decision making. The literature review therefore identified the opportunity for this research to address these gaps. Key considerations from the literature review for this research will be discussed further in Chapter Two.

1.3 Decision making on the suitability of disputes for ADR

While there has been little research on decision making on the suitability of disputes for conciliation, the question of the suitability of disputes for ADR has received attention in

the common phrasing in statutes that conciliators ‘must endeavour to resolve the complaint by conciliation’, citing *Equal Opportunities Act 1984* (WA) as an example.

²⁵ Baylis and Carroll discuss these concerns about consistency of decision making and the dependence on the level of skills, knowledge and judgments of individual officers in their article on the need for mechanisms to address power differences in statutory mediation and conciliation: above n 15, 305–8.

²⁶ See, eg, Astor and Chinkin, above n 15, 85–8, and Boulle, above n 3, 148–52. These issues will be discussed further in Chapter Two of this thesis.

²⁷ This literature review included examination of websites and publications of statutory bodies conducting conciliations in Australia. See Bibliography, D Other.

²⁸ See the comprehensive review of research on referral criteria for ADR by Kathy Mack: Kathy Mack, *Court Referral To ADR: Criteria and Research* (Australian Institute of Judicial Administration and the National Dispute Resolution Advisory Council, Melbourne, 2003) 25–36. See also Sourdin, above n 3; Sourdin provides a list of ADR empirical research conducted in Australia between 1986 and 2011 in Appendix G of this publication.

the context of debate on legislating for ADR, and the extent to which such processes should be regulated.²⁹ The former National Alternative Dispute Resolution Advisory Council (NADRAC)³⁰ made a significant contribution to this debate and the question of suitability of disputes for ADR. In its role of providing expert policy advice to the Attorney-General of Australia, NADRAC was required to consider ‘the suitability of alternative dispute resolution processes for particular client groups and for particular types of disputes’.³¹ In its 2006 report on *Legislating for alternative dispute resolution. A guide for government policymakers and legal drafters*, NADRAC provided the following commentary on criteria for referral to ADR:

3.5 In practice, it can be difficult to define the criteria on which to base referral decisions. Available research identifies very few consistent features about disputes and their participants that can be used to predict whether or not ADR will be successful. This makes it difficult then, outside of general principles, to determine specific criteria for referral to ADR.³²

While acknowledging the desirability of having some criteria for referral of matters to ADR and the need for an assessment of suitability to be made, NADRAC advised that such criteria do not need to be specified in legislation. Instead, NADRAC recommended that the aim should be ‘to determine general principles on which to base referral decisions without hindering the discretion of the courts and other relevant bodies to make decisions about individual circumstances’.³³ If criteria for such referral decisions were to be written

²⁹ See, eg, Law Reform Committee, Parliament of Victoria, above n 8, Chapter 5 ‘Regulating ADR’; see also discussion by Nadja Alexandra on the differences in approaches to the question of regulation of ADR and the tension of balancing the principles of diversity and flexibility with consistency: Nadja Alexandra, ‘Mediation and the Art of Regulation’ (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 1.

³⁰ NADRAC was an independent non-statutory body established in October 1995 that provided expert policy advice to the Attorney-General of Australia on the development of ADR. NADRAC was decommissioned in late 2013..

³¹ See ‘NADRAC Charter’ in National Alternative Dispute Resolution Advisory Council, *Annual Report 1996–97* (1997) vi, Australian Government Attorney-General’s Department
<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

³² National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution. A guide for Government Policymakers and Legal Drafters* (November 2006) 8, Australian Government Attorney-General’s Department
<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>

³³ Ibid 9.

into legislation, NADRAC proposed that ‘It may be more useful for legislation to specify negative criteria, for example when not to refer a dispute.’³⁴

NADRAC’s approach to this issue highlights, and appears to reinforce, the discretion often exercised by courts and other bodies in referring matters to ADR. At the same time, NADRAC points to the importance of assessment criteria and the need to identify principles for decision making on suitability. In advice to the Victorian parliamentary inquiry into ADR and restorative justice on the question of disputes unsuitable for ADR, NADRAC identified issues such as ‘severe power imbalances, safety or control’ as negative assessment criteria but again emphasised the exercise of discretion and individual judgment in such decision making.³⁵ NADRAC advised that:

Subject to the factors outlined below, NADRAC considers that it is appropriate for the determination of whether or not a dispute is suitable to be made by the dispute resolution practitioner. NADRAC does not consider it helpful to identify particular types of disputes and to apply blanket rules to them. A wide range of factors will determine whether any particular dispute is or is not suitable for ADR.³⁶

NADRAC qualified this advice by emphasising the importance of measures such as appropriate training, evidence-based screening and assessment processes, choice of suitable ADR process, recognition of cultural factors or other vulnerabilities and a number of other factors.³⁷

NADRAC’s consideration of this issue leaves the unanswered question of the evidence base or implicit criteria that may be used in such assessment processes, and what principles underpin decision making on the suitability of matters for ADR processes, including conciliation. There has been considerable commentary in the literature on

³⁴ Ibid 16.

³⁵ The Victorian Parliament’s Law Reform Committee invited NADRAC to provide further comments on the suitability of disputes for ADR raised in NADRAC’s initial submission made in November 2007 to the Committee’s ADR inquiry, referenced in above n 9; National Alternative Dispute Resolution Advisory Council, Submission to the Parliament of Victoria Law Reform Committee, *Inquiry into Alternative Dispute Resolution*, May 2008, 7–9, Australian Government Attorney-General’s Department <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>

³⁶ Ibid 7.

³⁷ Ibid 7–8.

intake and screening processes for ADR processes, particularly for mediation, and consideration of the appropriateness of matters for ADR processes.³⁸ The practice standards for the National Mediator Accreditation System (NMAS) require mediators to have specific skills in intake processes and ‘dispute diagnosis’ and knowledge of the appropriateness or inappropriateness of mediation.³⁹ Various commentators have, however, highlighted the lack of guidance or prescription in these standards and challenges associated with assessment and diagnostic processes,⁴⁰ as well as the lack of requirements or guidance in legislation for intake processes to assess the suitability of disputes for conciliation.⁴¹

Laurence Boulle, for example, highlights problems associated with ‘conventional approaches’ to the ‘diagnosis’ of the appropriateness of mediation or conciliation and the use of checklists of factors to consider, such as willingness and capacity of parties to participate, nature and causes of disputes, power imbalances, public interest issues and

³⁸ See, eg, Gay Clarke and Iyla T Davies, ‘Mediation – When Is It Not An Appropriate Dispute Resolution Process?’ (1992) 3(2) *Australian Dispute Resolution Journal* 70; Rhonda Payget, ‘The Purpose of an Intake Process in Mediation’ (1994) 5(4) *Australasian Dispute Resolution Journal* 190; John Wade, ‘Matching Disputes and Responses: How to Diagnose Causes of Conflict, and to Respond with Appropriate Interventions and/or Referrals’ (2010) 12(1) *ADR Bulletin* 4; see also discussion by Boulle on approaches to determining when mediation is appropriate or inappropriate: above n 3, 314–24; and Sourdin, above n 3, 441–9 on approaches to intake and referral processes.

³⁹ Mediator Standards Board, *National Mediator Accreditation System: Australian National Mediator Standards* (July 2015) Part III Practice Standards 10 [3.2], [3.3], 13–4 [10.1], Mediator Standards Board <<http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas>>.

⁴⁰ See, eg, discussion by Sourdin on the lack of prescription in the NMAS standards in relation to intake processes: above n 3, 215; see also Boulle on the lack of guidance provided in the NMAS on the assessment process for determining the appropriateness of mediation for a dispute: above n 3, 329–30. While both Sourdin and Boulle were commenting on the NMAS practice standards as at September 2007, the 2008 standards are consistent in these respects with the revised standards which came into effect in July 2015, referenced in above n 39. See National Mediator Accreditation System, *Australian National Mediator Standards: Practice Standards* (September 2007) 6 [3.2], [3.3], 10–11[7.3].

⁴¹ See discussion by Baylis and Carroll on the importance of statutory intake processes to determine the appropriateness of mediation, particularly in assessing power imbalances, and their concern that most legislative schemes have limited or no requirements for such processes: above n 15, 305–8; Boulle also highlights the lack of guidance in legislation for the diagnosis and assessment of the appropriateness of disputes for ADR processes: above n 3, 315–6.

timing or ‘readiness of disputes for a negotiated settlement’.⁴² Writing about the different perspectives in the literature on these factors, Boulle outlines the need to weigh up and prioritise the multiple and potentially conflicting factors that indicate appropriate or inappropriateness of an ADR process for a dispute.⁴³ Referring to the review conducted by Kathy Mack on criteria and research relevant to referrals to ADR,⁴⁴ Boulle notes the subjective nature of assessments and the inconclusive or contradictory evidence on factors commonly used in screening and intake processes. He points to the complexity and ‘inexact science’ of the assessment of the appropriateness of disputes for ADR processes: ‘While urban mythology abounds in this area, there is little in the way of scientific precision.’⁴⁵

Mack’s review of available research found that there was a relative lack of reliable, empirically validated criteria or predictors of success for ADR processes. These findings point to a significant disconnection between the findings from research and the legislative requirements for statutory complaint bodies to determine the suitability of disputes for conciliation and the likelihood of a successful resolution.⁴⁶ Mack found, however, that there are ‘significant issues of principle which must be taken into account in making appropriate referrals to ADR’, which informed the position adopted by NADRAC on criteria for referrals to ADR as discussed above.⁴⁷ These research findings, and the literature on the complexity of diagnosis of the appropriateness of disputes for ADR, are significant for examining the efficacy of decision making by statutory complaint bodies and will be discussed in more detail in Chapter Two.

1.4 The need to assess the efficacy of decision making for conciliation and appropriate access for people with disabilities

The above overview of approaches to decision making on the suitability of disputes for ADR highlights the complex variables and potential influences on these decisions, the

⁴² Boulle, above n 3, 320.

⁴³ Ibid 314.

⁴⁴ Mack, above n 28, and cited in Boulle, above n 3, 324–8.

⁴⁵ Boulle, above n 3, 314.

⁴⁶ Mack, above n 28, 86.

⁴⁷ Ibid; National Alternative Dispute Resolution Advisory Council, above n 32, 9.

lack of reliable, empirically validated criteria, and the limited guidance in the statutes or standards which can inform these decisions.

Decisions about referral of matters to conciliation, along with decisions that matters cannot be conciliated, are effectively decisions which determine a person's access to justice through this form of dispute resolution. Ensuring equal and effective access to conciliation for people with disabilities requires specific attention as will be outlined below. The potential impact of such decisions is particularly significant in jurisdictions where the options for a person to seek resolution or redress by other means (such as by application to a tribunal or court) are limited or non-existent, such as under the *Disability Act 2006* (Vic).⁴⁸ Despite these potential consequences, these decisions are generally made without any external review or scrutiny unless individually challenged by processes such as a complaint to an ombudsman.⁴⁹

Without explicit criteria or guiding principles for such decisions, there are risks that the use of implicit criteria or the influence of the individual officer's skills or knowledge may unduly limit access to conciliation. On the other hand, critics of statutory conciliation have pointed to the risk of matters being inappropriately referred to conciliation where a person's rights or entitlements may be affected or where an issue of public interest needs to be addressed.⁵⁰ There are also risks that decisions to refer matters to conciliation may pay insufficient attention to the need to adjust processes to address power imbalances between the parties and issues of capacity of the parties to participate in the process. Commentators have pointed to potential harm or trauma to vulnerable parties if matters are inappropriately referred to conciliation where there are severe power imbalances or existing trauma associated with, for instance, complaints about sexual harassment.⁵¹

⁴⁸ The *Disability Act 2006* (Vic) Pt 6 Div 6 provides only for complaints about disability services to be referred to either conciliation or investigation by the Disability Services Commissioner; see also discussion by Baylis on the lack of alternative procedures for making complaints in jurisdictions where statutory mediation and conciliation have been enacted: above n 1, 105.

⁴⁹ See, eg, discussion by Baylis on the need for accountability and procedurally fair processes for statutory mediation and conciliation: *ibid*, 103–4.

⁵⁰ See references in above n 15 and n 18.

⁵¹ See, eg, Claire Baylis's concerns about the appropriateness of sexual harassment complaints to conciliation and the risk the complainant experiencing further harm or trauma through conciliating directly

There is also the paradox identified in the literature, where ADR processes are seen to benefit vulnerable or disadvantaged groups through the provision of more accessible, flexible, informal and less alienating forums, while at the same time carrying the risk of negotiation or compromise of rights of those same groups.⁵² In its review of the suitability of ADR for vulnerable groups, NADRAC highlighted the advantages of ADR for people with disabilities as ‘its adaptability and its related potential to accommodate their special needs’.⁵³ At the same time NADRAC identified a range of barriers to access to ADR processes for people with disabilities. These barriers included physical impediments, communication support needs, lack of information about rights and ADR processes and the need for advocates and other supports to participate in the processes.⁵⁴

These considerations point to the merits of assessing the efficacy of such decision making in addressing these issues, and the extent to which current processes ensure appropriate access to conciliation as a means of resolving disputes, particularly for people with disabilities. The question of appropriate access to conciliation also requires consideration of the extent to which the potential barriers for people with disabilities to making a complaint are addressed by statutory bodies.

This question of appropriate access to conciliation for people with disabilities has particular significance when considering the obligations imposed by the *United Nations*

with the ‘harasser’: Claire Baylis, ‘The Appropriateness of Conciliation/Mediation for Sexual Harassment Complaints in New Zealand’, above n 15, 612–17; see also Baylis and Carroll, above n 16, 298–302 on the need to protect vulnerable parties in disputes where there are inherent and/or severe power imbalances.

⁵² Commentators who have identified this paradox include Chapman, above n 15, 322; see also discussion in Tracey Raymond and Jodie Ball, ‘Alternative Dispute Resolution in the Context of Anti-Discrimination and Human Rights Law: some comparisons and considerations’ (2000) Australian Human Rights Commission <<https://www.humanrights.gov.au/publications>>.

⁵³ National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution: A Discussion Paper* (1997) 126, [6.37], Australian Government Attorney-General’s Department

<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

⁵⁴ Ibid 126–31, [6.38]–[6.50].

Convention on the Rights of Persons with Disabilities.⁵⁵ This Convention has been given increased force and attention since it was ratified by Australia in 2008, requiring a specific focus on the rights of people with disabilities and a significant shift in ways of thinking about decision-making capacity and accessibility of processes. Article 12 of the Convention provides for equal recognition before the law for people with disabilities and states that ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’⁵⁶ Article 13, which deals with access to justice, similarly states that ‘States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others.’⁵⁷ These articles, together with Article 5 on non-discrimination and Article 9 on accessibility, create an imperative for bodies operating under federal or state legislation to ensure that people with disabilities have equal, fair and effective access to justice and receive supports and ‘reasonable accommodation’ to participate in these processes.⁵⁸ The *Charter of Human Rights and Responsibilities 2006* (Vic) is an example of state legislation which sets out recognition and equality before the law as a human right.⁵⁹ The various pieces of legislation dealing with human rights, equal opportunity and anti-discrimination also create obligations for decisions and processes adopted by statutory complaint bodies, including those operating under those legislative schemes, to be non-discriminatory for people with disabilities.⁶⁰

In addition to the *United Nations Convention on the Rights of Persons with Disabilities*, there is case law which points to the need for referrals to ADR to take into account equality of access for people with disabilities. The 2001 Federal Court decision of *ACCC*

⁵⁵ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). Australia signed this Convention on 30 March 2007 and ratified it on 17 July 2008. It entered into force in Australia on 16 August 2008. Australia acceded to the CRPD Optional Protocol on 21 August 2009.

⁵⁶ *Ibid* Article 12.

⁵⁷ *Ibid* Article 13.

⁵⁸ *Ibid*. Article 2 defines ‘reasonable accommodation’ as meaning ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

⁵⁹ *Charter of Human Rights and Responsibilities 2006* (Vic) pt 2 s 8.

⁶⁰ See legislation listed in Bibliography C.

v Lux Pty Ltd is instructive in its ruling that a person with an intellectual disability should have the opportunity to participate in mediation, and thereby the right to access ADR, as would other members of the community.⁶¹

As discussed above, power imbalances and the capacity of parties to participate have been identified by NADRAC and ADR commentators as factors that should be taken into account in the determination of the suitability of matters for ADR. As these factors are particularly relevant for people with cognitive impairments or mental health issues, this research has included a specific focus on how these factors have been assessed in decision making on the suitability of disputes involving people with disabilities and the extent to which these decisions have taken into account obligations for equality of access and non-discriminatory processes. In examining these issues, this research will also consider the extent to which decision making and conciliation processes have been informed by rights-based approaches to capacity assessments and ‘supported decision making’ for people with disabilities. These approaches aim to give effect to the *UN Convention on the Rights of Persons with Disabilities* and emphasise processes ‘whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters’.⁶² The literature on approaches to the capacity assessments, and considerations for access and participation, of people with disabilities in ADR processes will be discussed further in Chapter Two [2.7] and Chapter Six.

1.5 Research question, scope and aims

This research seeks to address the issue of efficacy of decision making on the suitability of disputes for conciliation with the following focus:

⁶¹ *ACCC v Lux Pty Ltd* [2001] (FCA) 600.

⁶² Piers Gooding, ‘Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law’ (2013) 20(3) *Psychiatry, Psychology and Law* 431, 432. The principles of legal capacity and supported decision making are also explained in the Australian Law Reform Commission’s consideration of the application of the *Convention on the Rights of Persons with Disabilities* to Commonwealth laws: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws. ALRC Report 124* (August 2014) 44–7, [2.37]–[2.50], 47–56, [2.51]–[2.90], Australian Government Australian Law Reform Commission
<https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf>.

How can decision making on the suitability of disputes for statutory conciliation ensure appropriate access, particularly for people with disabilities?

To answer this question, empirical research was conducted with 17 Australian statutory bodies with the jurisdiction to conciliate complaints about:

- health services
- disability services
- discrimination, equal opportunity and issues of human rights.⁶³

These statutory bodies were chosen on the basis of criteria which included whether there were express provisions in the legislation for conciliation of matters, types of matters which were likely to involve face-to-face conferences to resolve the dispute and the likely involvement of people with disabilities. A multi-method research design was chosen which included review of legislation and relevant documentation, scoping surveys and interviews with decision makers in nominated statutory bodies. The research examined the key factors, decision-making processes and explicit and implicit criteria that are being used to determine suitability for conciliation in these jurisdictions, along with specific approaches to access and participation of people with disabilities in conciliation. On the basis of the analysis of the research findings, this research proposes an ‘enabling model of decision making’ about the suitability of disputes for conciliation, which statutory bodies can use to ensure fair and effective access to conciliation as a means of resolving disputes. Broader implications of the findings are also considered and directions for further development and research are identified.

1.6 Organisation of the thesis

This chapter has established the need to address the question of efficacy of decision making on the suitability of disputes for statutory conciliation, and set out the aims and scope of the research and an overview of the research design and methods.

Chapter Two: Key considerations from the literature

This chapter outlines key considerations from the literature on the key features of statutory conciliation, and examines the ways in which conciliation is defined and

⁶³ See Appendix A for list of participating statutory complaints bodies.

conceptualised within the broader context of ADR. It highlights the definitional challenges associated with conciliation and key concerns raised by critics of statutory conciliation, including approaches to addressing issues of power, rights and interests of parties within conciliation. This chapter also examines the research and approaches to determining the suitability of matters for ADR, and the implications of the research findings on referral criteria for decision making by statutory bodies. It concludes with identifying key considerations from the literature in relation to access to ADR for people with disabilities and approaches to capacity to participate in ADR processes.

Chapter Three: Research design, methodology, and analysis of results

This chapter outlines the scope, design and methodology of the research, and summarises the research process, including ethics approval and seeking the participation of nominated statutory bodies. It discusses the rationale for choices made in the research design, methodology and scope, together with the limitations of this research. The chapter also outlines the ‘mixed methods’ approach adopted for this research and the application of grounded theory in the analysis of data from surveys and interviews with decision makers from the participating statutory bodies. It highlights the significance of the unanimous agreement of the nominated statutory bodies to participate in the research and the level of expressed interest in exploring the challenges and complexity of decision making about the suitability of disputes for conciliation. The chapter concludes with an overview of results of the survey and interview responses and the key themes identified from the data analysis. These themes are discussed in detail in the following three chapters.

Chapter Four: Diversity of conciliation approaches and factors affecting referrals

This chapter discusses the key findings of the research in respect of the models and approaches to conciliation adopted by the participating statutory bodies. It examines the diversity of approaches and interpretations of what conciliation means in different jurisdictions, along with some of the common ways in which conciliation is defined in the various legislative schemes and described by statutory bodies in documentation for the public. This chapter also examines common legislative requirements and the range of organisational and contextual factors which may affect the decision making of the suitability of matters for conciliation. The chapter concludes with a discussion of key findings on changes being made to approaches to conciliation by the majority of statutory

bodies, and the implications of the adoption of ‘early conciliation models’ and ‘presumptive’ approaches to the suitability of matters for conciliation.

Chapter Five: Approaches and criteria used in decision making on the suitability of matters for conciliation

This chapter presents the findings on the approaches and criteria being used by participating statutory bodies to decide on the suitability of individual matters for conciliation. Approaches to assessment and decision making are also explored in the context of the adoption by many statutory bodies of a ‘presumptive approach’ to decision making about the suitability of matters for conciliation. Despite the dominance of this presumption of suitability, the willingness and attitudes of parties to participate in conciliation was identified as a key consideration and challenge for most statutory bodies. This chapter introduces the notion that decision making on the suitability of disputes for conciliation is an interactive process which needs to take into account how the statutory body or officer is able to work with the particular challenges associated with the characteristics of the parties or nature of the dispute. It concludes by arguing the need to rethink approaches to determining the suitability of matters for conciliation and to change the question for statutory bodies from *‘Is this matter suitable for conciliation?’* to *‘How could we make this matter suitable for conciliation?’*

Chapter Six: Approaches to power imbalances, capacity and participation of people with disabilities

This chapter explores the way in which approaches adopted by participating statutory bodies take into account factors of power imbalances and parties’ capacity in decision making on the suitability of disputes for conciliation, as these are particularly relevant for people with disabilities. It examines the extent to which the approaches adopted to power imbalances and capacity of parties seek to ensure appropriate access to conciliation, particularly for people with disabilities. These findings are considered in the context of contemporary rights-based approaches to capacity assessments and ‘supported decision making’ for people with disabilities. This chapter concludes with a discussion of the need to incorporate these approaches as part of ‘rethinking’ overall approaches to determining the suitability of matters for conciliation. These approaches are conceptualised as an

‘enabling model of decision making’ on the suitability of disputes for conciliation which is proposed in the concluding chapter.

Chapter Seven: Conclusions – Towards an ‘enabling model of decision making’

This final chapter summarises the key findings from this research and proposes the development of an ‘enabling model of decision making’ as a way of ensuring appropriate access to conciliation as a means of resolving disputes. This model has a particular focus on enabling equal and effective access to conciliation for people with disabilities. The proposed model builds on the presumptive approaches to suitability found in this research, by paying attention to the organisation’s or officer’s role in facilitating people’s capacity and preparedness to engage in dispute resolution. The chapter outlines the way in which such an approach to decision making requires a new way of thinking about determining suitability of disputes for conciliation and about people’s capacity to participate. This model of decision making shifts the focus from party characteristics or capacity to the capacity of the organisation or officer to facilitate their participation in a conciliation process and incorporate objectives of addressing substantive rights and systemic outcomes. It concludes with an outline of the key components for developing and implementing an enabling model of decision making on the suitability of disputes for conciliation and identifies directions for further development and research.

CHAPTER TWO

KEY CONSIDERATIONS FROM THE LITERATURE

2.1 Introduction

This chapter outlines key considerations from the literature on the definitional questions and key features of statutory conciliation, and examines the ways in which conciliation is defined and conceptualised within the broader context of ADR. It explores the range of factors that may influence decision making on the suitability of matters for statutory conciliation, including key concerns raised by critics of statutory conciliation and approaches to addressing issues of power, rights and interests. It examines the research and approaches to determining the suitability of matters for ADR, and the implications of the research findings on referral criteria for decision making by statutory bodies. It concludes with identifying key considerations from the literature in relation to access to ADR for people with disabilities and approaches to capacity to participate in ADR processes.

2.2 Defining conciliation within the context of ADR

Governments over the past few decades have increasingly enacted legislation which provides for conciliation in a wide range of jurisdictions.⁶⁴ Commentators have highlighted the diverse applications and processes associated with conciliation, and ongoing debates about the extent to which conciliation can be distinguished from mediation.⁶⁵ Given the definitional questions associated with conciliation, a threshold consideration for this research is to examine how conciliation is defined within the broader context of ADR and distinguished from mediation. One of the challenges in defining conciliation is the lack of general agreement over definitions of ADR. Commentators on the rise of ADR have noted that ADR developments have been primarily driven by practice rather than theory, with terms being used in different ways by different people, according to their preferences and contexts.⁶⁶

⁶⁴ See, eg, King et al, above n 9, 114–15; Spencer and Hardy, above n 12, 313–30.

⁶⁵ See, eg, Spencer and Hardy, above n 12, 313; Astor and Chinkin, above n 15, 85–8; Boulle, above n 3, 148–52; Sourdin, above n 3, 158–60.

⁶⁶ See, eg, King, et al above n 9, 109.

While there is a continuing debate about the degree to which ADR processes should be defined,⁶⁷ NADRAC developed process descriptions, objectives and classifications of types of ADR which provide useful ways of conceptualising and discussing ADR and its various forms in Australia. NADRAC provided the following overall process description: ‘ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.’⁶⁸ NADRAC determined the most common objectives of ADR processes as being ‘to resolve or limit disputes in an effective way’, ‘to provide fairness in procedure’ and ‘to achieve outcomes that are broadly consistent with public and party interests.’⁶⁹ In its discussion paper on objectives of ADR, NADRAC also identified possible additional objectives of achieving lasting outcomes and using resources effectively.⁷⁰

These objectives provide a useful reference for examining the criteria, explicit or implicit, which may inform the approaches adopted by participating statutory bodies in this research. The effective use of resources and the objective of achieving lasting outcomes are, for example, likely considerations for statutory bodies facing budgetary constraints and/or dealing with complaints involving long-term relationships, as exist, for instance, in disability service provision.

NADRAC also classified ADR processes as being ‘facilitative’, ‘advisory’, ‘determinative’ or a ‘hybrid’ of these processes.⁷¹ These are useful classifications for understanding approaches to conciliation within the broader spectrum of ADR.

⁶⁷ See discussion by Sourdin, above n 3, 4.

⁶⁸ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) 4, Australian Government Attorney-General’s Department
<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

⁶⁹ National Alternative Dispute Resolution Advisory Council, *Report to the Commonwealth Attorney-General: A Framework for ADR Standards* (April 2001) 13–14, [2.3], Australian Government Attorney-General’s Department
<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

⁷⁰ Ibid 13, [2.1].

⁷¹ These classifications focus primarily on the role of the ‘dispute resolution practitioner’, which is the generic term used by NADRAC. NADRAC provides mediation as an example of a facilitative process, in which the dispute resolution practitioner assists the participants to a dispute to identify the disputed issues,

NADRAC defined conciliation as an example of a hybrid process, and distinguished it from mediation by putting forward their view that: “mediation” is a purely facilitative process, whereas “conciliation” may comprise a mixture of different processes including facilitation and advice.’⁷² As NADRAC’s detailed process description of conciliation is the only authoritative definition of conciliation in Australia, it is quoted here in full:

Conciliation is a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

Note: the term ‘conciliation’, may be used broadly to refer to other processes used to resolve complaints and disputes including:

- informal discussions held between the participants and an external agency in an endeavour to avoid, resolve or manage a dispute
- combined processes in which, for example, an impartial practitioner facilitates discussion between the participants, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.⁷³

The advisory role of a conciliator is further articulated in NADRAC’s definition of statutory conciliation, which includes an active and potentially interventionist role for the conciliator:

develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. In contrast, the role of the dispute resolution practitioner in advisory processes is to consider and appraise the merits of the dispute, provide advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. At the other end of the ADR spectrum, determinative dispute resolution processes are processes in which a dispute resolution practitioner evaluates the dispute and makes a determination: National Alternative Dispute Resolution Advisory Council, above n 68, 4–7.

⁷² Ibid 3

⁷³ Ibid 5.

Statutory conciliation takes place where the dispute in question has resulted in a complaint under a statute. In this case, *the conciliator will actively encourage the participants to reach an agreement which accords with the advice of the statute* [emphasis added].⁷⁴

In spite of NADRAC's efforts to provide some definitional clarity, a key theme in the literature on conciliation in Australia is that there is considerable variety in the approaches and models used, with the view that there is 'little consensus amongst conciliation providers as to what precisely conciliation means'.⁷⁵ Boulle highlights the limited guidance provided in statutes, commenting that: 'Legislatures are unoblingly, inconsistent in their use of the terms of mediation and conciliation, seldom defining them and rarely indicating what is required of the respective interveners.'⁷⁶

The continuing debates on the similarities or differences between conciliation and mediation often focus on the degree to which the dispute resolution practitioner takes on an advisory, evaluative or interventionist role in the dispute, or alternatively adheres to a facilitative role which focuses on neutrality, party control and party self-determination.⁷⁷ Boulle highlights that the forms of intervention that can occur in conciliation may also occur in evaluative mediation, such as the use of subject-matter expertise to guide and advise the parties towards agreements which take into account 'judgements about legal rules or other relevant norms'.⁷⁸ Sourdin also comments that while NADRAC assumed that a facilitative model of mediation will operate, many practitioners consider that there are two main forms of mediation, being facilitative and evaluative.⁷⁹ The commentary in the literature therefore raises questions on the extent to which NADRAC's process

⁷⁴ Ibid 10.

⁷⁵ Spencer and Hardy, above n 12, 313.

⁷⁶ Boulle, above n 3, 149; see also discussion by Baylis on the lack of guidance in statutes to distinguish between mediation and conciliation: above n 15, 282–5.

⁷⁷ See, eg, Baylis, above n 15, 282–5; Astor and Chinkin, above n 15, 61; Boulle, above n 3, 19–20; John Wade, 'Mediation: The Terminological Debate' (1994) 5(3) *Australian Dispute Resolution Journal* 204, 206.

⁷⁸ Boulle, above n 3, 148.

⁷⁹ Sourdin, above n 3, 69.

definitions reflect what occurs in practice, given the range of existing models and practices.⁸⁰

Another definition of mediation which is particularly relevant for this research is found in the National Mediator Accreditation System (NMAS).⁸¹ The NMAS was established in 2008 and is the only scheme under which both mediators and conciliators can currently be accredited.⁸² While the NMAS standards state that ‘a mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes’,⁸³ the standards nonetheless provide for mediators using a ‘blended process such as advisory or evaluative

⁸⁰ See, eg, Sourdin, above n 3, 69–7; Boule, above n 3, 19–20. NADRAC provides the following process definition of mediation which is similar to the definition provided for conciliation, with the exception of the references to the advisory role: ‘Mediation is a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.’: NADRAC, above n 68, 9.

⁸¹ The Australian National Mediator Accreditation System (NMAS) was established in 2008. The NMAS is a voluntary industry system under which organisations qualify as Recognised Mediator Accreditation Bodies (RMABs) that may accredit mediators and practitioners providing ‘blended processes’, such as conciliators. See Mediator Standards Board <<http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas>>.

⁸² The NMAS Approval and Practice Standards were established in 2008 and updated in July 2015. These standards provide for accreditation of practitioners who use ‘blended processes such as advisory or evaluative mediation or conciliation’. See Mediator Standards Board, above n 39, Practice Standards Part III [10.2], 14.

⁸³ Mediator Standards Board, above n 39, Practice Standards Part III [2.2], 9. Mediation is described as: ‘Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

- (a) communicate with each other, exchange information and seek understanding
- (b) identify, clarify and explore interests, issues and underlying needs
- (c) consider their alternatives
- (d) generate and evaluate options
- (e) negotiate with each other; and
- (f) reach and make their own decisions.

A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.’

mediation or conciliation, which involves the provision of advice’.⁸⁴ The recognition of the diversity of mediation practice was made more explicit in the updated standards in July 2015, referring to mediators practising in contexts such as ‘hybrid, blended or statutory environments’ and stating that additional requirements relevant to those contexts may apply.⁸⁵ These standards, however, do not articulate a model for blending processes or for how the mediation principle of party self-determination can be reconciled with advisory or evaluative roles of the dispute resolution practitioner.

In order for statutory complaint bodies to determine the suitability of matters for conciliation, there is a threshold consideration of how conciliation is conceptualised by the decision makers in each organisation. Given the limitations of the definitions discussed above, it is useful to consider other conceptual models and frameworks and how these might be used to inform and understand approaches to decision making about the suitability of matters for different types of ADR processes.

2.3 Applying conceptual models of mediation and ADR processes to conciliation

Issues in defining mediation have received the most attention and commentary in the literature. Given the comparisons commonly made between conciliation and mediation, the definitional issues identified for mediation provide an important context for conceptualising approaches to conciliation.

Some of the early writers on mediation argued that it defied a strict definition because its specific elements would depend on a number of variables.⁸⁶ John Wade describes ‘a mediation abacus’ of sets of variables which include skills, processes and protocols which can be ‘mixed and matched’ depending on factors such as cost, time, wishes and educational level of parties, training of the mediator and whether the mediator adopts a

⁸⁴ The 2008 and 2012 versions of the NMAS Approval Standards at 2.4 also included blended processes and referred to evaluative mediation and conciliation, as cited in Sourdin, above n 3, 618.

⁸⁵ Mediator Standards Board, above n 39 2, Part 1 Application. The 2008 and 2012 versions of the Approval Standards at 2.3 referred to mediation as ‘primarily a facilitative process’, as cited in Sourdin, above n 3, 618.

⁸⁶ See, eg, Wade, above n 77; Boulle, above n 3, 13.

theoretical framework.⁸⁷ Wade notes that conciliation has the same ‘abacus’ of variables, and that there has been limited analysis of how mediators may consciously or subconsciously use different packages of these variables to articulate their processes.⁸⁸

Boulle attributes the difficulties in defining and describing mediation to the fact that the term can be used to refer to three different approaches which he describes as ‘aspirational, procedural or occupational’.⁸⁹ He describes ‘aspirational’ approaches to defining mediation as focusing on the values and principles such as self-determination and empowerment which can be seen to underpin approaches to mediation. ‘Procedural’ approaches, as defined by Boulle, refer to the processes, steps, skills and techniques used by mediators to resolve disputes, while ‘occupational’ approaches refer to the variety of practices and conduct by mediators in different settings.⁹⁰

While these terms have not commonly been applied to the definitions of conciliation, there is an obvious application of the common understandings of ‘to conciliate’ and ‘conciliatory’ when considering potentially aspirational approaches to defining conciliation. Dictionary definitions of ‘to conciliate’ include ‘to win the goodwill or regard of, to reconcile conflicting views’,⁹¹ ‘to stop [someone] being angry or discontented’,⁹² and ‘to overcome the distrust or hostility of, by soothing or pacifying means; placate; win over’.⁹³ Given the lack of definitional clarity associated with conciliation, it is possible for these definitions of ‘to conciliate’ to influence how conciliation is understood by individual officers within statutory bodies or complainants, and for an ‘aspirational’ definition to influence decision making. The potential influence of these definitions and aspirational approaches to defining conciliation will be considered in this research.

⁸⁷ Wade, above n,77.

⁸⁸ Ibid 3, 3–4.

⁸⁹ Boulle, above n 3, 13.

⁹⁰ Ibid.

⁹¹ Definition of ‘to conciliate’ in *Concise English Dictionary 1985*, cited in Charlton, above n 22, 311.

⁹² Definition of ‘to conciliate’ in Oxford Dictionaries

<<http://www.oxforddictionaries.com/definition/english/conciliate>>.

⁹³ Definition of ‘to conciliate’ in *Macquarie Dictionary*

<<https://www.macquariedictionary.com.au>>.

Further models for conceptualising the diversity of practices and approaches to mediation are offered by Leonard Riskin in his 'Grid of Mediator Orientations'⁹⁴ and by Nadja Alexander in her 'Mediation Metamodel'.⁹⁵ Both of these models attempt to locate mediator practices within a grid of dimensions, and therefore offer multi-dimensional ways of conceptualising the combined or hybrid approaches that are commonly associated with conciliation. Riskin's model seeks to locate a mediator's interventions on a continuum from 'Evaluative' or 'Directive' interventions to 'Facilitative' or 'Elicitive' behaviours, with a focus on the degree of impact on the self-determination of parties.⁹⁶ Riskin's other dimension for classifying mediator practices was 'Problem Definition', with a continuum from a narrow definition of the problem commonly associated with 'settlement mediation' concerned with parties' positions over interests at one end, to a broad definition of problems at the other, commonly associated with approaches concerned about parties' underlying needs and interests.⁹⁷

A further way of conceptualising approaches to conciliation is to locate conciliation within the broader context of ADR, and consider the extent to which processes are concerned with the phenomena of rights, power and interests. Peter Condliffe describes

⁹⁴ Leonard Riskin, 'Decision-making in Mediation: The New Old Grid and the New Grid system' (2003) 79(1) *Notre Dame Law Review* 1.

⁹⁵ Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97. Alexander's meta-model provides a number of interaction dimensions, with four types of discourse being 'positional', 'interest-based', 'transformative' or 'dialogue', and an intervention dimension with a continuum of the degree to which the practitioner focuses on the problem or the process.

⁹⁶ Riskin, above n 98. Riskin originally called this dimension of mediator behaviours 'Evaluative' and 'Facilitative', but later revised these terms to 'Directive' and 'Elicitive' to focus on the impact of the mediator's behaviour on party self-determination and to cover a wider range of behaviours; see also discussion of Riskin's 'Grid of Mediator Orientations' in Jay Folberg, Dwight Golann, Thomas J Stipanowich and Lisa Kloppenberg (eds), *Resolving Disputes: Theory, Practice and Law* (Aspen Publishers, 2010) 274–7.

⁹⁷ Riskin, above n 102; see also Boule's discussion of 'settlement' mediation in his typology of four mediation models described as: 'settlement', 'facilitative', 'transformative' and 'evaluative'. This typology distinguishes these four approaches in terms of their main objective, the definition of the dispute, the types of mediators, the main role of the mediator in the process, and other key characteristics. The objective of 'settlement mediation' is described as encouraging incremental bargaining between parties' positions towards a compromise: above n 3, 44–7.

conflict as usually being managed around these three phenomena. In this framework, a concern about *rights* focuses on entitlements, credibility, merits and position, while a focus on *power* is concerned with who is able to achieve an advantage or superiority of position and how power can be manifested in many ways. In contrast, a focus on parties' *interests* is concerned with needs and desires and can be regarded as the 'why' of conflict.⁹⁸ Boulle similarly describes power, rights and interests as representing three different 'levels' which can differentiate the nature, degree and intensity of parties' engagement in ADR processes.⁹⁹

The extent to which ADR processes can address issues of power imbalances and people's rights and entitlements under law has featured in debates around the efficacy and suitability of ADR for different types of disputes, and in the criticisms of statutory conciliation noted in Chapter One. These debates have included questions about the extent to which dispute resolution processes should be 'rights-based' compared to a broader focus on needs and interests of the parties.¹⁰⁰ Boulle describes dispute-resolution processes which operate at the 'rights level' as being concerned with the respective rights and obligations of parties who seek a determination based on the law or normative standards from an authority, such as a court, tribunal, board or manager. In contrast, dispute-resolution processes which operate on the level of 'interests' attempt, according to Boulle, 'as far as possible to identify and reconcile parties' interests through negotiation, accommodation and compromise' with a focus on personal or business needs, interests and priorities.¹⁰¹

Boulle effectively portrays two ends of a continuum between a pure 'rights-based' approach which is most often associated with adjudicative and adversarial processes, to an 'interest-based' approach which is commonly associated with facilitative mediation.¹⁰² The literature on rights-based approaches in ADR characterises these processes as resolving disputes with reference to perceived rights and duties, for example, as

⁹⁸ Condliffe, above n 5, 30.

⁹⁹ Boulle, above n 3, 138–9.

¹⁰⁰ See, eg, the outline of arguments for and against ADR summarised by King et al, above n 9, 98–103; see also points raised in Baylis in respect of statutory models of mediation and conciliation: above n 1.

¹⁰¹ Boulle, above n 3, 138.

¹⁰² See, eg, the discussion on facilitative mediation in Sourdin, above n 3, 69–70.

articulated in law. Interest-based approaches, in contrast, focus on framing the dispute in terms of the parties' underlying needs and interests.¹⁰³ In considering the debate on the similarities and differences between conciliation and mediation, Boulle describes conciliation, particularly statutory conciliation, as 'generally a more rights and policy based system' when compared to facilitative mediation.¹⁰⁴ Sourdin also puts forward that many mediators view conciliation as more 'rights'-focused than pure mediation that is concerned with a broader focus on needs and interests.¹⁰⁵ Tracey Raymond, writing on approaches to statutory conciliation in the areas of human rights and anti-discrimination, also highlights the strong rights-based focus in these jurisdictions but proposes an integrated approach to dealing with parties' rights and interests which will be discussed further in Parts 2.4 and 2.5 below.¹⁰⁶

A continuum of dispute-resolution processes can be constructed with a focus on the amount of control given to parties over both the process and outcome and the consequent degree of 'adversarialism'. In this construct, litigation is at one end of the continuum and direct simple negotiation between two parties at the other.¹⁰⁷ Some commentators have placed conciliation about two-thirds of the way on the continuum between direct negotiation and litigation, and halfway between mediation and arbitration.¹⁰⁸ The placing of conciliation at this point on the continuum is based on the potential level of intervention by the conciliator in both process and outcome of the dispute.

The extent to which statutory complaints schemes can address substantive outcomes in terms of people's rights and entitlements under law, and provide for interventions by conciliators to ensure fairness of outcomes, are key questions raised in critiques of statutory conciliation. As noted in Chapter One, these critiques raise questions on the appropriateness of using this form of ADR in cases involving potential infringements of substantive rights under law, for example, anti-discrimination legislation, and question

¹⁰³ See, eg, Astor and Chinkin, above n 15, 126–7; Raymond, above n 20, 7–8.

¹⁰⁴ Boulle, above n 3, 148.

¹⁰⁵ Sourdin, above n 3, 159.

¹⁰⁶ Raymond, above n 20, 2, 7–8.

¹⁰⁷ King et al, above n 9, 108–9. King et al place mediation/facilitation at the centre of the 'ADR Process Continuum'.

¹⁰⁸ Ibid; see also Boulle, above n 3, 148.

whether the process and level of intervention used by a conciliator is sufficient to adequately safeguard people's rights.¹⁰⁹ Cases involving the rights of people with disabilities in relation to access to services have been highlighted as examples where public determinative processes which address substantive rights and create precedents may be more appropriate than conciliation.¹¹⁰

Critics raising such questions commonly point to the lack of specificity or guidance in these statutes on the role of the conciliator, the objectives of the process, and decision making on the suitability of matters for statutory conciliation.¹¹¹ It is therefore important for the purposes of this research to examine the key features and criticisms of statutory conciliation identified in the literature, and the potential influence of these factors on decision making about the suitability of matters for conciliation.

2.4 Key features and critiques of statutory conciliation

As indicated above, the focus on statutory conciliation in this research narrows some of the considerations arising from the definitional uncertainties and challenges in conceptualising conciliation within the broader spectrum of ADR. While the literature on statutory conciliation still points to the variability of models and roles of conciliators within statutory schemes,¹¹² there are some key common features and contexts associated with conciliation within the statutory complaint schemes which are the subject of this research.

In considering some of the distinguishing features of conciliation, Boulle points to conciliation as 'operating within statutory frameworks imparting standards and policy objectives', and being provided by public agencies with conciliators commonly being public officials rather than private practitioners.¹¹³ Where conciliators are required to

¹⁰⁹ See, eg, discussion by Anna Chapman on the application of statutory conciliation for discrimination complaints: above n 15, 321, 342; see also Baylis's review of statutory models of mediation/conciliation: above n 15.

¹¹⁰ See, eg, Baylis, above n 15, 28.

¹¹¹ See, eg, Baylis & Carroll above n 16, 306–7; Baylis, above n 1, 108.

¹¹² See, eg, Spencer and Hardy, above n 12, 313–30; Sourdin above n3, 158–160; Baylis, above n 15; Baylis and Carroll, above n 15.

¹¹³ Boulle, above n 3, 149.

promote statutory objectives, they cannot be said to be neutral or at arms-length in the way in which an external dispute resolution practitioner can be.¹¹⁴ Conciliators in this context have been described by some commentators as being ‘advocates for the law’ while remaining impartial to the parties, and operating to varying degrees in ‘the shadow of the law’.¹¹⁵ Boulle describes the apparent conflicts and challenges in combining facilitative processes with ‘the obligations imposed on conciliators to guide parties towards outcomes which reflect legislative norms such as non-discrimination and equal opportunity’.¹¹⁶ Despite these distinguishing features and common challenges, the literature points to ongoing questions relating to definitions and practices of statutory conciliation, with limited examination and articulation of conciliation practices across different statutory contexts.¹¹⁷

David Bryson, one of the key commentators on statutory conciliation in Australia, has described the ‘inherent contradictions’ and complexity of the roles of the statutory conciliator in facilitating resolution of disputes between parties while managing their own legal responsibilities and limitations.¹¹⁸ Bryson highlights these issues in the context of conciliating anti-discrimination complaints and workplace disputes, and contends that these have led to a range of criticisms of statutory conciliation. In addition to the concerns about potential compromise of rights in these processes, critics of statutory conciliation have also pointed to the way in which time and resource constraints may prevent the exploration of parties’ underlying agendas and interests and lead to pressure

¹¹⁴ Ibid; see also Charlton, above n 96, 313.

¹¹⁵ See, eg, David Bryson, ‘Mediator and Advocate: Conciliating Human Rights Complaints’ (1990) 1(3) *Australasian Dispute Resolution Journal* 136; Tracey Raymond and Sophie Georgalis, ‘Dispute Resolution in the Changing Shadow of the Law: A Study of Parties’ Views on the Conciliation Process in Federal Anti-discrimination Law’ (2003) 6(2) *ADR Bulletin* 1.

¹¹⁶ Boulle, above n 3, 368–9.

¹¹⁷ See, eg, Sourdin, above n 3, 159. Sourdin refers to the fact that conciliation is widely used to settle disputes in health and aged care, but models may not be well defined; see also Baylis, above n 1. Baylis outlines the issues in defining and conceptualising statutory mediation and conciliation; the literature review conducted for this research identified a limited number of writers and references dealing with this topic, compared to the extensive examination of mediation practices in different contexts. See, eg, Boulle, above n 3, 137–80. Boulle provides an extensive overview of mediation practices and associated literature in Chapter 5 of this publication.

¹¹⁸ Bryson, above n, 115; Bryson, above n 20.

for settlement, and how imbalances of power may result in conciliators becoming advocates for the less powerful or alternatively, collude with repeat players (such as large organisations) to achieve settlements.¹¹⁹ Writing in the late 1990s, Bryson identified the need for conceptual clarity within the practice of conciliation to respond to such criticisms, and proposed a model of statutory conciliation which articulates two modes of interventions for the conciliator, being the ‘power’ and the ‘empowerment’ mode, and the role of the conciliator as both a facilitator and ‘an advocate for the law’.¹²⁰

Tracey Raymond, writing about approaches developed by the Australian Human Rights Commission, also identifies the challenges and criticisms associated with statutory conciliation. Raymond outlines ways in which conciliators can operate as ‘advocates for the law’ by using hybrid approaches which combine facilitative approaches with evaluative, advisory and interventionist roles¹²¹ Raymond emphasises that these approaches can operate to ensure that the conciliation process is fair, with settlement options that do not breach legislation, and can include systemic outcomes that contribute to the social reform objectives of the law.¹²²

Both Raymond and Bryson have articulated models of statutory conciliation which endeavour to address the issues of rights, interests and power that feature in the critiques of statutory conciliation.¹²³ These issues and models will be discussed further in 2.5 below.

¹¹⁹ Bryson, above n 20, 246.

¹²⁰ Ibid 248.

¹²¹ Raymond, above n 1; Raymond and Georgalis, above n 115; Ball and Raymond, above n 52; Raymond, above n 21; see especially Jodie Ball and Tracey Raymond, ‘Facilitator or Advisor?: A Discussion of Conciliator Intervention in the Resolution of Disputes under Australian Human Rights and Anti-discrimination Law’ (2004) Australian Human Rights Commission
<<https://www.humanrights.gov.au/publications>>; The Australian Human Rights Commission was formerly called the Human Rights and Equal Opportunity Commission.

¹²² Raymond and Georgalis, above n 115, 34; see especially Raymond, above n 1, for discussion on ways in which conciliation outcomes can address broader social change objectives.

¹²³ See, eg, Thornton; Chapman; Baylis; Astor and Chinkin: above n 15; Baylis, above n 1.

Criticisms of statutory conciliation commonly focus on the differentials in power and interests between the parties, and the need to address substantive rights under law.¹²⁴ Margaret Thornton, one of the early critics of statutory conciliation for anti-discrimination complaints, points to the ‘inherent inequality between parties’ and the inability of an informal process of dispute resolution to achieve substantive equality or justice.¹²⁵ Thornton suggests that the legislative models for conciliation of anti-discrimination complaints assume that the majority should be dealt with in a confidential and private process of conciliation rather than adjudicated through a public hearing.¹²⁶ Thornton concedes that the informality and private nature of conciliation may be ‘a desirable alternative for particular categories of individual complainants who would be unlikely to pursue their complaints to the public level’ or through a formal system of adjudication.¹²⁷ She questions, however, what ‘resolved’ means in conciliation as well as the absence of legislative direction and accountability for conciliation processes and outcomes.¹²⁸ Similarly, Anna Chapman’s review of the use of conciliation in the handling of discrimination complaints in New South Wales in 2000 highlighted concerns about the individualised focus of the process and ‘the nature of a confidential process in privatising conflict and behaviour from public scrutiny and approbation’.¹²⁹

The criticisms of statutory conciliation reflect many of the broader criticisms of the rise of ADR and its appropriateness as a primary mechanism for dealing disputes. As indicated above, these criticisms centre on the individualised and confidential nature of the process, the lack of public scrutiny and accountability for outcomes, views about ‘second class justice’, and an overall concern that such processes ‘may limit the social reforming potential of the law and work to the disadvantage of those the law aims to protect’.¹³⁰

¹²⁴ Ibid.

¹²⁵ Thornton, above n 15, 760.

¹²⁶ Ibid 737.

¹²⁷ Ibid 760.

¹²⁸ Ibid 740, 748.

¹²⁹ Chapman, above n 15, 323.

¹³⁰ Raymond, above n 20, [1.2]. Raymond provides an overview of common criticisms of ADR in the context of human rights and anti-discrimination law; see also a similar summary provided in Chapman, above n 15, 323; the term ‘second class justice’ is used by Margaret Thornton, above n 15. NADRAC

Critics of statutory conciliation question the extent to which statutory conciliators can be ‘advocates for the law’, arguing that the term implies that ‘conciliators are charged with the task of ensuring that the relevant statute is complied with’, when in practice legislative provisions for conciliation provide only for ‘procedural rights’ in respect of the process but not for the discovery of ‘truth’ in respect to the potential infringement of a ‘substantive right’ to, for instance, non-discriminatory practices.¹³¹ Concerns also include the potential negotiation or compromise of rights in conciliation processes ‘where factors of power and disadvantage might not be conducive to protecting vulnerable individuals or advancing societal objectives as regards human rights’.¹³²

These types of concerns, and the associated questions raised about power and fairness in conciliation processes, are particularly relevant for considering factors which may influence decision making on the suitability of disputes in different contexts and jurisdictions, and for particular groups such as people with disabilities. Claire Baylis, for example, examined the practice of mediating or conciliating complaints about sexual harassment by the Human Rights Commission in New Zealand, and argued that such practices were inappropriate due to ‘the incompatibility of the characteristics of most sexual harassment disputes’ with the ‘basic precepts of mediation or conciliation’.¹³³ In examining the nature and characteristics of sexual harassment complaints, Baylis highlighted the impact of trauma, power imbalances and inequality as features of sexual harassment, and the potential harm to victims if they are expected to conciliate with their harasser.¹³⁴

Baylis contrasts the focus on confidentiality and privacy and reaching agreements in mediation or conciliation with the view that ‘the aim of any dispute involving a complaint of sexual harassment must be to examine the facts and if harassment occurred, to stop

outlined some of the shortcomings of ADR in its discussion paper on ‘A Framework for ADR Standards’, and identified risks associated with ADR, which include that ‘The private nature of ADR may result in unfair procedures or outcomes in the absence of clear standards and forms of accountability.’: above n 69, 25 [2.62].

¹³¹ See, eg, Chapman, above n 15, 342; Thornton, above n 15.

¹³² Boulle, above n 3, 368.

¹³³ Baylis, above n 51, 587–8.

¹³⁴ Ibid 612–17.

that person again and to deter others from doing it at all.’¹³⁵ According to Baylis, mediation or conciliation is unlikely to achieve either of these aims when conducted in private and without public reporting of outcomes to set standards and act as a deterrent.¹³⁶ Taking the view that a statutory scheme for sexual harassment complaints should aim to protect victims from further harm, uphold rights and set public standards, Baylis concludes that:

in determining the type of dispute resolution process which should be used for a certain dispute, a central consideration should be an analysis of the match between the characteristics of the dispute and the nature, objectives and the aims of the dispute resolution process itself.¹³⁷

These critiques of statutory conciliation point to the need to examine the nature and types of dispute being dealt with by a statutory complaints scheme, the overall objectives of the scheme and how the conciliation process fits within these objectives. Complaints made under a statute most often involve one party who is aggrieved and a ‘complaint target’ who may be an organisation or individual in a position of power or authority.¹³⁸ Ruth Charlton points out that such ‘complaint targets’ may not have perceived that a dispute exists but may be mandated by statute take part in conciliation processes.¹³⁹ A key common feature of statutory conciliation of complaints is that the dynamics and power imbalances between parties are different to those found in private or mutual disputes between two parties. Complaints, particularly anti-discrimination complaints, may also be about one party exerting power or influence over the other party.¹⁴⁰

Statutory complaint schemes dealing with health and community services, such as aged care and disability services, also commonly require assessment of relevant standards of care and consideration of potential issues of public interest and safety. These statutory

¹³⁵ Ibid 617.

¹³⁶ Ibid.

¹³⁷ Ibid 588.

¹³⁸ Charlton, above n 22, 7.

¹³⁹ Ibid.

¹⁴⁰ See, eg, David Spencer, *Principles of Dispute Resolution* (Thomas Reuters, 2011) 127–9. Spencer discusses conciliation of anti-discrimination complaints in the Australian Human Rights Commission and the power dynamics between parties.

complaint schemes can include a focus on risk management and quality assurance, and may be part of a broader regulatory framework.¹⁴¹ Such schemes can be regarded as ‘watchdogs’ in relation to the safety and quality of services, as well as having the function of resolving individual complaints.¹⁴² This means that both the schemes and the officers working within them can have multiple roles and functions which can affect both the expectations of people making complaints and the decision-making processes on the suitability of matters for conciliation.

Joanne Manning, for example, reviewed the options for health consumers in ‘seeking access to justice’ through the New Zealand Health and Disability Commissioner’s statutory complaints scheme, and highlighted the tension between the Commissioner’s ‘protective function’ in relation to patient rights and public safety, and the statutory role to provide ‘fair, simple, speedy and efficient resolution of complaints’.¹⁴³ While the Commissioner’s functions include investigations and potential determinations of breaches of care, Manning put forward concerns that only the ‘most serious matters’ were referred to formal investigation due to these processes being ‘relatively time-consuming and resource intensive’ and a view by the then-Commissioner that ‘early resolution is usually considered in the best interests of both complainants and provider’.¹⁴⁴

Manning’s analysis suggests that in some jurisdictions the criteria for referral to conciliation may be affected by the high threshold for referring matters to investigation, and the impact of factors such as volume of complaints and resources that are available to the statutory body to perform its functions. Considering this issue from the perspective of complainants, Manning contends that people who have experienced an adverse medical event or who have serious concerns about the standard of care received may not be satisfied unless there has been a thorough investigation which states ‘what happened,

¹⁴¹ Charlton, above n 22, 588; Sourdin, above n 3, 133.

¹⁴² The College of Nursing describes the NSW Health Care Complaints Commission’s primary role as being ‘the watchdog of the health industry’: College of Nursing, ‘The NSW Health Care Complaints Commission: How It Works’ (July 2002) 3(2) [online]. *Nursing.aust* 8 <<http://search.informit.com.au>>.

¹⁴³ Manning, above n 22, 181.

¹⁴⁴ Ibid 187.

what went wrong and why, who was involved and adjudged responsible ... and what remedial action was to be taken'.¹⁴⁵

The potential tension between the two options of investigation and conciliation was also identified in a review of conciliation of complaints by the NSW Health Conciliation Registry in its first few years of operation.¹⁴⁶ This article highlighted the difficulties experienced by the NSW Health Care Complaints Commission in obtaining consent from parties to refer matters to the Conciliation Registry and it attributed these difficulties to parties' perceptions of what should happen with the complaint.¹⁴⁷ Albertje Gurley, writing about her experiences as the inaugural Registrar, described the tendency for complainants to expect conciliation to be part of an investigation process, to convince the conciliator of the 'rightness of their cause' and the common lack of understanding of the process and potential outcomes of conciliation.¹⁴⁸ Julia Lines, writing a decade later about the NSW Health Conciliation Registry's approach to conciliation, highlighted the continued influence of adversarial approaches on complainants' willingness to participate in conciliation:

Convincing the health care consumers of arguably the most litigious centric state in the country, that conciliation of their complaint may bring salvation is not easy.¹⁴⁹

Nonetheless, a review in 2004 by the NSW Health Care Complaints Commission on the suitability of conciliation for health care complaints concluded:

The effectiveness of conciliation as a method of resolving appropriate complaints cannot be overemphasised. If parties can be brought face to face to discuss issues in a non-

¹⁴⁵ Ibid 188.

¹⁴⁶ Albertje Gurley, 'Conciliation of Health Care Complaints' (1997) 8(3) *Australian Dispute Resolution Journal* 168, 169. The NSW Health Conciliation Registry operates within the NSW Health Care Complaints Commission under the *Health Care Complaints Act 1993* (NSW). This legislation provides for the Commission to formally refer matters to the Conciliation Registry. Up to 2006, the NSW Health Conciliation Registry was located outside the NSW Health Care Complaints Commission and operated with a degree of separation from the Commission.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Julia Lines, 'Something's Happening Here: Resolving Complaints in the NSW Health Registry' in National Mediation Conference, *9th National Mediation Conference, Perth, WA, 9–12 September 2008, Program and Papers – Mediation: Transforming the Landscape* (Promaco Conventions, 2008) 247.

confrontational manner as quickly as possible after the event, a great deal of emotional distress can usually be avoided, not to mention subsequent litigation.¹⁵⁰

Outcomes achieved through conciliation of health care complaints are described as ranging from ‘apologies, to remedial surgical procedures, improved communication and systems of patient care incorporating quality improvements, to six figure compensation payments’.¹⁵¹ Research by the Victorian Health Services Commissioner has also identified ‘the power of explanation’ for resolving complaints in conciliation, and has contrasted the relatively small proportion of complainants seeking compensation.¹⁵² Commentators writing on the benefits of statutory conciliation for health care complaints have highlighted the range of outcomes that can be achieved that would not be possible through publicly adjudicated processes such as courts or tribunals. These can include individualised responses and actions, such as remedial surgery or follow-up care or a detailed explanation of what occurred and what steps will be taken to prevent a reoccurrence of the event and improve services for others.¹⁵³ Studies have found that complainants typically cite a ‘desire to improve service’ or ‘understand what went wrong’ or ‘prevent someone else from going through what I went through’.¹⁵⁴

Positive critiques of statutory conciliation focus on the way in which conciliation can deliver individualised outcomes that address the particular interests of parties, at the same time producing outcomes that can lead to service improvements or systemic change.¹⁵⁵

¹⁵⁰ Jeff Hunter MP, Chairman, Committee on the Health Care Complaints Commission, *Discussion Paper on the Health Conciliation Registry* Report No 4 June 2004, cited in *ibid* 248.

¹⁵¹ Lines, above n 149, 250.

¹⁵² Christian Behrenbruch and Grant Davies, ‘The Power of Explanation in Healthcare Mediation’ (2013) 24(1) *Australasian Dispute Resolution Journal* 54; James Cameron and Grant Davies, ‘Compensation through Conciliation: Payments Made through the Office of Health Services Commissioner (Victoria)’ (2014) 25(2) *Australasian Dispute Resolution Journal* 109.

¹⁵³ See Lines, above n 149, 249; Behrenbruch and Davies, above n 152, 57.

¹⁵⁴ Behrenbruch and Davies, above n 152, 57, citing Thomas Gallagher, David Studdert and Wendy Levinson, ‘Disclosing Harmful Medical Errors to Patients’ (2007) 356(26) *New England Journal of Medicine* 2713.

¹⁵⁵ See, eg, Raymond, above n 1; see also Rosalie Poole, ‘Facilitating Systemic Outcomes through Anti-discrimination Conciliation and the Role of the Conciliator in this Quest’ (2016) 27(1) *Australasian Dispute Resolution Journal* 49.

Similar themes are found in the positive commentary on statutory conciliation across the jurisdictions of anti-discrimination, human rights, health and other services.¹⁵⁶ These positive critiques reflect many of the reported benefits of ADR, such as the ability to provide timely, accessible and flexible processes that are responsive to party needs and can produce outcomes that meet their particular interests.¹⁵⁷ There is, however, particular attention given to the unique way in which the statutory conciliator can combine facilitative, advisory, evaluative, educative and interventionist roles to positively address issues of rights and power, at the same time as addressing underlying needs and interests of parties.¹⁵⁸ Lines, for example, emphasises the way in which conciliation processes can ‘transcend the power imbalance’ between the patient and the health service provider when parties are enabled to look at the issues from each other’s point of view and deal with the underlying emotions and needs of the parties in the dispute. While noting the power differentials in health care complaints, Lines asserts:

Conciliation has much to offer the seemingly powerless complainant. There is an opportunity to speak uninterrupted and to be heard. There is also the potential for self-determination and empowerment through joint decision-making and resolution of the conflict. Resolution can hasten healing and closure, and potentially also address underlying grief...Sometimes, the unexpected restoration of a fractured patient/provider relationship can also be achieved.¹⁵⁹

Raymond similarly highlights the benefits of facilitative interest-based approaches which focus on encouraging parties to understand each other’s views, engage in constructive dialogue and develop resolution options to address mutual needs and interests.¹⁶⁰ Apart from the individual benefits, particularly for complainants, Raymond argues that the use of these approaches can create the conditions whereby respondents to complaints may be open to appreciating the experiences and concerns of complainants or the group they

¹⁵⁶ See, eg, Raymond, above n 1; Poole, above n 155; Gurley, above n 146; Lines, above n 149; see also discussion of approaches to conciliation by the Office of Health Review in Western Australia (now called the Health and Disability Services Complaints Office) in Helen Shurven and Eamon Ryan, ‘Observations on Conciliating Medical Disputes’ (2005) 7(10) *ADR Bulletin* 177.

¹⁵⁷ National Alternative Dispute Resolution Advisory Council, above n 69, 25 [2.61].

¹⁵⁸ Lines, above n 149, 251–2.

¹⁵⁹ Ibid 250–252.; NADRAC also identifies that ADR processes can ‘allow existing relationships to continue and prosper’: above n 69, 25 [2.61].

¹⁶⁰ Raymond, above n 1, [2.2]–[4.2].

represent, and to learning about the relevant law. By combining these approaches with rights-based and educative approaches of conciliators, Raymond outlines the potential for conciliation to contribute to both attitudinal and broader social change.¹⁶¹ Reviews such as those of conciliation outcomes at the Australian Human Rights Commission and the Victorian Human Rights and Equal Opportunity Commission have identified systemic improvement outcomes from conciliation which reflect the legislative objectives of the particular statutory schemes¹⁶² These reviews provide examples of outcomes which extend beyond individual disputes, such as changes to workplace policies and practices, modification of facilities/premises/services and introduction of equal opportunity/anti-discrimination policies and training.¹⁶³

The key features of statutory conciliation and the associated positive and negative critiques discussed above point to a complex set of factors and considerations which could influence decision making on the suitability of matters for conciliation within different statutory complaint schemes. As power, rights and interests of parties have been identified as key considerations, approaches to addressing these factors will be explored further below.

2.5 Approaches for addressing issues of rights, interests and power in statutory conciliation

Various commentators have explored the extent to which power differences can be adequately addressed in statutory conciliation, either through statutory provisions or mechanisms in governing legislation, or through skills, interventions or knowledge applied by individual conciliators.¹⁶⁴ This is a particularly pertinent consideration for this

¹⁶¹ Ibid.

¹⁶² Ibid; Raymond and Georgalis, above n 115; Ball and Raymond, above n 52; Allen above n 15; Poole above n 155; see also McDonald and Charlesworth, above n15; Dominique Allen, 'Settling Sexual Harassment Complaints – What Benefits Does ADR Offer?' (2013) 24(3) *Australasian Dispute Resolution Journal* 169.

¹⁶³ See, eg, Raymond, above n 1, [5.2]; see also Poole, above n 155, 53. Poole provides an overview of reviews and studies on conciliation outcomes, and highlights that between 24% and 40% of these conciliation outcomes included systemic outcomes.

¹⁶⁴ See, eg, Baylis and Carroll above n 15; Bryson, above n 20; Astor and Chinkin, above n 15, 126–7; Lines, above n 155.

research, given that power imbalances between parties have been identified by NADRAC and ADR commentators as factors that should be taken into account in the determination of the suitability of matters for ADR, and significant power imbalances have been identified as contra-indicators of mediation or similar ‘consensus-based’ ADR processes.¹⁶⁵ The capacity of the conciliation process and the conciliator to deal fairly with disputes involving significant power differences has been identified as a threshold question for the legitimacy and appropriateness of the process for certain disputes.¹⁶⁶ On the other hand, examples are provided on the way in which conciliation can offer opportunities for the ‘seemingly powerless’ and vulnerable to be heard and empowered, and afforded access to justice that may not be available through other avenues.¹⁶⁷ These are important considerations for this research’s focus on appropriate access for people with disabilities.

Writing on the nature and importance of mechanisms for addressing power differences in statutory mediation and conciliation, Claire Baylis and Robyn Carroll provide an overview of process designs and strategies outlined in ADR literature on ways of addressing a disparity of power between parties. Power in its broadest sense can be defined as ‘the capacity to influence the behaviour of others, the emotions, or the course of events’.¹⁶⁸ In considering the possible application of mechanisms and strategies such as intake processes and intervention strategies by mediators or conciliators, Baylis and Carroll contend that the success of these approaches is very dependent on the knowledge, skills and ethics of individual practitioners and the parameters placed on their powers to intervene by the governing legislation in each jurisdiction.¹⁶⁹ These authors point to the need for individual practitioners to have substantive knowledge in the law or area of dispute as well as training and a conceptual understanding of the different types and

¹⁶⁵ National Alternative Dispute Resolution Advisory Council, above n 35, 7_8; Sourdin, above n 3, 86–7, 446–7, 475–6; Boule, above n 3, 324–5; Clarke and Davies, above n 38, 70–1.

¹⁶⁶ Baylis and Carroll, above n 15, 292–3.

¹⁶⁷ See Lines, above n 149, 252. For discussion on the perceived benefits of conciliation for vulnerable groups, including people with disabilities, see Chapman, above n 15, 322; see also National Alternative Dispute Resolution Advisory Council, above n 53, 126–31, [6.37]–[6.50].

¹⁶⁸ Definition of power used in *The Concise Oxford Dictionary* (10th ed, 2000) as quoted in Baylis and Carroll, above n 15, 287.

¹⁶⁹ Baylis and Carroll, above n 15, 296.

dynamics of power in order both to accurately assess the appropriateness of matters for statutory mediation or conciliation, and to implement effective strategies to address power imbalances.¹⁷⁰

Many ADR commentators highlight the need for dispute resolution practitioners to have a sophisticated understanding of power, and the way in which power can be understood as being either ‘structural power’ linked to the objective resources, authority and choices people have, or ‘personal’ power linked to individual characteristics such as knowledge and communication skills.¹⁷¹ While Baylis and Carroll point to structural power being the most common dynamic in statutory conciliation, they also highlight the need for individual practitioners to understand the different types of power that can be present in disputes such as strategic, emotional or psychological, cultural, physical and gender power, and to recognise power as being an attribute of a relationship and one that is complex, dynamic and contextual.¹⁷² They put forward that there is ‘a complex web of skills, ethical standards, and practical strategies and interventions for addressing power differences between the parties’ in statutory schemes and that there is a need for greater awareness of power issues within these contexts and the use of mechanisms to address them.¹⁷³

Baylis further highlights concerns about the variable training and expertise of mediators and conciliators in statutory schemes in her writing about the need for a ‘principled approach’ to statutory mediation and conciliation.¹⁷⁴ Baylis points to provisions in statutes whereby the role of mediator or conciliator, or decision-making responsibility, is conferred on an officeholder such as a Commissioner, and ‘the potential risk that this person may not have the training or experience as a mediator/conciliator’.¹⁷⁵ While Baylis concedes that such expertise may be considered in the appointment to such positions, she puts forward the concern that:

¹⁷⁰ Ibid 297–8.

¹⁷¹ Bernard Mayer, *The Dynamics of Conflict Resolution* (John Wiley & Sons Inc, 2000) 54; Baylis and Carroll, above n 15, 287–8.

¹⁷² Baylis and Carroll, above n 15, 289–90.

¹⁷³ Ibid 298.

¹⁷⁴ Baylis, above n 1, 124–7.

¹⁷⁵ Ibid 124.

it does leave open the possibility that a person acting under statutory authority in this area, potentially also with the ability to compel parties to attend at a mediation/conciliation, may be acting without a good knowledge and understanding of the practical and theoretical thinking that has occurred in these fields in the last twenty or so years.¹⁷⁶

The above commentary points to the importance of considering the potential influence of the training and expertise of individual officers on decision making about the suitability of matters for conciliation, particularly in assessing factors such as power imbalances and identifying mechanisms and safeguards which may be necessary to address these.

The model of statutory conciliation proposed by Bryson explicitly addresses issues of power, rights and interests of parties, by articulating two modes of interventions for conciliators.¹⁷⁷ In this model, the conciliator uses a range of interventions in ‘the power mode’ to ‘exert pressure in order to achieve settlements that accord with the rules of the [statutory] framework’.¹⁷⁸ In contrast, ‘the empowerment mode’ aims to ‘explore and integrate the interests of parties ... to involve everyone in a joint problem solving enterprise [which] accommodate[s] the wider needs of participants and extend[s] the issues capable of settlement’.¹⁷⁹ Bryson outlines a number of factors that will affect a conciliator’s ‘choice of mode’, with factors influencing the choice of the ‘power mode’ or evaluative processes including the presence of repeat or ‘expert players’, serious power differentials in knowledge and tactical ability, clear dispute causation and legal precedents, and significant time constraints on the conciliation process.¹⁸⁰ Bryson argues that the key to the efficacy of this model is the way in which conciliators manage the transitions and make strategic choices of when to move between these two modes, based on their perceptions of the power between the two parties.¹⁸¹ Bryson’s approach also highlights the importance of the skills and knowledge of conciliators, and the need for conceptual clarity of the model of conciliation. This model reflects some of the features

¹⁷⁶ Ibid 125.

¹⁷⁷ Bryson, above n 20, 248–9.

¹⁷⁸ Ibid 248.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 250.

¹⁸¹ Ibid 249.

of Riskin's 'Grid of Mediator Orientations' discussed in Part 2.3 above, with its concept of the mediator or conciliator consciously moving between 'Directive' and 'Elicitive' (facilitative) approaches, as well as between broad and narrow definitions of the nature of the dispute.¹⁸²

Tracey Raymond similarly articulates a hybrid model of statutory conciliation that aims to address issues of power, rights and interest of parties, with conciliators utilising both 'rights-based' and 'interest-based' ADR processes and shifting between facilitative and advisory roles at different stages of the conciliation.¹⁸³ As discussed in 2.4, Raymond highlights ways in which these hybrid processes can contribute to broader systemic outcomes.¹⁸⁴ Raymond also emphasises the need for specialist skills and knowledge of conciliators in order for statutory conciliation to address both the needs and interests of parties and produce fair and just outcomes. Raymond points to the need for conciliators to have expert knowledge of relevant law, an understanding of ADR theory and the characteristics of 'rights-based' and 'interest-based' approaches to dispute resolution, an understanding of the complexities of power, and the knowledge and skills to work at different levels of intervention depending on the nature and characteristics of the dispute and needs of the parties.¹⁸⁵

These approaches and models for addressing issues of power, rights and interests of parties in statutory conciliation provide an important context for examining general approaches to assessment of the suitability of disputes for ADR and how these may be applied in this research.

¹⁸² Riskin, above n 94. Riskin's model provides a useful conceptual framework for identifying the common features of the models proposed by David Bryson and by Tracey Raymond.

¹⁸³ See, eg, Raymond, above n 1; Raymond, above n 20; see especially Ball and Raymond, above n 121, 8. In this article Ball and Raymond outline the way in which facilitative and advisory processes may be used at different stages of the conciliation processes, and how conciliator interventions can ensure that parties are making informed choices about settlement terms and outcomes 'do not contravene the purposes of the legislation'.

¹⁸⁴ Raymond, above n 1.

¹⁸⁵ Raymond, above n 20.

2.6 Research and approaches to determining suitability of disputes for ADR

As outlined in Chapter One, approaches to determining the suitability of disputes for ADR have been the subject of detailed consideration by NADRAC and informed by research on the effectiveness of ADR and its efficacy in comparison to litigation and judicial decision making.¹⁸⁶ While there has been little attention to criteria used by statutory complaints bodies, NADRAC identified a need for courts ‘to develop criteria for referral to ADR and to make proper assessments on the suitability of dispute resolution processes for different cases and client groups’ and it commissioned a joint project on this subject with the Australian Institute of Judicial Administration in 2003.¹⁸⁷ The resulting report by Kathy Mack provides a comprehensive review of empirical literature and discussion of criteria for determining suitability for referral to ADR.¹⁸⁸ While this review is focused on the question of court referral, the results provide a useful framework for a consideration of decision making on the suitability of disputes for statutory conciliation.

Significantly, Mack’s review of available research found that there was a relative lack of reliable, empirically validated criteria or predictors of success for ADR processes:

A number of factors are regularly listed in the ADR literature which are thought to relate to appropriate ADR referral. However it appears that there is relatively little research directly addressing the validity of many of the widely identified ‘criteria’ for referral, and where there is research, it tends to be inconclusive or contradictory.¹⁸⁹

Mack’s review highlighted the subjective nature of approaches to assessing the suitability of matters for ADR processes, and the inconclusive or contradictory evidence on factors commonly used in screening and intake processes.¹⁹⁰ The research findings outlined in this review point to a significant disconnection between the evidence on the lack of reliable, empirically validated criteria or predictors of success for ADR processes and the

¹⁸⁶ See Mack, above n 28, 25–36. Mack provides a comprehensive overview of key findings of ADR research up to 2003 in Chapter 4.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid 55.

¹⁹⁰ Ibid 55–68.

legislative requirements for statutory complaint bodies to determine the suitability of disputes for conciliation and the likelihood of a successful resolution.¹⁹¹

Mack reviewed over twenty different ADR referral criteria identified in the literature and research and found three main types, each of which were found to be problematic in offering guidance to decision making on suitability of a dispute for ADR. These are categorised as criteria which are ‘descriptive’ of features associated with the parties, the dispute or the context, criteria related to ‘qualities’ that appear to make ADR success more or less likely, and criteria based on ‘principle’.¹⁹²

‘Descriptive’ criteria were found by Mack to be the most common in the literature reviewed. Mack’s analysis suggests that this type of criterion can, however, be ambiguous or contestable depending on the way in which a factor was described, such as the example of ‘fear of violence’ as a party characteristic compared to ‘risk of violence’ as a feature of the dispute or context.¹⁹³ Mack outlined other examples of descriptive criteria where the empirical research was either inconclusive or contradictory; these included factors such as the type of case, whether the matter is primarily a dispute of fact, the presence of multiple or complex issues, multiple parties, or social characteristics of parties such as gender, age, economic or education status.¹⁹⁴ Mack concluded that descriptive criteria offer little guidance for decision making about the suitability of a dispute for ADR.

Similarly, Mack examined examples of criteria relating to ‘qualities’ that have been identified in the literature as being either a predictor or barrier to ADR success, and found the evidence to be either inconclusive or contradictory. One example highlighted by Mack was a history of an adversarial relationship, which may indicate entrenched positions, but could mean instead that parties may be ready to try an alternative approach

¹⁹¹ See, eg, *Equal Opportunity Act 1998* (WA) s 91(1), which provides for the referral of matters to conciliation if the Commissioner ‘is of the opinion’ that the complaint ‘may be resolved by conciliation’. The legislative requirements for referrals to conciliation by participating statutory bodies in this research are examined in Chapter Four [Part 4.3.2] of this thesis.

¹⁹² *Ibid* 55–7.

¹⁹³ *Ibid* 55

¹⁹⁴ *Ibid* 61–4

through ADR. In Mack's view the 'contingent and dynamic nature of factors makes this categorisation inappropriate'.¹⁹⁵ Mack did, however, identify some examples of 'empirically based referral criteria' relating to particular qualities in specific contexts that 'may be significant facts in ADR effectiveness'.¹⁹⁶ These examples included: 'the participation of a party ... with authority to settle or be bound by the outcome', 'major, non-negotiable value differences', 'intensity of conflict' and disputes that are 'multi-issue [with] ongoing relationships'.¹⁹⁷ Of note was that 'intensity of conflict' as a factor was dependent on both context and 'practitioner skill', with the research indicating that 'practitioner behaviour and skill may have a more significant impact on success than any of the frequently identified criteria relating to party or case characteristics'.¹⁹⁸ These findings support the focus on the specialist knowledge and skills of conciliators in the critiques of statutory conciliation discussed in Part 2.5 above.

Mack concluded in her review that 'the most important general criteria are those of principle, which indicate features essential to a minimally fair process or to allow the ADR process to function at all'.¹⁹⁹ This is reflected in the position adopted by NADRAC on criteria for referrals to ADR which emphasised the need for 'general principles on which to base referral decisions without hindering the discretion of the courts and other relevant bodies to make decisions about individual circumstances' and to limit any criteria to 'negative criteria' on when not to refer a dispute to ADR.²⁰⁰

Mack described 'criteria based on principle' as reflecting principles for deciding that ADR should not be used. Such criteria are also supported by little or no evidence from empirical research about the effectiveness of ADR. Mack highlighted the example of negative criteria such as a history of violence where the process may place a vulnerable party at risk of further violence.²⁰¹ Other examples of 'criteria based on principle' identified by Mack from the literature included: 'the capacity of the parties to participate

¹⁹⁵ Ibid 55.

¹⁹⁶ Ibid 64.

¹⁹⁷ Ibid 64–8.

¹⁹⁸ Ibid 67.

¹⁹⁹ Ibid 89.

²⁰⁰ National Alternative Dispute Resolution Advisory Council, above n 32, 9, 16.

²⁰¹ Mack, above n 28, 56–8.

safely and effectively on their own behalf’, ‘an unmanaged mental illness or intellectual disability without appropriate advocacy’, ‘the existence and nature of any power imbalance, and the extent to which any power imbalance can be redressed’ and ‘public interest [which] may require a formal binding determination’.²⁰²

The above examples are particularly relevant to the focus of this research and the question of appropriate access to statutory conciliation, particularly for people with disabilities. They also reflect the concerns about substantive rights and issues of power which feature in the criticisms of statutory conciliation. Mack’s identification of the reliance on principles rather than empirical research for these criteria informed the inclusion of qualitative methods through surveys and interviews in this research to explore the way in which such principles are applied to decision making on the suitability of disputes for conciliation.²⁰³

As discussed in Chapter One, these research findings, and issues identified in literature on the complexity of diagnosis and assessment of disputes are significant for examining approaches to decision making on the suitability of matters for conciliation by statutory complaint bodies. Apart from the concerns raised by the critics of statutory conciliation about the appropriateness of matters such as sexual harassment complaints for conciliation, there has been very limited attention in the literature on such decision making. Shurven and Ryan offer some observations from conciliating health complaints in Western Australia, suggesting that complaints relating to access or resourcing issues, or arising from ‘emotional issues, differences in opinion or values, such as the manner in which a service was provided’ may not be amenable to conciliation.²⁰⁴ There is, however, extensive commentary in the literature on intake and screening processes for mediation, and assessments of suitability for mediation.²⁰⁵ As indicated in the discussion of Mack’s review of referral criteria to ADR, there are many lists of criteria identified in the

²⁰² Ibid 57–60.

²⁰³ The rationale for the choice of methodology and research design is outlined in Chapter Three of this thesis.

²⁰⁴ Shurven and Ryan, above n 156, 2–3.

²⁰⁵ See, eg, Clarke and Davies; Payget; Wade: above n 38; see also discussion by Boulle, above n 3, 314–24 on approaches to determining when mediation is appropriate or inappropriate; see also Sourdin, above n 3, 441–9 on approaches to intake and referral processes.

literature including factors such as willingness and capacity of parties to participate, nature and causes of disputes, public interest issues, timing or ‘readiness of disputes for a negotiated settlement’²⁰⁶ and ‘issues of severe power imbalances, safety or control’ as common negative assessment criteria.²⁰⁷ Commentators such as Sourdin and Boulle have, however, highlighted the problems associated with a ‘checklist’ approach to assessing the suitability of matters for ADR, pointing to the need to weigh up and prioritise the multiple and potentially conflicting factors that may indicate the appropriateness or inappropriateness of an ADR process for a dispute.²⁰⁸ Sourdin and Boulle have also highlighted the lack of guidance or prescription in the practice standards for the National Mediator Accreditation System (NMAS) which require mediators to have specific skills in intake processes, ‘dispute diagnosis’ and knowledge of the appropriateness or inappropriateness of mediation.²⁰⁹

The literature is, however, consistent in highlighting the value of intake processes and ‘pre-conference’ processes for both assessing suitability of matters for ADR processes and preparing parties.²¹⁰ Baylis and Carroll argue that intake processes are important safeguarding mechanisms for assessing power imbalances in statutory mediation or conciliation, noting that most legislative schemes have limited or no requirements for such processes.²¹¹ From a different perspective, Rhonda Payget outlines the way in which

²⁰⁶ Boulle above n 3, 320; see also discussion by Boulle of the categories of factors found in checklists for determining the suitability of disputes for ADR processes. Boulle above n 3 314–24.

²⁰⁷ National Alternative Dispute Resolution Advisory Council, above n 32, 7.

²⁰⁸ Sourdin, above n 3, 216, 446–7; Boulle, above n 3, 316–7. Boulle outlines the range of factors that may need to be considered when assessing whether a matter is appropriate for mediation. These factors are grouped in categories such as ‘Factors relating to parties’, ‘The cause of the dispute’, ‘Fairness and equity issues’. This approach contrasts to an earlier approach by Boulle of listing ‘indicators’ of ‘suitability’ or ‘unsuitability’ for mediation. See Laurence Boulle *Mediation: Principles, Process and Practice* (Butterworths, 1996) 77–81.

²⁰⁹ Boulle, above n 3, 329; Sourdin, above n 3, 215; Mediator Standards Board, above n 39. See Part III Practice Standards 10 [3.2]–[3.3], 13–14 [10.1].

²¹⁰ See, eg, Payget, above n 38, 193; Helen Shurven, ‘Pre-mediation for Mediators’ (2011) 12(6) *ADR Bulletin* 120; Sourdin, above n 3, 441–9; Baylis and Carroll, above n 15, 305–8.

²¹¹ Baylis and Carroll, above n 15, 305–8; see also Boulle, above n 3, 315–16. Boulle highlights the lack of guidance in legislation for the diagnosis and assessment of the appropriateness of disputes for ADR processes.

intake processes can assist in dealing with issues of resistance or willingness to participate in mediation, and identify whether the issues are related to doubts or fears about the process or, alternatively, indicate that ‘a party is not yet ready for mediation’.²¹² Payget also highlights the importance of intake processes being a check against the potential to ‘reject the parties because they are too difficult or irrational to deal with’ or because ‘we are unable to make sense of their conduct within the constructs of our own understanding’.²¹³ The need to be aware of potential cognitive or unconscious biases in decision making in ADR processes has also been highlighted by Sourdin, referring to insights gained from neuroscience and studies into the psychology of decision making.²¹⁴

The literature therefore supports the importance of identifying both the explicit and implicit criteria that are being used by statutory bodies and individual officers to determine the suitability of matters for conciliation, along with the processes used to weigh up and prioritise different factors and to check potential biases or assumptions. These issues are particularly important when considering approaches to assessment of capacity to participate in conciliation and appropriate access for people with disabilities.

2.7 Approaches to access and participation in ADR for people with disabilities

As discussed above, power imbalances and ‘capacity of the parties to participate safely and effectively on their own behalf’ have been identified in the literature as factors that should be taken into account in the determination of the suitability of matters for ADR.²¹⁵ The question of whether parties have ‘legal capacity to make binding agreements’ is also discussed in the literature as a factor that should be taken into account in determining whether a matter is appropriate for mediation.²¹⁶ As discussed above, Mack’s review specifically identified an explicit criterion in the literature of an ‘unmanaged mental

²¹² Payget, above n 38, 197.

²¹³ Ibid 113. Payget cites L Marlow and S R Sauber, *The Handbook of Divorce Mediation* (1990 Plenum Press) 113.

²¹⁴ Tania Sourdin, ‘Decision Making in ADR: Science, Sense and Sensibility’ (2012) *Decision-making*. Paper 1, Civil Justice Research Online <<http://www.civiljustice.info/decision/1>>.

²¹⁵ See discussion of these criteria in Mack, above n 28, 57–9.

²¹⁶ Boulle, above n 3, 319; see also Robyn Carroll, ‘Appointing Decision-makers for Incapable Persons: What Scope for Mediation?’ (2007) 17(2) *Journal of Judicial Administration* 75; David Spencer, ‘Case Notes: Capacity to Enter a Deed of Mediation’ (2001) 12(4) *Australasian Dispute Resolution Journal* 209.

illness or intellectual disability without appropriate advocacy’ as being a reason why an ADR process may be assessed as not appropriate.²¹⁷

These factors raise questions as to the extent to which decisions about the suitability of matters involving people with cognitive impairments or mental health issues for ADR take into account obligations for equality of access under the *United Nations Convention on the Rights of Persons with Disabilities*²¹⁸ and non-discriminatory processes under Commonwealth and state and territory laws.²¹⁹ As discussed in Chapter One, the 2001 Federal Court decision of *ACCC v Lux Pty Ltd*²²⁰ is instructive in its ruling that a person with an intellectual disability should have the opportunity to participate in mediation, and thereby the right to access ADR, as would other members of the community.

There has, however, been very limited attention in ADR research and literature to the approaches to assessments of capacity and the participation of people with disabilities, particularly in Australia.²²¹ There is also little guidance in the literature in Australia to inform decisions about access to ADR for people with disabilities and how processes can be adjusted to facilitate the participation of people with cognitive impairments, communication and decision-making support needs. Apart from a paper by Jim Simpson in 2003 on facilitating the participation of people with disabilities in mediation,²²² and NADRAC’s efforts to promote the accessibility of ADR processes for people with disabilities through its discussion paper ‘The Issues of Fairness and Justice in Alternative Dispute Resolution’ and the resource ‘A Fair Say – A Guide to Managing Differences in

²¹⁷ Mack, above n 28, 58.

²¹⁸ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

²¹⁹ The various pieces of legislation dealing with human rights, equal opportunity and anti-discrimination create obligations for decisions and processes adopted by statutory complaints bodies, including those operating under those legislative schemes, to be non-discriminatory for people with disabilities. See legislation listed in Bibliography C.

²²⁰ *ACCC v Lux Pty Ltd* [2001] (FCA) 600.

²²¹ See Mack, above n 28; see also Sourdin, above n 3, Appendix G for an overview of ADR research between 1986 and 2011.

²²² Jim Simpson, ‘Guarded Participation: Alternative Dispute Resolution and People with Disabilities’ (2003) 14(1) *Australasian Dispute Resolution Journal* 31.

Mediation and Conciliation – A Guide for All Involved’,²²³ there has been very limited attention to the right of people with disabilities to access ADR processes. The questions about how to assess the ‘capacity of the parties to participate safely and effectively on their own behalf’ and ‘appropriate advocacy’ for people with cognitive impairments or mental illness have therefore been left largely unanswered in the Australian ADR literature.

In contrast, specific guidelines and standards for mediations conducted under the *Americans with Disabilities Act 1990* have been developed in the United States. These guidelines and associated commentary in the literature focus on approaches to capacity and requirements for ‘reasonable accommodations’ to mediation processes to promote access and participation of people with disabilities.²²⁴ In addition, the work by Dan Berstein on ‘mental health mediation’ in the United States highlights potentially discriminatory practices which limit access to mediation for people with mental illness, and proposes that the principle of ‘universal design’ should be applied to mediation in the same way as other services to ensure that mediation is accessible for all parties.²²⁵

²²³ National Alternative Dispute Advisory Council, above n 53; National Alternative Dispute Resolution Advisory Council, *A Fair Say – A Guide to Managing Differences in Mediation and Conciliation – A Guide for All Involved* (1999) Australian Government Attorney-General’s Department <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

²²⁴ See ADA Mediation Standards Work Group, Kucin Program for Conflict Resolution at Benjamin N Cardozo School of Law and the Cardozo Journal of Conflict Resolution, *ADA Mediation Guidelines* (2000) Mediate.com <<http://www.mediate.com/articles/ada1tr.cfm>>; see also U.S. Equal Employment Opportunity Commission, National Council on Disability and U.S. Department of Justice, ‘Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)’, U.S. Equal Employment Opportunity Commission <http://www.ada.gov/ada_mediators.html>. Similar guidelines have been developed in British Columbia, Canada; see British Columbia Mediator Roster Society, *Accommodating People with Disabilities: A Reference Guide for Mediators* (February 2009) British Columbia Mediator Roster Society <[http://www.mediatebc.com/PDFs/1-23-Resources-\(For-Mediators\)/AccommodatingHandbook-web.aspx](http://www.mediatebc.com/PDFs/1-23-Resources-(For-Mediators)/AccommodatingHandbook-web.aspx)>.

²²⁵ Dan Berstein, *Mental Illness in Mediation: A Universal Design Approach* (2013) <<http://www.slideshare.net/AssociationforConfli/mental-health-in-mediation>>; see also Dan Berstein, *Opportunities for Mediation in Mental Illness* (2012) Association for Conflict Resolution–Greater New York Chapter <http://www.acrgny.org/Resources/Documents/Conference_2012/Workshop%20Materials/4E%20-%20Dan%20Berstein%20-%20Mediation%20in%20Mental%20Illness.pdf>.

‘Universal design’ is defined in the *United Nations Convention on the Rights of Persons with Disabilities* as ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design’.²²⁶ These approaches, together with contemporary rights-based approaches to capacity and ‘supported decision making’,²²⁷ offer new ways of thinking about the capacity of people with disabilities to participate in conciliation and will be explored in more detail in Chapter Six in relation to this research’s findings on approaches to these matters by statutory bodies.

2.8 Conclusion

The above overview of the literature and research on approaches to decision making on the suitability of disputes for ADR highlights the complex variables and potential influences on these decisions, the lack of reliable, empirically validated criteria, and the limited guidance in the statutes or standards which can inform these decisions. The lack of definitional and conceptual clarity associated with conciliation, and the concerns raised by critics of statutory conciliation in relation to issues of power, rights and interests of parties, are also important contextual considerations for examining the approaches to decision making on the suitability of disputes by statutory bodies in this research. The limited attention in the literature to the question of appropriate access to ADR for people with disabilities and to approaches to capacity to participate in ADR processes, reinforces the importance of including a specific focus on these questions in this research.

²²⁶ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), Article 2 Definitions.

²²⁷ See Australian Law Reform Commission, above n 62; see also Gooding, above n 62.

CHAPTER THREE

RESEARCH DESIGN, METHODOLOGY AND ANALYSIS OF RESULTS

3.1 Introduction

This chapter outlines the scope, design and methodology of the research, and summarises the research process, including ethics approval and seeking the participation of nominated statutory bodies. It discusses the rationale for choices made in the research design, methodology and scope, together with the limitations of this research. The chapter also outlines the ‘mixed methods’ approach adopted for this research and the application of grounded theory in the analysis of data from surveys and interviews with decision makers from the participating statutory bodies. It concludes with an overview of results of the survey and interview responses and the key themes identified from the data analysis.

3.2 Scope of research

In determining the scope of this research and the selection of statutory bodies to invite to participate, consideration was first given to the diversity of applications of conciliation in Australia.²²⁸ A review of the applications of conciliation within Australian jurisdictions identified that conciliation is used in a wide range of jurisdictions, including industrial relations and workplace disputes, workers compensation, complaints about human rights, equal opportunity and discrimination, family law and complaints about health, disability, aged care and community services.²²⁹

Taking into account this diversity of applications of conciliation and the aims of this research to include a focus on appropriate access for people with disabilities, the

²²⁸ Consideration was also given to extending the scope of the research to include New Zealand jurisdictions, but a decision was made to limit the scope to Australian jurisdictions for practical reasons, along with the desire to analyse the results of the research with reference to Australian developments in ADR.

²²⁹ Other jurisdictions include residential and retail tenancy disputes, consumer affairs, privacy complaints, superannuation disputes, and various complaint bodies dealing with services such as public transport, water, energy, financial services, building disputes. See, eg, Sourdin, above n 3, 31–2; King et al, above n 9, 114–15; Spencer and Hardy, above n 12, 313–30.

following criteria were developed to identify potential jurisdictions and respondent organisations and thus refine the scope of the research:

- *Statutory conciliation*: where the relevant legislation expressly provides for conciliation of matters
- *Nature of dispute or conflict*: where the matters are likely to include issues of communication and relationships between parties and consideration of face-to-face conferences to resolve the dispute
- *Likely involvement of people with a disability in disputes*: where the matters are likely to involve people with a disability and judgments about a person's capacity to participate in the process
- *Decision has to be made to refer to conciliation*: where the legislation requires a decision to be made to refer a matter to conciliation and thus the application of criteria for suitability (whether implicit or explicit)
- *Conciliation includes conferences*: where the conciliation model includes conferences which may warrant greater consideration of suitability than processes that are limited to telephone and shuttle arrangements.

Applying the above criteria resulted in the identification of 17 Australian statutory bodies with the jurisdiction to conciliate complaints about:

- health services
- disability services
- discrimination, equal opportunity, and human rights.²³⁰

²³⁰ See Appendix A for details of the statutory complaints bodies selected for this research. All of these bodies agreed to participate in the research. In applying these criteria, jurisdictions which may otherwise have seemed relevant were excluded for the following reasons: industrial relations/workplace disputes due to the extent of prescription in legislation and strong links to arbitration; workers compensation due to the mandatory referral of matters to conciliation and the unique statutory powers of conciliators in this jurisdiction, which include powers to issue binding directions on parties; and family law, due to predominance of mediation linked to court processes and the fact that this area of ADR has already attracted considerable research. See discussion of these jurisdictions in King et al, above n 9, 114–15; Sourdin, above n 3, 110–12; Spencer and Hardy, above n 12, 313–30.

These statutory bodies were variously constituted, with some having jurisdiction for complaints about both health and disability services, and one having jurisdiction for all three types of complaint, as summarised in Table 1 below.²³¹

Table 1. Breakdown by jurisdiction of participating statutory bodies

Type of jurisdiction	n=17
State/territory statutory bodies with jurisdiction for complaints about discrimination, equal opportunity, and human rights	7
State/territory statutory bodies with jurisdiction for complaints about health services and disability services	4
State statutory bodies with jurisdiction for complaints about health services	3
State statutory body with jurisdiction for complaints about disability services	1
Territory statutory body with jurisdiction for complaints about health services, disability services and discrimination, equal opportunity, and human rights	1
Federal statutory body with jurisdiction for complaints about discrimination, equal opportunity, and human rights	1

3.3 Research methodology and design

A ‘mixed-methods research’ approach combining qualitative and quantitative methods was chosen to offer the best opportunity for answering the research question.²³² These methods included analysis of relevant documentation and publications from each participating statutory body, scoping surveys and follow-up interviews using a combination of structured and exploratory questions. By definition, mixed-methods research involves integrating quantitative and qualitative methods of data collection and analysis in a single study, and is recommended where the combination of these methods are likely to provide a better understanding of a research problem or issue than either

²³¹ Appendix A provides the details of the types of complaints dealt with by each participating statutory body.

²³² R Burke Johnson and Anthony J Onwuegbuzie, ‘Mixed Methods Research: A Research Paradigm Whose Time Has Come’ (2004) 33(7) *Educational Researcher* 14, 16.

research approach alone.²³³ One of the benefits of mixed-methods research is the complementarity of methods, whereby one method can be used to elaborate or clarify the results from another method, and thus provide a deeper exploration and understanding of the issues.²³⁴ This approach informed the research design by including interviews to explore and clarify the information obtained through survey responses and the analysis of related documentation and legislation.

This research design involved the following components:

Literature review: This review identified and critiqued literature and research relevant to decision making on the suitability of disputes for statutory conciliation as outlined in Chapter Two. The issues identified from this review informed the questions included in the survey and follow-up interviews.

Scoping survey of selected Australian statutory bodies conducting conciliation: This survey was designed to identify how many of the selected statutory bodies have established criteria or policies for determining suitability of matters for conciliation, what these criteria are, and the process and responsibility for making decisions on individual matters. It also sought information on the relevant legislative provisions and how these have been interpreted, the type of model used in conciliation, and whether any specific objectives for conciliation have been identified by the statutory body.²³⁵

Follow-up interviews with nominated officers in the statutory bodies: Respondents to the survey were asked to indicate whether they would be willing to participate in a follow-up interview to the survey, and to nominate an officer for this interview. The interviews used a combination of structured and exploratory questions which commenced with points of clarification of the survey responses.²³⁶ The questions also aimed to elicit both explicit and implicit criteria being used in decision making on the suitability of disputes for conciliation, and the way these take into account:

²³³ Ibid 16. See also discussion of mixed methods research in Martyn Denscombe, *The Good Research Guide: For Small-scale Social Research Projects* (Open University Press, 4th ed, 2010). A detailed overview of mixed methods research is provided in Chapter Eight of this guide.

²³⁴ See discussion of advantages of mixed methods research in Denscombe, above n 233, 150–1.

²³⁵ See Appendix C.4 Survey Form.

²³⁶ See Appendix C.7 for outline of Interview Questions.

- the nature of dispute or conflict
- the type of model and objectives of conciliation for each jurisdiction
- the capacity of parties (including issues of cognitive capacity, mental health and the role of representatives for parties)
- power imbalances between the parties and potential risks
- legislative requirements, including those under relevant human rights legislation.

The interview questions were designed to explore the conceptual frameworks and perspectives underpinning the approaches taken to the above factors, and the extent to which these approaches enable the participation of people with disabilities in conciliation conducted by these bodies.

This mixed-methods research design is best characterised as an ‘embedded’ research design, as described by Creswell and Plano Clark.²³⁷ An embedded research design involves collecting and analysing both quantitative and qualitative data to interpret the data and make findings, often using a ‘supplemental’ qualitative strand to enhance the understanding of the subject matter or test a hypothesis.²³⁸ In this research, the addition of the qualitative interviews was designed to enhance the exploration of the factors influencing decision making on the suitability of matters in each jurisdiction, and enable the type of naturalistic inquiry characteristic of grounded theory methods of research used in the social sciences.²³⁹

Grounded theory is an approach to research developed by social scientists, which enables the researcher to identify and conceptualise patterns of responses and develop a theoretical understanding of the subject matter through open and selective coding

²³⁷ John W Creswell and Vicki L Plano Clark, *Designing and Conducting Mixed Methods Research* (Sage Publications, 2nd ed, 2011) 69–72.

²³⁸ *Ibid* 71–2.

²³⁹ A comprehensive overview of the applications of grounded theory methods to social science research is provided in Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage Publications, 3rd Edition, 2008); see also Denscombe, above n 233. Chapter Seven of Denscombe’s guide outlines grounded theory and its applications.

processes and an ongoing comparative analysis of the data.²⁴⁰ In its ‘pure’ form, grounded theory research is a process that builds a theory from data systematically obtained in a social setting, using an inductive approach to generate codes and meaning from the data, and moving to a deductive approach using more focused questions to test the meanings and theories being developed.²⁴¹ An inductive approach to the content analysis of qualitative data is normally recommended when there is limited or fragmented knowledge of the subject matter.²⁴² A deductive approach to the framing of questions and analysis of data draws on an existing knowledge base and seeks to test or further develop a theory.²⁴³

As this research was informed by the literature review and related research outlined in Chapter Two, a hybrid research methodology using concurrent inductive and deductive approaches to the data collection and analysis was chosen to explore the research questions and to develop a conceptual framework for decision making on conciliation. This approach is consistent with what Linda Robrecht describes as an evolving method of grounded theory, which recognises that the researcher’s knowledge will inform the identification of themes from the data. Robrecht outlines a process of ongoing data collection and analysis, with the researcher undertaking ‘a cycle of inductive and deductive reasoning until sufficient data have been reviewed to arrive at a dense theoretical explanation’.²⁴⁴ In this research, the questions developed for the surveys and follow-up interviews were informed by the key considerations identified from the literature review and related research outlined in Chapter Two. The process of data

²⁴⁰ Corbin and Strauss, above n 239; an overview of the development of grounded theory methods and the work of Anselm Strauss and Barney Glaser in the 1960s is provided in Linda Robrecht, ‘Grounded Theory: Evolving Methods’ (1995) 5(2) *Qualitative Health Research* 169, 169.

²⁴¹ Corbin and Strauss, above n 239; see also the explanation of grounded theory methods provided by Grounded Theory Online <<http://www.groundedtheoryonline.com/what-is-grounded-theory>>. There are differing views about the description and application of grounded theory. The linear description of grounded theory methods is questioned, for instance, by Robrecht, above n 240; see also Descombe above n 233.

²⁴² See discussion on the use of inductive and deductive approaches to content analysis of qualitative data in Satu Elo and Helvi Kynge, ‘The Qualitative Content Analysis Process’ (2008) 62(1) *Journal of Advanced Nursing* 107, 109.

²⁴³ Ibid.

²⁴⁴ Robrecht, above n 240, 175.

collection and thematic analysis, and associated coding of responses, will be outlined below in Part 3.7.

3.4 Ethics approval and requirements

Approval for the research scope, design, methodology and associated research tools, including explanatory statement, consent to participate, survey and interview questions, was obtained from the Monash University Human Research Ethics Committee on 3 November 2010 for a period of five years.²⁴⁵ The research was conducted in accordance with the requirements of this ethics approval. The research design and associated ethics approval took into account the researcher's background and former position with the Victorian Disability Services Commissioner. Through this position, and the researcher's involvement with professional associations for dispute resolution practitioners,²⁴⁶ the researcher was known to 12 out of the 17 statutory bodies and recognised as a practitioner with experience in conciliation and the development of accessible resolution processes for people with a disability.

The researcher's background and experience were disclosed to all participating statutory bodies and respondents in the interviews. By conducting this research with statutory bodies performing similar functions to the researcher's own position, the research can be characterised as having elements of both 'insider research' and 'outsider research' as described in the resource paper produced by the former National Alternative Dispute Resolution Advisory Council (NADRAC).²⁴⁷ NADRAC put forward that 'insider research' conducted within an organisation may be more attuned to the needs and issues identified, and produce findings that organisations may be more willing to accept. In contrast, 'outsider research' conducted by persons independent of and external to

²⁴⁵ Monash University Human Research Ethics Committee (MUHREC) Approval for Project Number CF10/2795 – 2010001586. Two further amendments were submitted and approved, the first on 14 March 2011 and the second on 29 August 2012. These amendments were confined to the addition of statutory bodies and interviewees who were identified through the conduct of the research. This included the addition of two Commissioners operating within Commissions which had agreed to participate.

²⁴⁶ National Alternative Dispute Resolution Advisory Council, 'ADR Research: A Resource Paper' (March 2004) 7, Australian Government Attorney-General's Department

<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

²⁴⁷ Ibid 7.

organisations, can face difficulties in understanding the particular issues confronting the area under study.²⁴⁸ In this research, the researcher's experience in both conducting conciliations, and making decisions on suitability of matters for referral, was beneficial for identifying the themes in the responses and engaging respondents in the exploration of these themes.

Concerns associated with 'insider research' include the potential effects of existing relationships on the nature and rate of responses and consequently the reliability of findings.²⁴⁹ Steps were therefore taken to ensure the requests made to organisations to participate and subsequent agreements were made through independent processes and according to the ethics requirements as described in the following section and in Appendix C.

3.5 Requests and agreements to participate

An overview of the process for requesting the participation of statutory bodies in this research is outlined in Appendix C. The correspondence sent to the Commissioners or heads of the statutory bodies included a request for participation in this research with an explanatory statement and a form providing consent and agreement to participate.²⁵⁰ A copy of the survey form developed for the research was also included in this initial correspondence to enable organisations to make an informed choice to participate.²⁵¹

All 17 statutory bodies agreed to participate in this research. For one statutory body, this required agreements being sought and obtained from two individual Commissioners with separate jurisdictional responsibilities operating within the one Commission, one for anti-discrimination complaints and one for health and disability services complaints.²⁵² This meant that there were a total of 18 respondents for interviews which were conducted.

²⁴⁸ Ibid 8.

²⁴⁹ Ibid 7.

²⁵⁰ See Appendix D – Research Instruments: D.1 'Request to Participate' letter, D.2 'Explanatory Statement', and D.3 'Agreement & Consent to Participate'.

²⁵¹ See Appendix D.4 Survey Form.

²⁵² Australian Human Rights Commission, ACT.

All statutory bodies provided consent to be identified as participants in the research, and 10 consents were received to identify the organisation's responses by name. A decision was made to adopt a uniform approach of using a code to identify responses only by types of complaint handled rather than to identify some organisations by name and others by type only.²⁵³ Participating statutory bodies are, however, identified by name when legislative provisions and publicly available materials such as information/fact sheets and websites are discussed separately to the responses provided in the surveys and interviews.

The original research design contemplated a sample of follow-up interviews based on self-selection and willingness of statutory bodies to participate in these follow-up interviews. However, all of the selected statutory bodies agreed to participate in follow-up interviews.²⁵⁴ For each interview, a draft transcript was provided to the interviewee for checking and confirmation.²⁵⁵ In each case, the interviewee and the organisation had the opportunity to make any amendments or additions to the record that they felt would be appropriate to reflect the practices of their organisation. For some organisations, the confirmation of interview records was delayed to allow additional information or a follow-up interview to capture the outcomes of reviews, legislative amendments or planned changes in approaches to conciliation.²⁵⁶ While the interviews were conducted

²⁵³ See Appendix B for an explanation of coding used to identify responses for each statutory body by type. One exception was made to the identification of the responses from participants in the research. The former Federal Disability Discrimination Commissioner at the Australian Human Rights Commission, Graeme Innes, was interviewed for his perspectives on ensuring appropriate access and participation of people with disabilities in conciliation processes. Where appropriate, his responses are identified in the discussion in Chapter Six on this topic. This interview was conducted in addition to the interviews conducted as a follow-up to the completed surveys for this research and was not included in the collated results set out in Appendix E.

²⁵⁴ Interviewees were provided with an explanatory statement of the research and a consent form, which provided optional consent for audiotape to be used, and an agreement by the researcher to provide a transcript of the interview for checking and approval. See Appendix D.5 Explanatory Statement for Participants of Interviews and D.6 Consent Form – Participants of Interviews.

²⁵⁵ In 15 out of the 19 interviews conducted, transcripts were produced from an audio recording of the interviews, with the remainder produced from notes taken at the interview.

²⁵⁶ During this research, seven out of the 17 statutory bodies were reviewing or making changes to their approaches to complaint resolution, including conciliation. The research endeavoured to include as many of these changes as possible by undertaking follow-up phone interviews and accepting additional comments to the interview record.

over a two-year period between 2010 and 2012, the analysis of results took into account any changes in legislation and public documentation on approaches to conciliation up until May 2016. This process ensured the continued relevance and applicability of the results from the surveys and interviews.

3.6 Methodology for analysis of results

As outlined in Part 3.3, a hybrid research methodology was adopted which used concurrent inductive and deductive approaches to the data collection and analysis of results. The survey questions were therefore informed by the key considerations identified from the literature review, and sought both quantitative and qualitative responses. The quantitative questions sought information on objective factors associated with decision making about the suitability of matters for conciliation. These questions covered:

- whether there was a written policy on criteria and/or decision making on suitability of matters for conciliation
- the types of models/approaches used in conciliation, including most common approaches
- who conducted conciliations (positions within the organisation)
- the stage/s in the complaints process at which the decision on suitability for conciliation were made
- who within the organisation made the decisions about referral of matters to conciliation, and the process for this decision making
- how often decisions were made that a matter is not suitable to refer to conciliation.

In addition, the survey questions sought initial qualitative responses to the following areas in relation to decision making about the suitability of matters for conciliation:

- what factors were taken into account when deciding whether a matter should be referred to conciliation

- how factors such as capacity to participate or power imbalances were taken into account
- the most common reasons not to refer a matter to conciliation
- the most common reasons for decisions that a matter cannot be conciliated
- any changes that had been made over time to approaches to conciliation or to decision making about suitability
- other relevant comments or information for the research to consider.

An initial review of responses from the survey informed the follow-up interview questions with each of the participating statutory bodies, and the results were concurrently analysed to explore themes identified progressively from the two sources of data. In each interview, the survey responses were clarified, and emerging themes from the analysis of responses were explored.

The free text responses from the survey and interviews were analysed progressively through open and selective coding processes. Open and selective coding are the core methods used in grounded theory research for analysis of qualitative data. These processes involve identifying and labelling concepts in the data, and then defining and developing categories based on selected and emerging themes. In this research a common code frame was developed by progressive analysis of the free text responses from the survey and interviews for each question or topic discussed. These codes represented particular themes or issues identified in responses such as ‘The attitude of parties towards resolution/willingness of parties’ as a factor that is taken into account when deciding whether a matter should be referred to conciliation. Each response was then assigned to one or more codes based on the range of issues or considerations raised in the response.

In order to ensure consistency and integrity of the coding, the code frame and allocation of codes were reviewed after all survey results and interviews had been coded for each question. Consideration was given to using a software program for this analysis, but it was decided that this would be of limited benefit due to the progressive nature of the open coding process and the quantum of the data. The manual process of coding also enabled the author to reflect on the emerging themes in the data and to identify areas for further exploration.

The results for survey responses were integrated with the interview responses where the responses covered the same question or topic. In most cases, additional themes or codes were identified in the interview responses which were not evident from the surveys. This was because the interviews provided the opportunity to clarify the survey responses and explore the factors affecting the decision-making processes of each statutory body in more detail. Additional themes in responses were also identified in the interviews, such as the development of approaches to ‘early conciliation’ and ‘presumption of suitability’ of matters for conciliation, which will be discussed in Chapter Four.

The overall results for each of the questions and topics explored in the research are presented in terms of numbers of responses or comments, and converted to percentages where appropriate. As the majority of the questions invited multiple responses, such as the question about factors considered in assessing suitability of a matter for conciliation, the number of responses or comments and associated percentages represent frequency results which are calculated with reference to the total number for each item represented by ‘n’.

In addition to the analysis of survey and interview responses, the websites and publications of each of the statutory bodies were reviewed and analysed for descriptions of the model and processes of conciliation, the role of the conciliator, outcomes of conciliation and any other factors relevant to referrals or decision making on suitability of matters for conciliation. A comparative analysis of relevant legislative provisions was also undertaken, with a particular focus on provisions for referral to conciliation and descriptions of conciliation processes and the role of the conciliator.

3.7 Limitations of the research

The findings of the research are limited by the restricted number of jurisdictions selected for the target group of statutory bodies, and the reliance on data generated from ‘self-reports’ from participating statutory bodies through surveys and interviews completed by individual officers. The research was also limited by its reliance on the responses provided by the heads and senior officers of the statutory bodies about how decisions about the suitability of matters for conciliation were being made in their organisations. While actual practices of decision making were not examined, all interviewees were directly involved in these decision making processes within their organisation. It was beyond the capacity of the research to include examination of actual case examples of

decision making on the suitability of matters for conciliation or to include comparative data analysis on rates of referral of matters to conciliation and documented reasons for decisions. The inclusion of case-specific examination would have been particularly instructive for examining the question of ensuring appropriate access and participation for people with disabilities. Due to the complexity of the threshold questions of conceptualising conciliation and decision making about the suitability of matters, it was also not possible to fully explore the range of issues relating to access for people with disabilities. This was also due to the limited number of examples identified in the interviews and the indicative low rates of people with disabilities making complaints to the statutory schemes. As will be discussed in Chapter Seven, the question of ensuring appropriate access and participation of people with disabilities in conciliation and other statutory complaint resolution processes would benefit from more targeted research and attention.

It was also beyond the scope of the research to undertake a detailed comparative analysis of the legislation governing each of the statutory complaints schemes. As indicated above, key legislative provisions were, however, examined and considered for their impact on the approaches that each statutory body adopted to conciliation and decision making on the suitability of matters for referral.

3.8 Overview of results

As indicated above, all 17 statutory bodies agreed to participate in this research by completing a survey and participating in a follow-up interview.²⁵⁷ Fifteen returned completed surveys, with two statutory bodies electing to complete the survey as part of an interview. A total of 22 interviews were conducted, including three follow-up interviews with statutory bodies which advised of changes in legislation and approaches during the period in which the research was conducted, and a separate interview with the former Federal Disability Discrimination Commissioner at the Australian Human Rights Commission on access and participation of people with disabilities in conciliation.

²⁵⁷ As noted above, the Human Rights Commission, ACT required separate responses from the Commissioner responsible for discrimination complaints and the Commissioner responsible for health and disability services complaints. A total of 18 interviews was therefore required.

The survey responses were completed by the Commissioner/Statutory Head or delegate for each statutory body. The officers nominated to participate in the follow-up interviews ranged in positions held within their respective organisations, with five organisations nominating two officers.²⁵⁸ The breakdown of interviewees and positions is shown in Table 2 below.

Table 2. Positions held by officers participating in interviews

Position held by interviewee	No. of interviewees
Commissioner/Statutory Head	4
Deputy Commissioner ²⁵⁹	1
Director/ Manager	12
Conciliator	5

The level of participation and interest shown in this research can be seen as a significant finding in itself. The responses provided in the interviews indicated a common interest in exploring the challenges and complexity of decision making about the suitability of disputes for conciliation, and in developing a knowledge base and practice framework to inform such decisions. Respondents in the interviews commonly expressed an interest in practices and approaches used in other jurisdictions, and in the findings of this research. Overall, the level of interest and proactive engagement of participating statutory bodies confirmed the relevance and importance of aims of this research in addressing the question of the efficacy of decision making about the suitability of matters for conciliation and ensuring appropriate access, particularly for people with disabilities.

The key findings of the research are drawn from the results of the coded analysis of responses to the surveys and interviews, together with an overall thematic analysis which locates these responses within the different frameworks and key considerations from the

²⁵⁸ While some interviews involved more than one officer from a statutory body, only one 'interview respondent' per statutory body or jurisdiction was counted for the purposes of collation and discussion of results.

²⁵⁹ This respondent was described as a 'Director/Manager' in quotes of interview responses in order to avoid potential identification of these responses.

literature outlined in Chapter Two. These findings are grouped and discussed under the headings of the next three chapters, which include quotes from interviews to provide greater depth and meaning to the results.

In the process of the thematic analysis of results and exploration of issues in the interviews, the author identified new concepts for considering the efficacy of decision making on the suitability of disputes for conciliation and developed a framework for 'an enabling model of decision making' which is outlined in Chapter Seven.

3.9 Conclusion

The chosen research methodology reflected the aim of exploring and examining the processes of decision making undertaken by each statutory body and of identifying the range of factors and potential influences on the decisions made on the suitability of matters for conciliation. The use of open and selective coding of the qualitative data from both survey and interview responses, together with quantitative data obtained from the surveys, produced a rich source of data from which key findings were made and a model for decision making can be developed. The unanimous agreement of all statutory bodies to the request to participate in the research is indicative of the level of interest in exploring the challenges and complexity of decision making about the suitability of disputes for conciliation, and in developing a knowledge base and practice framework to inform such decisions.

CHAPTER FOUR

DIVERSITY OF APPROACHES TO CONCILIATION AND FACTORS AFFECTING REFERRALS

4.1 Introduction

This chapter discusses the key findings of the research in respect of the models and approaches to conciliation adopted by the participating statutory bodies. It examines the diversity of approaches and interpretations of what conciliation means in different jurisdictions, along with some of the common ways in which conciliation is defined in the various legislative schemes and described by statutory bodies in documentation for the public. This chapter also examines common legislative requirements and the range of organisational and contextual factors which may affect decision making on the suitability of matters for conciliation. The chapter concludes with a discussion of key findings on changes being made to approaches to conciliation by the majority of statutory bodies, and the implications of the adoption of ‘early conciliation models’ and ‘presumptive’ approaches to the suitability of matters for conciliation.

4.2 Overview of findings in relation to models and approaches to conciliation

Consistent with the literature on conciliation in Australia, the examination of the models and approaches to conciliation of the different statutory bodies in this research revealed diverse applications across jurisdictions. While this finding is not surprising, the nature and extent of diversity in approaches to conciliation was notable. As one respondent to the research commented, ‘It’s like comparing apples with pears,’²⁶⁰ pointing to the differences in the assessment decisions and threshold questions which bodies may have to address before deciding to refer a matter to conciliation.

In some jurisdictions, the decision to refer a matter to conciliation can be essentially equivalent to a decision to accept a complaint as being within jurisdiction of the office, without any assessment of merit or substance. While such applications are more common for statutory bodies dealing with anti-discrimination complaints, this is not uniformly the

²⁶⁰ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

case, as legislation for some of these bodies requires an investigation or finding on the substance of a complaint prior to referral to conciliation.²⁶¹ These differences raise an obvious challenge in developing a common knowledge base and approach to decision making on the suitability of matters for conciliation.

In addition to the varying requirements to assess or investigate a complaint prior to referral to conciliation, the survey and interview responses also revealed a range of other contextual factors affecting the decision making on the suitability of matters for conciliation. These ‘contextual’ factors are distinct from individual factors such as the nature of the dispute or characteristics of the parties that may be taken into account in decision making on individual matters. These contextual factors included the availability of other options for dealing with the complaint, such as other ‘resolution processes’ or ‘negotiated settlement’ as well as the option to conduct formal investigations.²⁶² The use and availability of powers to compel parties to attend conciliation was also a factor affecting referrals to conciliation, along with associated issues of the willingness of parties to agree to conciliation on a voluntary basis. Other factors included considerations of public interest issues, resources and the availability of alternative avenues such as tribunals and courts. These findings will be discussed below in Part 4.6.

Amidst this diversity, the survey and interview responses also revealed some common issues experienced by statutory bodies in articulating their approaches and models of

²⁶¹ See, eg, *Anti-Discrimination Act 1992* (NT) ss 74–78; see also *Anti-Discrimination Act 1998* (Tas) ss 69–71.

²⁶² The Health Care Complaints Commission NSW, for example, describes conciliation as an option within their ‘Resolution Service’. The *Health Care Complaints Act 1993* (NSW) ss 58B–D provide for complaints to be referred to ‘complaint resolution’ as well as to conciliation as a distinct process: s 13, s 24. See Health Care Complaints Commission, NSW, *Complaints Process* <<http://www.hccc.nsw.gov.au/Complaints/Complaint-Process>>. ‘Negotiated settlement’ is an option for dealing with complaints under the *Health and Disability Services (Complaints) Act 1995* (WA), s 36B. This option is described as being an exchange of information between parties that does not normally involve a face-to-face meeting. See Health and Disability Services Complaints Office, WA, *Complaints Process* <<https://www.hadscow.wa.gov.au/complaints/index.cfm>>. The impact of these types of alternative to conciliation is discussed in Chapter Four [Part 4.6.3] of this thesis.

conciliation, ensuring appropriate training and skill development for staff in conciliation practice, and in dealing with the legislative requirements and limited guidance provided in relation to conciliation processes and the role of the conciliator. There were also commonalities in the types of component used in conciliation processes and in the way in which statutory bodies describe conciliation in public documentation. The most common approach used in conciliation was face-to-face conferences, with the majority of descriptions of conciliation reflecting facilitative processes with limited references to the conciliator's advisory or potentially interventionist role. These findings and their implication for decision making about the suitability of matters for conciliation will be discussed below in Parts 4.4 and 4.5.

A further significant finding was a trend towards 'early conciliation' or the adoption of other 'early resolution' processes by the majority of statutory bodies participating in this research. For some bodies, this shift has been reflected in amendments to legislation to provide for early resolution options or alternatives to conciliation.²⁶³ The shift towards 'early conciliation' or resolution processes has significant implications for the nature of referrals to conciliation and decision making on the suitability of matters for conciliation or alternative resolution processes. Many interview respondents indicated that this shift had been accompanied by a 'presumption of suitability' which will be explored further in Chapter Five's discussion on criteria and decision-making processes.

In order to examine the models and approaches to conciliation adopted by the statutory bodies in this research, it is important to first consider the similarities and differences in the legislative definitions of conciliation and associated requirements across jurisdictions.

4.3 Legislative definitions and requirements

4.3.1 Definitions and descriptions of conciliation

As discussed in Chapter Two, a common criticism of the legislative provisions for conciliation is the lack of specificity or guidance on the role of the conciliator and details of the process. Not surprisingly, the 18 governing pieces of legislation examined for this

²⁶³ See, eg, amendment to *Health Complaints Act 1995* (Tas) s 25A, which provides for 'Early resolution of complaints' without the need for the Commissioner to undertake an assessment. See also the addition of 'Negotiated settlement' in *Health and Disability Services (Complaints) Act 1995* (WA), s 36B.

research contained little detail in the provisions for conciliation.²⁶⁴ Ten of these 18 statutes provided no descriptions of conciliation or the role of the conciliator other than references to the decision to refer to conciliation and procedural requirements such as attendance by parties, confidentiality and agreements.²⁶⁵ These legislative limitations applied to all but one of the statutory bodies dealing with complaints about anti-discrimination, equal opportunity and human rights. In addition, the pieces of legislation providing for the conciliation of complaints about health records in Victoria and disability services in New South Wales also contain no description of conciliation.²⁶⁶ The lack of detail was most notable in the *Ombudsman Act 1974* (NSW), which stipulates only that: ‘The Ombudsman may, at any time, decide to attempt to deal with a complaint by conciliation under this section.’²⁶⁷

Eight pieces of legislation which provide for conciliation of complaints about health or disability services²⁶⁸ included almost identical descriptions of the conciliation process and the function of the conciliator, such as the following:

The function of a conciliator is to encourage the settlement of a complaint by—

- (a) arranging discussions or negotiations between the complainant and the health or community service provider;
- (b) assisting in the conduct of those discussions or negotiations;

²⁶⁴ There were 18 pieces of legislation applicable to the 17 participating statutory bodies, as the Office of the Health Services Commissioner in Victoria deals with complaints under the *Health Services (Conciliation and Review) Act 1987* (Vic) and the *Health Records Act 2001* (Vic).

²⁶⁵ See, *Australian Human Rights Commission Act 1986* (Cth) ss 46P–PN; *Anti-Discrimination Act 1977* (NSW) ss 91A–B; *Anti-Discrimination Act 1991* (Qld) ss 158–164; *Anti-Discrimination Act 1992* (NT) ss 78–82; *Anti-Discrimination Act 1998* (Tas) ss 74–77; *Equal Opportunity Act 1984* (WA) ss 87–88, 91–92; *Equal Opportunity Act 1984* (SA) s 95; *Health Records Act 2001* (Vic) ss 59–63; *Ombudsman Act 1974* (NSW) s 13A; *Equal Opportunity Act 2010* (Vic) s 112.

²⁶⁶ *Health Records Act 2001* (Vic) ss 59–63; *Ombudsman Act 1974* (NSW) s 13A.

²⁶⁷ *Ombudsman Act 1974* (NSW) s 13A.

²⁶⁸ See *Health and Community Services Complaints Act 2004* (SA) s 35; *Health and Disability Services (Complaints) Act 1995* (WA) s 38; *Health and Community Services Complaints Act 1998* (NT) s 38(1); *Health and Community Services Complaints Act 2004* (SA) s 35; *Health Care Complaints Act 1993* (NSW) s 49; *Health Complaints Act 1995* (Tas) s 31; *Health Quality and Complaints Commission Act 2006* (Qld) s 74(2); *Health Services (Conciliation and Review) Act 1987* (Vic) s 20(5).

- (c) assisting the complainant and the health or community service provider to reach agreement;
- (d) assisting in the resolution of the complaint in any other way.²⁶⁹

Five of the statutes used the terms ‘discussions and negotiations’, while three of the statutes used the term ‘informal discussions’.²⁷⁰ Other variations to the above description of the role and functions of the conciliator included the additional requirement of ‘explaining the conciliation process and the voluntary nature of the conciliation process’ in the *Health and Community Services Complaints Act 1998* (NT) s 38(1)(a).

A common theme in these provisions is that the descriptions do not explicitly refer to a conciliation conference. However, the *Health Care Complaints Act 1993* (NSW) s 49(a) specifically refers to the function of the conciliator as being ‘to bring the parties to the complaint together for the purpose of promoting the discussion, negotiation and settlement of the complaint’. In contrast the *Health and Community Services Complaints Act 2004* (SA) s 35(2) specifies the alternative option: ‘A conciliator may, if the conciliator thinks it appropriate to do so, undertake a conciliation without bringing the parties together.’ The *Health Care Complaints Act 1993* (NSW) s 49 (a) also outlines the limits of the conciliator’s functions: ‘A conciliator has no power to impose a decision on the parties, to make a determination or to award compensation.’

All of these legislative provisions fall short of specifying that the conciliator’s role in ‘encouraging a settlement’ should be in accordance with ‘the advice of the statute’, or reflect the advisory role of the conciliator that is included in NADRAC’s definition of statutory conciliation.²⁷¹ Only one of the statutory bodies in this research, the ACT Human Rights Commission, has legislation which refers to the provision of advice within the definition of conciliation, stating: ‘The parties to conciliation decide the outcome of the conciliation, *usually with advice from the commission* [emphasis added].’²⁷²

²⁶⁹ *Health and Community Services Complaints Act 2004* (SA) s 35.

²⁷⁰ The following statutes used the term ‘informal discussions’ instead of negotiations: *Health Services (Conciliation and Review) Act 1987* (Vic) s 20(5); *Health and Disability Services (Complaints) Act 1995* (WA) s 38; *Health Complaints Act 1995* (Tas) s 31.

²⁷¹ National Alternative Dispute Resolution Advisory Council, above n 70, 3; see discussion of NADRAC’s definition of statutory conciliation in Chapter Two, [2.2].

²⁷² *Human Rights Commission Act 2005* (ACT) s 55.

The above reference to the advisory role of the conciliator is, however, limited. This definition of conciliation also specifies the parties' control over the outcome, and that 'willing and *informed* agreement' is required from the parties to participate in the process [emphasis added].²⁷³ This latter requirement provides some guidance for decision making on the suitability of matters for conciliation, and suggests that the conciliator has a role in both educating the parties about conciliation and assessing whether they are able to make an informed agreement to participate.

In contrast to all of the pieces of legislation discussed above, the legislation which provides for conciliation by the Victorian Equal Opportunity and Human Rights Commission relies upon 'dispute resolution principles' which are intended to guide the provision of dispute resolution for complaints made to the Commission:

The principles of dispute resolution offered by the Commissioner are that—

- (a) dispute resolution should be provided as early as possible; and
- (b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
- (c) the dispute resolution process is fair to all parties; and
- (d) dispute resolution is voluntary; and
- (e) dispute resolution should be consistent with the objectives of this Act.²⁷⁴

This legislation, the *Equal Opportunity Act 2010* (Vic), is the most recently enacted statute examined in this research and is the only one that does not specifically use the term 'conciliation'. The Victorian Equal Opportunity and Human Rights Commission has, however, continued to refer to its dispute resolution processes as 'conciliation' for consistency with terms used in the previous *Equal Opportunity Act 1995* (Vic). The new Act does not provide any details on the role and functions of the conciliator, other than what can be drawn from the principles outlined above. The legislation's focus on principles and broad descriptions of dispute resolution reflects the outcomes and recommendations of a review of the previous Act conducted by Julian Gardner. This review required consideration of 'options for more tailored approaches to dispute resolution and dispute resolution options that will allow systemic approaches to systemic

²⁷³ Ibid.

²⁷⁴ *Equal Opportunity Act 2010* (Vic) s 112.

discrimination and discrimination complaints that raise public interest issues’.²⁷⁵ The recommendations from the Gardner review included that ‘the Commission’s dispute resolution process include a flexible range of ADR options so that the conciliators can adopt an ADR process for each particular matter that is most appropriate to the nature of the individual dispute’.²⁷⁶ The report also recommended that ‘the Commission’s conciliators aim to achieve systemic outcomes by taking a more active role in the ADR process, moving towards a more interventionist and guided approach’.²⁷⁷

The legislative provisions guiding conciliation at the Victorian Equal Opportunity and Human Rights Commission are unique in the inclusion of explicit references to the processes being fair and appropriate to the nature of the dispute, and consistent with the objectives of the Act. These legislative objectives are to ‘encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation’.²⁷⁸ While the legislation does not prescribe the role of the conciliator, the Second Reading Speech introducing this legislation referred to the adoption of the Gardner review recommendations, with the key elements of dispute resolution being:

Early and active intervention by the Commission to facilitate both compliance with the Act and dispute resolution;

The Commission to offer flexible dispute resolution processes in a way that supports the objectives of the Act.²⁷⁹

While this legislation continues the trend of limited detail on processes and the role of the conciliator, the dispute resolution principles and the explicit references to supporting the objectives of the Act may be seen as providing greater guidance for the role of conciliators and decision making about referrals and the conduct of conciliations. When compared to the other statutes, this legislation and supporting background materials offer a framework for the provision of hybrid facilitative and advisory processes and articulate

²⁷⁵ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, Department of Justice, 2008) cited in Poole above n 155, 50.

²⁷⁶ See details of recommendations in Gardner, above n 275, [3.39], [3.50]–[3.52], [3.59].

²⁷⁷ *Ibid.* See details of recommendations [3.60], [3.61], [3.65], [3.92].

²⁷⁸ *Equal Opportunity Act 2010* (Vic) s 3(c).

²⁷⁹ Second Reading Speech. *Equal Opportunity Bill 2010* (Vic), 10 March 2010, 5.

the role of the conciliator as being an ‘advocate for the law’.²⁸⁰ The extent to which respondents from other statutory bodies conceptualised their roles as being ‘advocates for the law’ will be discussed in Part 4.4.3 below. This is particularly relevant when considering the question of access for people with disabilities and whether, for example, statutory bodies dealing with anti-discrimination complaints apply the principles of their legislation to their own decision making on the suitability of matters for conciliation.

4.3.2 Provisions for referral to conciliation

As noted in Chapter One, the legislative provisions which provide for statutory conciliation commonly refer to a determination as to whether a matter is ‘suitable’ for conciliation or ‘likely to be resolved by conciliation’, but do not provide any criteria for determining suitability nor define the approach or type of conciliation model to be used in the particular jurisdiction. The legislative provisions for referral to conciliation were examined for each of the statutory bodies participating in this research.

In four of the 18 pieces of legislation examined for this research, the provisions relating to referral of matters to conciliation were silent about the requirements for such decisions, and contained only procedural requirements relating to the decision to make such a referral.²⁸¹ More commonly, the governing legislation for the statutory bodies in this research has provisions which require an assessment of the likelihood of resolution by conciliation or, alternatively, whether conciliation was likely to be ‘successful’.²⁸² These

²⁸⁰ The concept of statutory conciliators having a role as ‘advocates for the law’ is discussed in Chapter Two [Part 2.4] of this thesis; Julian Gardner in his review report on dispute resolution processes also referred to the need for these to be consistent with the role of being ‘an advocate for the Act’: above n 275, [3.6.5].

²⁸¹ See *Ombudsman Act 1974* (NSW) s 13A; *Health and Community Services Complaints Act 1998* (NT) s 27, s 35; *Health and Community Services Complaints Act 2004* (SA) s 29(2); *Equal Opportunity Act 2010* (Vic) s 115.

²⁸² See *Anti-Discrimination Act 1977* (NSW) s 13(3); *Anti-Discrimination Act 1991* (Qld) s 158; *Anti-Discrimination Act 1992* (NT) s 27, s 33; *Anti-Discrimination Act 1998* (Tas) s 59(1); *Equal Opportunity Act 1984* (WA) s 91(1); *Equal Opportunity Act 1984* (SA) s 91A; *Health Quality and Complaints Commission Act 2006* (Qld) s 61(3); *Human Rights Commission Act 2005* (ACT) s 51(1); *Health Records Act 2001* (Vic) s 56(1). *The Australian Human Rights Commission Act 1986* (Cth), while not explicitly requiring an assessment of likelihood of success for referral of a matter to

provisions are found in eight of the statutes and most often also include a requirement that the Commissioner must endeavour or try to resolve the complaint by conciliation:

If the Commissioner is of the opinion that a matter the subject of a complaint ... may be resolved by conciliation, the Commissioner must make all reasonable endeavours to resolve the matter by conciliation.²⁸³

One statutory body, the ACT Human Rights Commission, is required to consider both the likelihood of success, and whether the matter is ‘appropriate’ for conciliation:

The commission may, at any time, refer a complaint, or matter that forms part of a complaint, for conciliation if satisfied that—

- (a) the complaint or matter is likely to be successfully conciliated;
- and
- (b) the matter is appropriate for conciliation.²⁸⁴

This requirement to assess ‘appropriateness’ or ‘suitability’ applied to four other statutory bodies, with similarly worded provisions that the complaint must be referred to conciliation if assessed as being ‘suitable’.

If the Commissioner decides to accept a complaint in whole or in part, and if, in the Commissioner's opinion, the complaint is suitable for conciliation, the Commissioner must without delay refer it for conciliation.²⁸⁵

As discussed in Chapter Two, the requirement for statutory bodies to assess the suitability of matters for conciliation and the likelihood of successful resolution presents a number of challenges given the research findings on the lack of reliable, empirically validated criteria or predictors of success for ADR processes,²⁸⁶ and the complexity of diagnosis

conciliation, provides at s 46PH(1) for a complaint to be terminated on the basis that ‘there is no reasonable prospect of the matter being settled by conciliation’.

²⁸³ *Equal Opportunity Act 1984* (SA) s 91A.

²⁸⁴ *Human Rights Commission Act 2005* (ACT) s 51.

²⁸⁵ *Health Services (Conciliation and Review) Act 1987* (Vic) s 19(10); see also *Health and Disability Services (Complaints) Act 1995* (WA) s 34(4)(b); *Health Care Complaints Act 1993* (NSW) s 13, s 24; *Health Complaints Act 1995* (Tas) s 59(1).

²⁸⁶ See Mack, above n 6, 86; see, eg, Boule, above n 3, 314–28; see discussion in Chapter Two [Part 2.6] of this thesis.

and assessment of the appropriateness of disputes for ADR.²⁸⁷ These challenges are further complicated by the requirements pursuant to the *Health Practitioner Regulation National Law*²⁸⁸ for statutory bodies dealing with health complaints. This national law, which was enacted in each state and territory between 2009 and 2010, requires these statutory bodies to consult with the Australian Health Practitioner Regulation Agency and professional boards/councils in order to decide which organisation should take responsibility for complaints raised about individual health practitioners.

Some interview respondents described how these decision-making processes can involve joint consideration of the suitability of matters for conciliation between the complainant and the practitioner. Of particular note is an explicit provision in the *Health Care Complaints Act 1993* (NSW), which requires a matter to be referred to conciliation if *either* the Commission or the relevant professional council forms the view that the matter is appropriate for conciliation.²⁸⁹

The prospect of a professional council such as medical council deciding that a matter is suitable for conciliation by a statutory complaints body raises unique questions in relation to the efficacy of decision making in such matters. The consultation and referral

²⁸⁷ *Health Care Complaints Act 1993* (NSW) s 13(3).

²⁸⁸ Each state and territory has enacted the *Health Practitioner Regulation National Law*, with some variations to the regulatory arrangements and roles of the ‘health complaints entities’ as described in this law. The Health Care Complaints Commission and the ACT Human Rights Commission operate in a co-regulatory framework with the Australian Health Practitioner Regulation Agency, and have powers to take actions against individual practitioners, as well as conciliate complaints. For an overview of the operation of the *Health Practitioner Regulation National Law* in relation to the statutory bodies in this research, see Australian Health Practitioner Regulation Authority, *Working with Health Complaints Entities* <<http://www.ahpra.gov.au/Notifications/About-notifications/Working-with-health-complaints-entities.aspx>>. See, eg, *Health Practitioner Regulation National Law (NSW) No 86a 2009* (NSW) s 145A(1) which states ‘Before any action is taken on a complaint, a Council and the Commission must consult to see if agreement can be reached between them as to the course of action to be taken concerning the complaint.’

²⁸⁹ *Health Care Complaints Act 1993* (NSW) s 13(2): ‘If: (a) neither the Commission nor the appropriate professional council is of the opinion that the complaint (or part) should be investigated or referred to the professional council, but (b) either is of the opinion that it should be referred for conciliation and the Registrar considers that it is appropriate for conciliation, the Commission is to refer the complaint for conciliation under Division 8.’

processes with professional councils/boards were identified as one of the factors affecting referrals to conciliation and is discussed further in Part 4.6.5 below.

For statutory bodies dealing with health or disability complaints, there are also either implicit or explicit legislative requirements for the Commissioner to ‘take into account the public interest’ when considering referrals for conciliation. For two statutory bodies the legislation expressly prohibits referrals to conciliation if either of the following assessments are made by the Commissioner:

The Commissioner must not refer a complaint to a conciliator if the complaint appears to the Commissioner to indicate—

- (a) the existence of a significant issue of public safety, interest or importance; or
- (b) a significant question as to the practice of a health or community service provider.²⁹⁰

For the majority of statutory bodies dealing with health or disability complaints, the legislation includes a requirement that matters of public interest be brought to the attention of the Commissioner or the conciliator if the matter proceeds to conciliation.²⁹¹ Not surprisingly, the legislation does not provide any guidance on how matters of public interest should be assessed or treated if identified, and was identified as an issue by some interview respondents in respect to determining the threshold criteria for referral or non-referral to conciliation. These issues will be discussed further in Chapter Five in the context of the findings on criteria used in decision making on the suitability of matters for conciliation.

²⁹⁰ *Health and Community Services Complaints Act 2004* (SA) s 29(4); *Health Complaints Act 1995* (Tas) s 25(4).

²⁹¹ See *Health and Community Services Complaints Act 2004* (SA) s 36; *Health Complaints Act 1995* (Tas) s 32(1); *Health Care Complaints Act 1993* (NSW) s 52; *Health Quality and Complaints Commission Act 2006* (Qld) s 61(3); *Health and Community Services Complaints Act 1998* (NT) s 39. For the remaining statutory bodies, the legislative provisions do not include express references to the consideration of matters of public interest or safety in decisions on the suitability of matters for conciliation, but instead commonly provide for the Commissioner to refer a matter to investigation, tribunals or other authorities on the basis that s/he ‘believes that the nature of the complaint is such that it should be referred’. See, eg, *Anti-Discrimination Act 1998* (Tas) s 78(c). Issues of public interest were identified as factors that were taken into account in decision making, as will be discussed in Chapter Five.

A further legislative provision relevant to the referral of matters to conciliation is a provision for a Commissioner to direct parties to compulsorily attend a conciliation conference. These powers are commonly conferred on Commissioners/Statutory Heads dealing with complaints about anti-discrimination and human rights, as was the case for statutory bodies in this research, with the only exception being the Victorian Equal Opportunity and Human Rights Commission.²⁹² None of the statutory bodies dealing with complaints about health or disability complaints have powers to compel attendance at conciliation conferences, with the legislation more commonly specifying the voluntary nature of conciliation.²⁹³ The responses in the surveys and interviews indicated divergent views on the efficacy of legislative provisions to compel attendance at conferences, which will be discussed at Part 4.6.2 below.

4.3.3 Requirements for preliminary assessment or investigation

The legislative requirements for statutory bodies to conduct a preliminary assessment and/or an investigation into the substance or merits of the complaint vary considerably. For example, the *Anti-Discrimination Act 1991* (Qld) requires an assessment of the complaint to be completed in 28 days and a conciliation conference to be held within six weeks.²⁹⁴ In contrast, the *Anti-Discrimination Act 1998* (Tas) provides for a preliminary assessment of up to 42 days to make a decision to accept a complaint followed by an investigation to determine whether a complaint should be referred to conciliation.²⁹⁵ Statutory complaint bodies dealing with complaints about health or disability services similarly have variable requirements and timeframes for preliminary assessment or investigation of complaints prior to a referral to conciliation. The timeframes for

²⁹² The provisions for dispute resolution in the *Equal Opportunity Act 2010* (Vic) Pt 8 Div 1.

²⁹³ See, eg, *Health and Community Services Complaints Act 1998* (NT) s 38(1); *Health Care Complaints Act 1993* (NSW) s 48.

²⁹⁴ *Anti-Discrimination Act 1991* (Qld), ss 141(1), 143(2), 143(3). Section 143(2) provides for the respondent to the complaint to provide a written response within 28 days of the date of notification of acceptance of the complaint, and s 143(3) provides for the conciliation to be held 'not more than 14 days' after the 28 days allowed for the written response. The legislation was amended in 2003 to introduce these timeframes.

²⁹⁵ *Anti-Discrimination Act 1998* (Tas) s 64(2), s 69, s 71(1)(b). Section 69, which provides for investigation of complaints, does not prescribe any timeframes for completion of investigations.

preliminary assessment range from 28 days to up to 90 days,²⁹⁶ with the *Human Rights Commission Act 2005* (ACT) having no timeframes prescribed for these processes.²⁹⁷ In some jurisdictions, the legislation explicitly provides for early resolution to be facilitated by the statutory body during the assessment period, which may impact on the number of matters being referred to conciliation.²⁹⁸

The legislation also varies across all jurisdictions with respect to the extent to which the assessment requires a judgment on the substance or merits of the complaint. For example, some of the legislative schemes for complaints about health or disability services specify the grounds of complaint as being that the provider has ‘acted unreasonably’, ‘failed to exercise due skill’ or failed to treat a consumer ‘in an appropriate professional manner’, in addition to a requirement that ‘all reasonable steps have been taken by the complainant to resolve the complaint with the provider’.²⁹⁹ Similarly, the legislation for statutory bodies dealing with discrimination complaints may require the grounds of the complaint to specify an ‘alleged discrimination or prohibited conduct’ which must be assessed prior to a decision to refer the matter to conciliation.³⁰⁰

²⁹⁶ See, eg, *Health Services (Conciliation and Review) Act 1987* (Vic) ss 19(8) and (9AA) requires a preliminary assessment of the complaint within 28 days but provides for an extension of a further 28 days if it is assessed that the complaint could be resolved in that period. *Health and Disability Services (Complaints) Act 1995* (WA) s 34(1) has a similar provision for 28 days assessment and a 28-day extension; *Health Complaints Act 1995* (Tas) s 25 (1) provides for a 45-day assessment. The following statutes provide for a 60-day assessment period with no extensions: *Health Care Complaints Act 1993* (NSW) s 22; *Health and Community Services Complaints Act 1998* (NT) s 27(1); *Health Quality and Complaints Commission Act 2006* (Qld) s 52, s 53(3) provided for a 60-day assessment and an extension of up to 30 days if it was assessed that the complaint could be resolved in that period.

²⁹⁷ *Human Rights Commission Act 2005* (ACT) ss 47–52.

²⁹⁸ See, eg, *Health Complaints Act 1995* (Tas) s 25A(1); *Health Quality and Complaints Commission Act 2006* (Qld) s 53(3); *Health Services (Conciliation and Review) Act 1987* (Vic) s 19(9AA).

²⁹⁹ See, eg, *Health and Community Services Complaints Act 2004* (SA) s 25; see also *Health and Community Services Complaints Act 1998* (NT) s 26(a)(i) for an example of the requirement that ‘reasonable steps’ be taken to resolve complaint.

³⁰⁰ See, eg, *Anti-Discrimination Act 1998* (Tas) s 62(1)(c), s 67, s 69, s 71.

While the above requirements for preliminary assessment or investigation of complaints have the potential to significantly impact subsequent referrals to conciliation, the survey and interview responses indicated that the impact of these provisions was very much dependent on the interpretation and weight given by each statutory body to these requirements. As will be discussed in Part 4.6.1, many interview respondents described the negative impact of these requirements for preliminary assessment or investigation on the prospects of resolution through conciliation. The increasing adoption of approaches to ‘early conciliation’ has meant that many statutory bodies have effectively ‘read down’ the requirements for preliminary assessment or investigation, which will be discussed further in Part 4.8 below. For some statutory bodies, this shift towards ‘early resolution’ has been supported by legislative amendments which have provided other options to conciliation, which has thus affected decision making on referrals to conciliation.³⁰¹

4.4 Ways in which conciliation and role of conciliator are defined and conceptualised

4.4.1 Documentation on conciliation models and objectives

In order to gain a picture of how each statutory body defined and conceptualised their model of conciliation, available documentation was requested through both the surveys and follow-up interviews. Only two statutory bodies had internal manuals which articulated their model of conciliation in terms of principles and objectives of the legislation, and referred to the NADRAC definition of statutory conciliation as guidance for the advisory role of the conciliator.³⁰² One of these statutory bodies had developed a specific training package for their conciliators which included ADR theory and the use of hybrid processes in statutory conciliation.³⁰³

The documentation produced by the majority of statutory bodies was in the form of procedural manuals and guidelines for conciliation, with six statutory bodies including criteria or considerations for referral of matters to conciliation. None of the procedural

³⁰¹ See, eg, *Health Complaints Act 1995* (Tas) s 25A which provides for early resolution of complaints during the assessment period. The impact of alternatives to conciliation is discussed in Chapter Four [Part 4.6.5] of this thesis.

³⁰² DEO-2, DEO-9.

³⁰³ DEO-9.

manuals provided in this research outlined specific objectives or principles to inform the approach to conciliation or the role of the conciliator, other than references to the legislative requirements.³⁰⁴ Many interview respondents, however, discussed their interest in documenting a conceptual framework for their approach to conciliation and more detailed practice guidance for their conciliators.

All statutory bodies had produced a range of internal resources such as decision-making or agreement templates, and external publications such as information and fact sheets on conciliation or videos/DVDs to assist parties to understand the process. These external publications and information provided on the statutory bodies' websites were also reviewed in terms of how conciliation and the role of conciliator were described.³⁰⁵ This review was instructive in identifying implicit models of conciliation, and potential impacts on the attitudes of complainants and respondents to the referral of matters to conciliation. The information on conciliation was first analysed to identify the most common ways in which conciliation was described, and the particular features or benefits of the process which were highlighted. The documentation and websites were also analysed to identify the extent to which statutory bodies included information about the role of conciliators in providing advice or educating about the law in order to prevent future breaches and promote systemic outcomes. The results are summarised below in Table 3 and set out in more detail in Appendix F.1.

Table 3. Descriptions of conciliation and role of conciliator in public documentation

Description of conciliation and role of conciliator	Statutory bodies n=17	%
Impartial/Conciliators don't decide outcome	17	100%
'Facilitative' process	14	82%
Provision of advice and possible outcomes	8	47%
'Party control' over outcome	6	35%
Educate about law and prevent breaches	4	24%

³⁰⁴ Seven procedural manuals or excerpts were provided to the author for review in this research (HDS-1, DEO-1, HDS-2, HDS-3, HDS-4, HS-4, DS-1).

³⁰⁵ See list of websites and materials reviewed in Bibliography D.1.

It is noteworthy that the majority of these public descriptions of conciliation are suggestive of ‘facilitative’ processes as defined by NADRAC, rather than NADRAC’s definition of conciliation as a hybrid process which includes advice and interventions by the conciliator.³⁰⁶ Fewer than half of the descriptions outlined an advisory role of the conciliator and only four referred to the conciliator providing education about the law and ways in which future breaches could be prevented. The following is a typical example of conciliation being described in ‘facilitative’ terms in an information sheet on conciliation:

The conciliator’s role is to facilitate communication between the parties. The conciliator helps the parties clarify their concerns; talk with each other about those concerns and assists them in trying to reach agreement on ways to resolve them.

The conciliator does not decide who is right or wrong, or decide how a complaint should be resolved. The conciliator has no power to make decisions or findings about what occurred or make a determination about compensation.³⁰⁷

The impartial role of the conciliator was featured in all descriptions of conciliation, as was the confidential nature of the process. The descriptions of conciliation which included an advisory role of the conciliator were most often phrased in terms of ‘explaining the law’, providing ‘specialist knowledge of the Act’, and providing information about ‘possible terms of settlement ... how the law may apply to the complaint [and] how other complaints have been resolved’.³⁰⁸ In jurisdictions dealing with health or disability complaints, conciliators were also described as having a role to ‘determine any relevant, applicable standards [and to] assist with determining realistic outcomes’.³⁰⁹

³⁰⁶ National Alternative Dispute Resolution Advisory Council, above n 69, 7, 5, 10; see discussion on the classifications of different ADR processes and the definitions of conciliation in Chapter Two [2.2].

³⁰⁷ Health Complaints Commissioner Tasmania, *Conciliation* <http://www.healthcomplaints.tas.gov.au/__data/assets/pdf_file/0008/254456/Conciliation.pdf>.

³⁰⁸ See Equal Opportunity Commission of South Australia, *Conciliation* <<http://www.eoc.sa.gov.au/eo-you/making-complaint/conciliation>>; Anti-Discrimination Commission Queensland, *Conciliation Conferences* <<http://www.adcq.qld.gov.au/resources/brochures-and-guides/brochures/Conciliation-conferences>>; Australian Human Rights Commission, *Conciliation. How It Works*. <<https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>>.

³⁰⁹ See Health and Disability Services Complaints Office, WA, *Information Sheets, Conciliation* <https://www.hadsco.wa.gov.au/publications/info_sheets.cfm>.

There were, however, very limited references to conciliators having potentially more active and interventionist roles as ‘advocates of the law’ and/or promoting systemic outcomes. The closest description to this type of role is that conciliators ‘help all parties to understand their rights and responsibilities under the Act’,³¹⁰ ‘to advise respondents how to prevent discrimination in the future’,³¹¹ and to work to achieve ‘fair and just outcomes in complaint-handling processes’.³¹² Fourteen out of the 17 statutory bodies, however, included examples of possible systemic outcomes of conciliation in their information, with the most common being ‘changes or introduction of policy and procedures’ or ‘staff training’ on areas such as rights and responsibilities under the law or ‘acceptable behaviour’. More examples were provided of individual outcomes of conciliation, such as a ‘detailed explanation of what happened’, an apology, refunds/reimbursements, job reinstatements, access to services or treatment, or compensation for ‘financial loss or injury to feelings’.³¹³

It is also interesting to note that some of the descriptions of conciliation used by statutory bodies are suggestive of the ‘aspirational’ approach to defining mediation which was identified by Boule.³¹⁴ As discussed in Chapter Two, this ‘aspirational’ approach to defining and describing processes focuses on values and principles which are seen as

³¹⁰ See Anti-Discrimination Commission Queensland, above n 294; Victorian Equal Opportunity & Human Rights Commission, *Information about Making a Complaint* <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/brochures/item/110-information-on-making-a-complaint-feb-2012>>

³¹¹ Anti-Discrimination Commission Queensland, above n 294; see also ACT Human Rights Commission, *Conciliation: A Guide for Complainants & Respondents in Discrimination Complaints* <<http://hrc.act.gov.au/discrimination/make-discrimination-complaint/guide-conciliation/>>. In this guide the conciliator’s role is to provide advice on ‘proposed resolutions [to] ensure that the alleged discrimination stops’.

³¹² Equal Opportunity Tasmania, *About Us. Values* <http://equalopportunity.tas.gov.au/about_us>. The Victorian Equal Opportunity & Human Rights Commission, the Australian Human Rights Commission, and the Anti-Discrimination Commission Queensland also referred to the aim of fairness in complaint handling or achieving fair outcomes.

³¹³ See, eg, Equal Opportunity Commission of South Australia, above n 294; see also Appendix F.2: Examples of conciliation outcomes in public documentation and websites.

³¹⁴ Boule, above n 3, 13. See discussion on these approaches to defining mediation and ADR processes in Chapter Two [Part 2.3] of this thesis.

underpinning the process. Six of the descriptions of conciliation included references to party control over the outcomes, and the aims of conciliation being to resolve complaints in a ‘collaborative’ or ‘mutually acceptable way’, to enable parties to ‘settle matters on their own terms’ or with ‘mutual satisfaction’.³¹⁵ These descriptions appear to emphasise the tenets of consensual processes and party self-determination which critics of statutory conciliation have argued create risks for vulnerable parties when issues of substantive rights are in dispute.³¹⁶ The extent to which these ‘aspirational’ descriptions of conciliation are reflected in the survey and interview responses, and approaches to decision making on conciliation will be considered further below, and discussed in Chapter Five.

The benefits of conciliation as being a quicker, more cost-effective alternative to tribunal/court or an alternative to litigation were highlighted by almost half of the statutory bodies in their descriptions. Conciliation was also commonly described as being ‘informal’ and ‘non-adversarial’,³¹⁷ with the exception of two statutory bodies where conciliation was described as ‘a more formal dispute resolution process’ and suitable for ‘more serious matters’.³¹⁸ The threshold for referral to conciliation was also identified as a factor in the survey and interview responses, and will be discussed further in Part 4.6.3 below.

³¹⁵ See summary table of examples in Appendix F.1; see also ACT Human Rights Commission, above n 311; Health Complaints Commissioner Tasmania, *Complaints Process* <http://www.healthcomplaints.tas.gov.au/making_a_complaint/complaints_process>; Health and Disability Services Complaints Office, WA, *Complaints Process* <<https://www.hadscsco.wa.gov.au/complaints/index.cfm>>; Australian Human Rights Commission, above n 308.

³¹⁶ See, eg, Baylis, above n 1; Baylis and Carroll, above n 15. See also discussion of criticisms of statutory conciliation in Chapter Two [Part 2.4] and [Part 2.5] of this thesis.

³¹⁷ See, eg, Health Complaints Commissioner Tasmania, above n 307.

³¹⁸ See Health and Community Services Complaints Commissioner, SA, *Managing a Complaint* <<http://www.hcscscc.sa.gov.au/managing-a-complaint-made-to-hcscscc/>>; Health and Community Services Commission, NT, *Conciliating Complaints* <<http://www.hcscscc.nt.gov.au/complaints/complaint-resolution/conciliating-complaints/>>.

4.4.2 Ways in which interview respondents defined and conceptualised conciliation

The interviews with respondents were conducted in a semi-structured way, with room for general discussion about approaches to conciliation and the way in which conciliation was defined and conceptualised for each statutory body. Respondents offered varying perspectives on the key features of their statutory body's model and approach to conciliation. These responses were analysed for broad contextual themes rather than subjected to the open and selective coding processes that were used for other questions. The following responses were instructive, as they provided a context to the approaches adopted by each statutory body that was not apparent from the public documentation reviewed in the previous section. For example, two respondents articulated their role explicitly as being 'advocates for the law' and outlined evaluative and interventionist approaches to conciliation:

There are broader outcomes we have to uphold the principles and objectives of the legislation. The respondent has to, if not accept the responsibility, at least have 'a light go on' ... So that's part of our role. Our role is to fly the flag for the legislation. Whilst we are not an advocate for either party, we are an advocate for the Act.³¹⁹

I say to people that I'm not partial, I am not an advocate for either party – I am an advocate for this legislation, and this legislation is about ensuring that in the context of a complaint that people's rights were upheld [and] that the generally accepted standard was met.³²⁰

A number of interview respondents discussed concerns that the benefits of conciliation had not been adequately recognised in their jurisdictions, with some respondents linking this to a lack of understanding of ADR and a focus on investigations:

There has been a view that investigations are more likely to lead to systems change compared to the focus on individual outcomes in conciliation...There is a need to make a cultural shift in the Commission's approach to conciliation and its role in dispute resolution.³²¹

³¹⁹ Interview with DEO-8, Director/Manager (9 March 2011).

³²⁰ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

³²¹ Interview with HDS-2, Commissioner/Statutory Head (10 May 2010).

We have under-utilised conciliation.³²²

In contrast, three interview respondents highlighted the way in which conciliation has been promoted as a way of achieving systemic improvements or educating about the law:

There is value in getting agencies/providers to talk to complainants, to hear their concerns and to explain what changes could or will be made to their systems. We find that this is an effective way of getting systemic improvements – it's a cultural approach to systemic improvement – as well as an effective way of utilising limited resources for the office. In some cases complainants are encouraged to participate in conciliation in order to be able to highlight areas of systems improvement for the provider.³²³

We talk about the benefits of the conciliation being educative for the respondent ... [W]e are addressing systemic discrimination through this approach. It's not just about resolving individual complaints, it's also addressing education at a systemic level. The difference this makes can be quite substantial.³²⁴

Conciliation has a number of benefits that aren't inbuilt to the legislation. One is the education aspect, so you can bring people in and educate them about the legislation and about rights and responsibilities. And the other is the emotional impact and that can sometimes break through the legalistic barriers ... People may say 'Well, I didn't break the law' and then you have a person sitting across from [them] who is so distraught and so affected that [they] can understand [the need to change].³²⁵

There were also contrasting perspectives on the objectives of conciliation in terms of settlement of disputes and legal rights:

The Commission's approach to statutory conciliation aims to blend the approaches of mediation and legal settlement.³²⁶

³²² Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

³²³ Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

³²⁴ Interview with DEO-2, Director/Manager (6 September 2012).

³²⁵ Interview with DEO-8, Director/Manager (9 March 2011).

³²⁶ Interview with DEO-9, Director/Manager (15 April 2011).

It's important that we're not a 'behind closed doors' settlement on something that in fact has a public interest safety dimension.³²⁷

Our resolution isn't about the law, it's not about settlement, and it's not about proving who is right and wrong. It really is about the fundamentals of helping people understand what happened.³²⁸

As indicated above, some interview respondents emphasised the facilitative processes of conciliation, reflecting the way in which conciliation is described in much of the public documentation:

Conciliation is preferred to investigation as it enables parties to gain a better understanding of the issues. People who make a complaint often want to prevent reoccurrence [sic] of the incident and conciliation enables the complainant to understand the changes being made by the provider and can provide closure.³²⁹

Most interview respondents, however, highlighted the particular knowledge and skills required of conciliators, and the way in which these differ from those used in mediation:

One of the issues to address is the training of staff in conciliation. Some of the areas of practice to develop [are] the level of engagement with parties, the advisory role of conciliators and distinguishing between impartiality and neutrality – with parties and staff understanding that the conciliator is not neutral given their role under the Act.³³⁰

Some of the [mediation] training is just the basics and how you transfer into it into this [statutory] context is the key.³³¹

In order to apply the legislation appropriately, officers need to have an ADR theoretical framework to inform their decision making.³³²

³²⁷ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

³²⁸ Interview with HS-3, Director/Manager (11 May 2011).

³²⁹ Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

³³⁰ Interview with HDS-2, Commissioner/Statutory Head (10 May 2010).

³³¹ Interview with DEO-8, Director/Manager, (9 March 2011).

³³² Interview with DEO-9, Director/Manager (15 April 2011).

This focus on the importance of skills, knowledge and training of conciliators is consistent with some of the key considerations identified from the literature and the challenges of implementing hybrid dispute resolution processes in a statutory framework.³³³

4.5 Types of components and approaches used in conciliation models

4.5.1 Most common approaches used in conciliation

Information was sought on the types of approaches used by each statutory body in order to identify whether the particular approaches or components used in conciliation had an impact on decision making on referrals to conciliation. As can be seen in Figure 4.1 below, there was a high degree of consistency in approaches used by the different statutory bodies, with the majority using face-to face conferences, separate meetings with parties, telephone conferences and shuttle conciliation processes.³³⁴

While co-conciliation (using two conciliators) was identified as an approach used by 12 of the 17 statutory bodies, all respondents qualified this response in interviews by saying it was not often used, primarily due to staffing and resource constraints. This was also the primary reason given by those statutory bodies that did not use co-conciliation. Most interview respondents, however, identified the benefits of using co-conciliation for complex matters and power imbalances:

Co-conciliation can be used but due to resourcing constraints, it is not the dominant practice model. ...It is recognised that co-conciliation can help to address power imbalances and assist in making conciliation suitable for complex matters and matters where the participants have particular needs for example where one of the parties has a psychiatric disability. Shuttle conciliation is also an option that is used in such matters.³³⁵

³³³ See earlier discussion in Chapter Two [Part 2.4] and [Part 2.5] of this thesis.

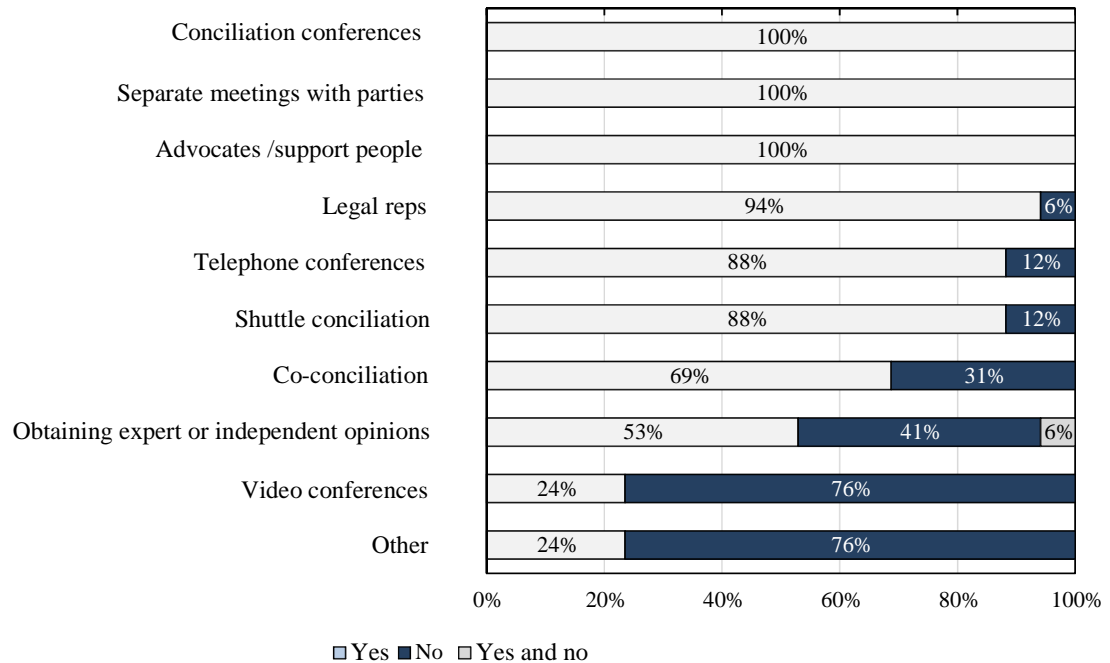
³³⁴ 'Shuttle conciliation' was defined in the survey as 'the conciliator facilitating exchange of information/proposals back and forth between parties, either in addition to, or instead of, facilitating a conference'.

³³⁵ Interview with DEO-9, Director/Manager (15 April 2011).

If the case is complicated, there are issues of equity and balance [or] you've got contentious issues or highly emotional or upsetting circumstances then sometimes that can be quite difficult for just one conciliator.³³⁶

Figure 1. Types of components in approaches to conciliation

Base: n=17



Face-to-face conferences were identified by 14 out of 17 statutory bodies as the most common approach used in conciliation. However, all interview respondents described a combination of approaches being the most common, rather than relying on a conference alone. A combination of teleconferences and shuttle conciliation was also often used by statutory bodies in the larger states and territories due to the practical difficulties of convening conferences in regional or remote areas.³³⁷ Most interview respondents emphasised the preference and value of face-to-face conferences for achieving the resolution through conciliation:

³³⁶ Interview with DEO-8, Director/Manager (9 March 2011).

³³⁷ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011); Interview with DEO-6, Director/Manager (8 May 2012); Interview with DEO-7, Director/Manager (7 September 2011).

Face to face conferences are the preferred format as these have been found most likely to promote the resolution of complaints.³³⁸

Due to the focus on conferences as the preferred approach used by most statutory bodies, respondents in interviews were asked about the number of conferences usually held for each matter and whether there were any constraints in holding more than one conference. The most common approach was to aim for one conference, with three statutory bodies responding that they would generally not have more than two. Only one respondent indicated that the number of conferences could be flexible as required by the nature of the matter and needs of the parties.

The capacity of statutory bodies to offer, for instance, more than one conference or a co-conciliation model, was explored with interview respondents as a potential factor affecting referral and decision making on the suitability of matters for conciliation, particularly matters involving people with disabilities. These considerations are discussed and explored further in Chapters Five and Six.

4.5.2 Who makes decisions and conducts conciliations

The survey and interviews also sought information on the types of officers who are delegated responsibility for making decisions about the suitability of matters for conciliation, and also the types of officers who conduct conciliations within statutory bodies. The responses revealed considerable variety in both the titles of officers and the level of positions within organisations to which these responsibilities were delegated. These results are set out in Appendices E.1 and E.2.

The majority of statutory bodies had more than one type of officer who was able to make decisions about suitability of matters for conciliation, with 10 involving either the Commissioner or Deputy Commissioner in this decision making, depending on the complexity of the matter. Of interest is that 10 statutory bodies delegated this decision making to positions that were variously titled 'Resolution, Complaint, Assessment Officers', 'Investigation, Conciliation Officers' or 'Case Managers'. The variation in seniority and backgrounds of officers making these decisions raises questions about how

³³⁸ Interview with DEO-9, Director/Manager (15 April 2011).

the efficacy and consistency of decision making can be assured. In order to address this issue, two statutory bodies had established committee processes for decision making on the outcomes of the assessment of complaints, including referrals for conciliation.³³⁹ Other interview respondents spoke of consultation processes that occurred within their organisations where questions were raised about the suitability of matters for conciliation.

The officers within statutory bodies who conduct conciliations also have a wide variety of titles, with varying levels of seniority. The majority of statutory bodies (15 out of 17) used officers with titles of Conciliator, Complaints or Resolutions Officer. Five of the statutory bodies involved Directors, Managers and ‘Principal’ or ‘Senior’ officers in the conduct of conciliations, and two organisations used external or independent conciliators.³⁴⁰ As indicated above in Part 4.4.2, respondents in the interviews commonly spoke of the varying backgrounds of conciliators and the challenge of accessing training appropriate to the statutory context of their work. While it was not uncommon for statutory bodies to have officers with a background or training in mediation, only two statutory bodies had supported their conciliators to obtain accreditation under the National Mediator Accreditation System.³⁴¹ Most interview respondents commented that the accredited mediation training courses did not reflect the requirements of statutory conciliation, and spoke of the value of accessing specialist training developed by the Australian Human Rights Commission.³⁴²

4.6 Contextual factors affecting referrals to conciliation

As discussed above in the overview of survey and interview responses, a range of contextual factors were identified which can have an impact on the referral of matters for conciliation. These ‘contextual’ factors are distinct from individual factors such as the

³³⁹ Interview with HS-1, Director/Manager (15 April 2011); Interview with HS-4, Director/Manager (4 May 2012).

³⁴⁰ See Appendix E.2 Types of officers who conduct conciliations.

³⁴¹ Interview with DEO-9, Director/Manager (15 April 2011); Interview with HS-4, Director/Manager (4 May 2012). See Mediator Standards Board, above n 39 for details of the National Mediator Accreditation System.

³⁴² The Australian Human Rights Commission developed a training package for its own staff on statutory conciliation, which has been provided to some of the statutory bodies dealing with discrimination complaints.

nature of the dispute or characteristics of the parties that may be taken into account in decision making on individual matters, and are explored below.

4.6.1 Impact of preliminary assessment and/or investigation processes

As outlined earlier in Part 4.3.3, the legislative requirements for statutory bodies to conduct a preliminary assessment and/or an investigation into the substance or merits of the complaint vary considerably, and have the potential to have a significant impact on referrals to conciliation.³⁴³ The diversity of these legislative requirements means that the tasks and decisions that some statutory bodies would undertake in an ‘assessment stage’ of a complaint, may essentially be undertaken ‘within conciliation’ by those statutory bodies where referral criteria are limited to the question of jurisdiction. These assessment tasks and decisions can include clarifying the substance of the complaint, exploring options for resolution and determining whether the complaint meets the statutory body’s ‘threshold’ to warrant action or use of resources required to try to resolve the matter. Decisions to dismiss a complaint in conciliation in one jurisdiction can be essentially based on the same considerations not to accept a complaint in another jurisdiction where more detailed assessment decisions are required. As one respondent described, all accepted complaints are referred to conciliation, but a decision to dismiss may be made after referral ‘where there is a very “weak” complaint’.³⁴⁴ Alternatively, assessments on the merits or substance of complaints can also occur as part of the decision making on the suitability of referral of a matter to conciliation, which again makes it difficult to draw comparisons between jurisdictions.

The survey responses on the different stages at which statutory bodies make decisions on the suitability of a matter for conciliation are outlined in Appendix E.3. Despite these differences, interview respondents commonly reflected on the negative impact that lengthy assessments or investigations can have on subsequent referrals to conciliation. Respondents in interviews spoke of the way in which these experiences had led to shifts in practice to models of ‘early conciliation’ or other options for ‘early resolution’ of complaints:

³⁴³ See Appendix F.3 for a summary breakdown of the requirements for each statutory body to conduct an assessment or investigation prior to a referral to conciliation.

³⁴⁴ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011)

Previously, most complaints were investigated and findings of fact were made on the reasonableness of providers' actions, and then referred to conciliation. The effect of this approach was that parties became firmly entrenched in their rights and not willing to conciliate.³⁴⁵

There is a real risk with lengthy investigations that parties do become entrenched in their positions, and if they become aggrieved about the process through which their complaint has been investigated, then you end up with conflict, not only about the substance of the complaint, but also about the whole process that has been undertaken along the way.³⁴⁶

We really have to stop this paper warfare as it is not conducive to resolution. It is entrenching positions and not using the skills that we have.³⁴⁷

The willingness or attitude of parties towards conciliation was identified as a key factor considered in decision making on the suitability of matters for conciliation, which will be discussed in detail in Chapter Five. While interview respondents often described the willingness or attitude of parties as an individual characteristic considered in the assessment of suitability for conciliation, there was also recognition that the preliminary assessment or investigation processes can have a significant influence on the way in which parties may respond to the prospect of conciliation.

On the other hand, two interview respondents outlined processes whereby matters are referred to conciliation essentially by default when the time period for assessment had elapsed and responses from services had not yet been received.³⁴⁸ In these circumstances, assessments were completed as part of the conciliation process. Another respondent described the way in which all complaints were referred directly to conciliation, following an assessment of jurisdiction, with an 'investigation' being completed as part of the conciliation process:

³⁴⁵ Interview with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011).

³⁴⁶ Interview with DEO-3, Director/Manager (3 March 2011/ 5 September 2012).

³⁴⁷ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

³⁴⁸ Similar examples of 'default' referrals to conciliation were provided in the following interviews: Interview with HS-4, Director/Manager (4 May 2012); Interview with HDS-3, Conciliator (15 November 2010).

The ‘investigation phase’ is the process of getting the statement and response. The roles of investigation and conciliation are not clearly distinguished. From the complainant’s and respondent’s point of view the conciliation starts with the allocation of the conciliator.³⁴⁹

The above comment also highlights how investigations can have very different meanings depending on the legislative basis and approaches adopted by each statutory body. At one end of the continuum, statutory bodies may undertake an investigation and establish findings in relation to the substance of the complaint.³⁵⁰ On the other, one respondent spoke of the benefits of the new legislation having no requirements for investigation and ‘no substance call’ on the complaint, with matters being referred directly for ‘dispute resolution’.³⁵¹

4.6.2 Voluntary or compulsory nature of the process

Seven of the statutory bodies dealing with complaints about anti-discrimination or human rights had legislative powers to compel parties to attend conciliation. For the remaining statutory bodies in this research, the voluntary nature of conciliation was emphasised in the public descriptions of conciliation, and in some cases also emphasised in the legislation.³⁵²

Respondents in the interviews, however, offered divergent views on the efficacy of legislative provisions to compel attendance at conferences and the extent to which having such compulsory powers affected referrals to conciliation. In many ways, these divergent views about the value and effectiveness of compulsion of parties to attend conciliation reflect the equivocal research findings and discussion in the literature about the links between compulsory referral and the likelihood of settlement or resolution of disputes. As Mack concluded from her review of the research on the use of compulsory referrals to ADR, the ‘empirical research is simply contradictory and inconclusive on the impact of compulsory referral on success’.³⁵³ Mack, however, highlighted the widely accepted

³⁴⁹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

³⁵⁰ Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

³⁵¹ Interview with DEO-2, Director/Manager (6 September 2012).

³⁵² See, eg, *Health and Community Services Complaints Act 1998* (NT) s 38(1)(a).

³⁵³ Mack, above n 28, 47.

view that the participation of parties who are willing and informed about what to expect, was likely to enhance the likelihood of success of ADR processes.³⁵⁴

This view was reflected by six out of the eight respondents from statutory bodies with powers to compel attendance, who spoke of these powers rarely being used.³⁵⁵ These respondents instead emphasised the importance of the skills of conciliators to achieving a willingness of parties to participate in conciliation:

The Commission rarely uses the compulsory powers ... Skilled conciliators can show the benefits of conciliation and respondents are usually more willing to participate in conciliation, knowing that the alternative is court where costs can be awarded.³⁵⁶

[We have] power to compel attendance [but] it's not used ... when there is a variety of ways to engage with parties, there doesn't seem to be a point in compelling them.³⁵⁷

Those interview respondents who put forward benefits of having powers to compel attendance also qualified their comments by pointing to the importance of achieving a willingness to participate in the process of conciliation:

I suppose it is useful in a way that it makes people take it seriously if they think that they can be compelled... It becomes irrelevant, because unless there is a genuine display of willingness, then you're not going to get over the second hurdle that it's reasonably likely to resolve.³⁵⁸

We find in particular [that] respondents aren't eager to attend a conciliation. ...To ensure their attendance, we use our directive powers to require all parties to attend...when we get them in the room, a lot of time they do conciliate. Sometimes it's just their knee jerk reaction to the complaint that makes them not want to conciliate.³⁵⁹

³⁵⁴ Ibid 47-8. Mack discussed the questions about the impact of compulsory referral to ADR processes in the context of the debate about the role of party choice and informed decision making as a basis for the effectiveness and success of ADR.

³⁵⁵ See Appendix F.3 for a breakdown of the statutory bodies which have statutory powers to compel parties to attend conciliation.

³⁵⁶ Interview with DEO-9, Director/Manager (15 April 2011).

³⁵⁷ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

³⁵⁸ Interview with DEO-1, Conciliator (1 June 2011).

³⁵⁹ Interview with DEO-7, Director/Manager (7 September 2011).

The willingness or attitude of parties towards conciliation was a key theme in the responses to the question about factors considered in decision making on the suitability of matters for conciliation, which will be discussed in detail in Chapter Five. One interview respondent, however, also identified resistance of respondents to complaints and a general lack of understanding about conciliation as a contextual factor which limited the number of matters referred to conciliation. This respondent put forward the potential benefit of having powers to compel attendance at conciliation as a way of increasing general understanding of conciliation in the community, and by implication greater numbers of parties being willing to participate:

The difficulty we have though is that conciliation is a new concept for providers and we are getting resistance from providers. I do not have powers to compel conciliation. I think that it would be useful [to get people to the table]. That would give us a critical mass of people who would understand what it means as it [conciliation] is not a word that people understand.³⁶⁰

4.6.3 Alternative complaint resolution options

Another contextual factor identified by interview respondents was the availability of other complaint resolution options within their statutory framework to deal with complaints.³⁶¹ For some respondents, conciliation was described as a component or option within a continuum of approaches to complaint resolution. For these respondents, conciliation was conceptualised as a more formal process involving a conference and formal agreements:

[We have] a continuum of approaches. It starts with assessment. ... We go into what we call a 'resolution process' where a resolution plan is developed ... conciliation is almost like a subset [of the resolution process].³⁶²

We probably do more of [facilitated meetings] than formal conciliation conferences, but we don't call them conciliation ... The office has defined conciliation as a process with certain steps and written agreements [and a] formal escalation ... The rest are just

³⁶⁰ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

³⁶¹ See Appendix E.3 for a summary breakdown of the complaint resolution options available for each statutory body.

³⁶² Interview with HS-3, Director/Manager (11 May 2011).

resolution activities.³⁶³

Some interview respondents spoke of an ‘arbitrary distinction’ between complaint resolution processes and conciliation.³⁶⁴ These other options are variously described in legislative schemes as ‘early resolution’, ‘informal resolution’, ‘informal mediation’, ‘negotiated settlement’ and more broadly ‘complaint resolution’.³⁶⁵ The availability of these options was often described as impacting the number of matters referred to conciliation, and creating a higher threshold for such referrals, with two statutory bodies expressly referring to conciliation being reserved for the ‘more serious matters’.³⁶⁶

One of the reasons we don’t use conciliations is that we don’t need to, as we have the flexibility of informal mediation.³⁶⁷

[In the past] all [accepted] complaints, almost without exception, went to conciliation. Now we are finding that, of the cases accepted, approximately one third or more go to [other complaint resolution process] for those cases that are less complex [and] can be resolved through exchange of information. We will try to reserve conciliation for the types of matters where we feel that it will be of genuine benefit for the parties to sit down together and talk through the issues.³⁶⁸

As indicated above, the availability of other complaint resolution options, particularly ones which were conceived of as being more flexible and informal, had a direct impact on the general factors considered for the suitability of matters for conciliation. Whereas two statutory bodies explicitly described conciliation in public documentation as being

³⁶³ Interview with DS-1, Director/Manager (10 September 2012).

³⁶⁴ Interview with HS-3, Director/Manager (11 May 2011); Interview with HDS-3, Conciliator (15 November 2010).

³⁶⁵ See, eg, *Health Quality and Complaints Commission Act 2006* (Qld) s 52. This section provides for ‘Early resolution’ and states that ‘The commission may arrange mediation between the complainant and the provider concerned.’ See also *Health Care Complaints Act 1993* (NSW) ss 58B–D which provide for complaints to be referred to ‘complaint resolution’. ‘Negotiated settlement’ is an option for dealing with complaints under the *Health and Disability Services (Complaints) Act 1995* (WA), s 36B.

³⁶⁶ Health and Community Services Complaints Commissioner, SA, above n 318; Health and Community Services Commission, NT, above n 318.

³⁶⁷ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

³⁶⁸ Interview with HDS-3, Manager (23 February 2012).

beneficial for disputes involving ongoing relationships,³⁶⁹ this was not seen to be the case for a statutory body operating with a discrete model of conciliation within a continuum of approaches:

Conciliation isn't seen as applicable for ongoing relationships because you're only doing one or two meetings, whereas the [assisted] resolution process can be several months.³⁷⁰

When asked about the factors that would favour a referral to conciliation compared to other complaint resolution options, interview respondents would commonly point to the legal privilege and confidentiality requirements attached to conciliation processes.³⁷¹ As one respondent put forward:

Resolution officers conduct face to face meetings [similar to] conciliation, but just without the privilege. There are times when a practitioner might push to make some offers and want the privilege, and we'd like to be able to flick it across into conciliation at that point.³⁷²

4.6.4 Impact of other functions, roles and resources of the statutory body

Respondents from statutory bodies dealing with health or disability complaints identified the tension of having functions to both investigate and conciliate complaints,³⁷³ and the impact this had on the expectations of complainants and their willingness to participate in conciliation:

Complainants don't so much say that they want to conciliate – that's too foreign – but they do say that they want us to investigate.³⁷⁴

³⁶⁹ Health Complaints Commissioner Tasmania, above n 307; NSW Ombudsman, *Complaints about Community and Disability Services*

<<http://www.ombo.nsw.gov.au/what-we-do/our-work/community-and-disability-services/complaints-about-community-and-disability-services>>.

³⁷⁰ Interview with HS-3, Director/Manager (11 May 2011).

³⁷¹ A common feature of legislative provisions for conciliation is the protection of admissions made in conciliation or conciliation agreements from being used as evidence in tribunal or court proceedings. See, eg, *Health and Disability Services (Complaints) Act 1995* (WA) s 42; *Human Rights Commission Act 2005* (ACT) s 66.

³⁷² Interview with HS-3, Director/Manager (11 May 2011).

³⁷³ The tensions described by respondents were similar to those discussed by Manning, above n 22, and Gurley, above n 146; see discussion in Chapter Two [Part 2.4] of this thesis.

³⁷⁴ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

They [complainants] do want the big stick. They want that impartial watchdog process to be upheld.³⁷⁵

Respondents in interviews commonly identified that investigations were reserved for the most serious matters due to resource constraints:

We are not equipped to investigate to any significant degree.³⁷⁶

We undertake a formal investigation fairly rarely, because they are highly resource intensive.³⁷⁷

We find that [conciliation is] an effective way of utilising limited resources for the office.³⁷⁸

The public documentation by statutory bodies on the role of investigation also commonly referred to the purpose of investigations as being to look into ‘broad systemic issues’ or to address matters of public interest or safety.³⁷⁹ Three statutory bodies, however, identified investigation as an alternative consideration to conciliation, with the need to first address the threshold question of what action may be required by the statutory body in its role as a ‘watchdog’ in respect to public safety and standards of service.³⁸⁰

There is a threshold issue to consider first as to whether the matter warrants the Commission taking action on the complaint, followed by an assessment on the likelihood of reaching an agreement through conciliation.³⁸¹

4.6.5 Other external avenues for dealing with the issues in dispute

Respondents in interviews described the impact of other external avenues to deal with the issues in dispute, such as courts or tribunals, to adjudicate and determine the issues in

³⁷⁵ Interview with DS-1, Director/Manager (10 September 2012).

³⁷⁶ Interview with DEO-7, Director/Manager (7 September 2011).

³⁷⁷ Interview with HS-4, Director/Manager (4 May 2012).

³⁷⁸ Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

³⁷⁹ See, eg, Health and Disability Services Complaints Office, WA, above n 267; Health Complaints Commissioner Tasmania, above n 307 and n 315.

³⁸⁰ Interview with HS-1, Director/Manager (15 April 2011); Interview with HS-3, Director/Manager (11 May 2011); Interview with DS-1, Director/Manager (10 September 2012).

³⁸¹ Interview with HS-1, Director/Manager (15 April 2011).

dispute, or the role of health professional councils/boards to determine matters of potential misconduct or fitness to practise for health practitioners. Respondents from statutory bodies dealing with health complaints described how the role of AHPRA and professional councils/boards under the *Health Practitioner Regulation National Law*³⁸² excluded complaints being referred to conciliation where issues were raised about potential misconduct or fitness to practise of an individual health practitioner until a decision had been made by the relevant professional council or board. Respondents in interviews spoke of the consultation processes with AHPRA and professional councils/boards, and the need to resolve differing views on the applicable threshold for a potential misconduct issue and what matters may be suitable for conciliation.

[We] need to consult with [the professional council/board] and they can have a view as the best way to deal with a matter, including whether it should be conciliated. There are some tensions at times.³⁸³

Respondents also outlined differing ways in which referrals to AHPRA and professional councils/boards could affect the timing of referrals to conciliation, depending on the particular provisions in their legislation and the enactment of the *Health Practitioner Regulation National Law* in their jurisdiction:

If the complaint issue involves potential misconduct, it would be inappropriate for conciliations to deal with these matters. ... if the matter is one that may benefit from referral to conciliation as well as to AHPRA ... the actual conciliation [is] deferred until the AHPRA process is complete.³⁸⁴

The issues around public safety and [fitness to practise or potential misconduct] would arise in assessment and be referred to AHPRA ... so by the time it gets to conciliation those things have been sorted out.³⁸⁵

A matter can still be conciliated when it has been referred to a registration board, but [this is] limited to the 'financial aspects' and subject to agreement by the parties. It is possible

³⁸² See explanation of the *Health Practitioner Regulation National Law* and the role of the Australian Health Practitioner Regulation Agency (AHPRA), above n 288.

³⁸³ Interview with HS-3, Director/Manager (11 May 2011).

³⁸⁴ Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

³⁸⁵ Interview with HS-4, Director/Manager (4 May 2012).

to conciliate other dimensions ... after the registration board has completed dealing with the matter.³⁸⁶

The impact of the role of AHPRA and professional councils/boards on referrals to conciliation was thus described in terms of both the assessment of the suitability of the nature of the dispute for conciliation, and potential delays of referrals to conciliation. In contrast, the availability of tribunal or court processes as an alternative to conciliation was identified by interview respondents as a factor affecting parties' willingness and attitudes towards participating in conciliation. For all but one of the statutory bodies dealing with anti-discrimination or human rights complaints, the legislation provides for the matter to be referred to a tribunal or court or the option of an application being made after a matter failed to resolved through conciliation.³⁸⁷ In many of these legislative schemes the statutory body acted as a 'gateway' or alternative to a tribunal or court process.³⁸⁸

Most interview respondents from these statutory bodies spoke of the way in which they highlight the benefits of conciliation in comparison to tribunal processes, and 'reality test' complainants' expectations of potential determinations by a tribunal or court:

Skilled conciliators can show the benefits of conciliation and respondents are usually more willing to participate in conciliation, knowing that the alternative is court where costs can be awarded.³⁸⁹

We 'reality test'. [We say that] 'if you're looking for a big payout, well look at the tribunal decisions to date ... and you may need be legally represented.' So we talk about

³⁸⁶ Interview with HS-1, Director/Manager (15 April 2011).

³⁸⁷ See *Australian Human Rights Commission Act 1986* (Cth) pt IIB div 2; *Anti-Discrimination Act 1977* (NSW) pt 9 div 2 sub-div 6, div 3; *Anti-Discrimination Act 1991* (Qld) ch 7 pt 1 div 4, div 5; *Anti-Discrimination Act 1992* (NT) s 86; *Anti-Discrimination Act 1998* (Tas) pt 6 div 4; *Equal Opportunity Act 1984* (WA) ss 93–93A; *Equal Opportunity Act 1984* (SA) ss 95B–D; *Human Rights Commission Act 2005* (ACT) pt 4 div 4.2A. The *Equal Opportunity Act 2010* (Vic) pt 8 div1,div 2, provides for complainants to choose the dispute resolution process provided by the Victorian Equal Opportunity and Human Rights Commission or lodge an application directly with the Victorian Civil and Administrative Tribunal.

³⁸⁸ See Appendix F.3 for summary breakdown of statutory bodies with 'gateway' functions in respect to tribunal or court processes.

³⁸⁹ Interview with DEO-9, Director/Manager (15 April 2011).

factoring in all of those elements [into the complainant's thinking].³⁹⁰

The conciliators outline the conciliation process and potential outcomes, compared to the powers of [the tribunal] and the decisions that are possible at [the tribunal], which can be more limited to the agreements possible through conciliation.³⁹¹

These examples indicate that the roles of conciliators clearly include the provision of advice on possible outcomes, and an active role in promoting informed decision making by parties. Respondents in interviews also noted the difficulties for parties making informed decisions when there are few published tribunal determinations.³⁹² Questions of the extent to which substantive rights could be addressed through conciliation compared to tribunal or court processes, did not, however, feature in interview respondents' comments on the impact of these alternative processes on referral of matters to conciliation.³⁹³ While the critics of statutory conciliation have pointed to the need to assess whether the matter warranted a public determination on substantive rights, interview respondents highlighted the limited number of matters that go to a tribunal hearing and the limited information on determinations by tribunals³⁹⁴. Conciliation was also commonly described as more timely and accessible than tribunal processes. Respondents in interviews also pointed to the trend for tribunals to refer to mediation or conciliation as part of the tribunal processes and the fact that 'most [cases] get settled so it's hard for people to weigh up alternatives'.³⁹⁵

³⁹⁰ Interview with DEO-1, Conciliator (1 June 2011).

³⁹¹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011)

³⁹² The issue of the limited number of tribunal decisions on discrimination complaints, and the consequential impact on conciliation outcomes, was also highlighted by Allen, above n 15, McDonald and Charlesworth, above n 15, and Hunter and Leonard, above n 15.

³⁹³ See discussion in Chapter Two on the critiques and criticisms of statutory conciliation; see, eg, Thornton; Chapman; Baylis: above n 15; and Baylis, above n 1..

³⁹⁴ These issues were raised for example in interview with DEO-4, Director/Manager & Conciliator (7 January 2011); Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011); Interview with DEO-8, Director/Manager (9 March 2011).

³⁹⁵ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

One of the key concerns put forward by interview respondents who raised the above issues was the negative impact on parties' willingness to participate in conciliation, and the likelihood of resolution:

The potential outcome of a matter going to the tribunal can sometimes constrain negotiations or discussions in conciliation because of judgments that the parties (more often respondents) may make on what might happen if it goes to the tribunal ... more often than not, complainants are expressing that they don't want to go to the tribunal and are wanting to resolve it.³⁹⁶

In some cases ... they want it to get to hearing – either because related matters have already been referred to the tribunal or because they want to get a precedent for future decisions to be made.³⁹⁷

While interview respondents indicated that the alternative of a tribunal or court determination had some negative impacts on parties' attitude to participating in conciliation, it was more common for interview respondents to highlight parties' preferences for conciliation:³⁹⁸

In most cases, people just want the issue sorted, and as quickly as possible resolved. Because the tribunal potentially is a time-consuming process, it does put them off, for many people.³⁹⁹

Most complainants [and smaller respondents] appear to prefer to have the matters dealt with through the Commission and the conciliation process, with the sense that they prefer to have 'the process over and done with' ... rather than going through what is perceived as a more formal and legalistic ... process.⁴⁰⁰

³⁹⁶ Interviews with DEO-3, Director/Manager (3 March 2011/ 5 September 2012).

³⁹⁷ Interview with DEO-7, Director/Manager (7 September 2011).

³⁹⁸ See Appendix E.4 for breakdown of comments made by respondents on the impact of alternatives to conciliation.

³⁹⁹ Interview with DEO-1, Conciliator (1 June 2011).

⁴⁰⁰ Interview with DEO-1, Conciliator (1 June 2011)

4.7 Changes in approaches to conciliation

A significant finding of this research was that the majority of statutory bodies (15 out of 17) reported changes to their approaches to conciliation, either through legislative changes or adoption of 'early conciliation' models, or a combination of both.⁴⁰¹ The drivers for these changes included many of the contextual factors discussed above. Ten out of the 17 statutory bodies reported adopting models of 'early conciliation', with a further three reporting recent or planned changes in conciliation models which involved more options for early resolution of complaints.⁴⁰² Of note is that interview respondents often spoke of these changes in approaches to conciliation as having been prompted by concerns about the negative impact of extended processes of assessment and investigation on future prospects of resolution.⁴⁰³ Other drivers for these changes included feedback from parties on the timeliness of complaint processes and resource constraints experienced by statutory bodies, which will be discussed further below in Part 4.8 on the adoption of 'early conciliation' models.

For two of the statutory bodies in this research, legislative changes introduced alternative complaint resolution options to conciliation, with a focus on providing greater flexibility in assessment and resolution processes.⁴⁰⁴ Over time, these changes are likely to affect

⁴⁰¹ See Appendix E.5 for breakdown of comments made by respondents on types of changes made to approaches to conciliation.

⁴⁰² Survey and interview responses from HDS-1, HS-2, HDS-4, DEO-2, DEO-3, DEO-4, DEO-5, DEO-7, DEO-7 outlined shifts to 'early conciliation'; survey and interview responses from HDS-2, HDS-3, HS-4 outlined recent or planned changes to create more options for 'early resolution' of complaints.

⁴⁰³ See discussion and comments from respondents in Chapter Four [Part 4.6.1] of this thesis.

⁴⁰⁴ The *Health and Disability Services (Complaints) Act 1995* (WA) was amended to introduce the option of 'Negotiated settlement' in 2011. See above n 249 and discussion in [Part 4.6.3]. The *Health Complaints Act 2016* (Vic) was passed in April 2016 to replace the *Health Services (Conciliation and Review) Act 1987* (Vic), and will come into effect in February 2017. A further legislative change which occurred during the period of this research was the enactment of the *Health Ombudsman Act 2013* (Qld) which repealed the *Health Quality and Complaints Commission Act 2006* (Qld) and resulted in the decommissioning of the Health Quality and Complaints Commission (Qld) on 30 June 2014. This legislation retained options for complaint resolution, including 'local resolution of complaints' with the option of facilitated meetings, conciliation and investigation of complaints. See *Health Ombudsman Act 2013* (Qld) div 3 pt 4, pt 6 and pt 11. The Office of the Health Ombudsman (Qld) was not included in this research, as the surveys and interviews had been completed by the time of the establishment of that office on 1 July 2014.

the way in which conciliation is conceptualised within a continuum of resolution options, and thus the type and number of referrals to conciliation. In Victoria, the *Health Complaints Act 2016* (Vic) introduced provisions for ‘early resolution of complaints’ and ‘complaint resolution processes’ in addition to conciliation, and builds on changes in practices already adopted by the Victorian Health Services Commissioner.⁴⁰⁵ This new legislation explicitly provides for the Commissioner to ‘decide the manner in which the complaint resolution process is to be conducted’ and that the Commissioner ‘must prefer the least formal action that is appropriate in the circumstances of the complaint’.⁴⁰⁶ These options were described in the Second Reading Speech as providing a ‘more accessible and responsive complaints system’ with ‘a range of approaches in an attempt to resolve complaints’, with ‘formal conciliation [retained] as an option for situations that require stricter confidentiality to enable more frank and fruitful discussions to progress’.⁴⁰⁷

This new legislation in Victoria reflects some of the options for ‘early resolution’ and ‘complaint resolution processes’ which are already in other pieces of legislation discussed in Part 4.6.3 above, but contains a greater emphasis on choice of the most appropriate resolution approaches and a preference for informality. If this type of provision for increased options and flexibility in approaches to complaint resolution becomes a legislative trend, this is likely to lead to conciliation being increasingly defined as a more formal and limited process, with consequential decision making about the suitability of matters for conciliation.⁴⁰⁸

4.8 Adoption of ‘early conciliation’ models

As indicated above, the most common change reported by statutory bodies in this research was a shift towards ‘early conciliation’ and other approaches to promote the

⁴⁰⁵ *Health Complaints Act 2016* (Vic) pt 2 div 2, ‘Preliminary Complaint Resolution’ s 12(4), pt 3 div 1 ‘Complaint Resolution Processes’, div 2 ‘Conciliation’.

⁴⁰⁶ *Health Complaints Act 2016* (Vic) ss 32(2), 32(3).

⁴⁰⁷ Second Reading Speech, Health Complaints Bill 2016 (Vic) 10 February 2016, 99 <<http://www.legislation.vic.gov.au/>>.

⁴⁰⁸ Such a trend may be indicated by the *Mental Health Act 2014* (Vic), which similarly provides for flexible complaint resolution options in addition to conciliation. Section 228(b) provides for the Commissioner ‘to endeavour to resolve complaints in a timely manner using formal and informal dispute resolution as appropriate, including conciliation’.

early resolution of complaints. The impact on decision making and referrals to conciliation was more pronounced for those statutory bodies where conciliation was the primary option for dealing with complaints. Most significantly, the adoption of ‘early conciliation’ models was commonly associated with a ‘presumptive’ approach to the suitability of matters for conciliation which will be explored in the discussion on decision making criteria and processes in Chapter Five. This presumptive approach offers many benefits in terms of enabling access to conciliation as a means of resolving disputes, particularly for people with disabilities.

Ten out the 17 statutory bodies described deliberate shifts in practice to early conciliation and attributed these changes to organisational imperatives to increase timeliness and effectiveness of complaint handling, including the likelihood of achieving a resolution.⁴⁰⁹

One of the drivers [for early conciliation] [is] limits in our resources. [Another has] been growing awareness of the impact of time taken in dealing with complaints.⁴¹⁰

[We responded to] feedback from participants and stakeholders who expressed concern that the process took too long.⁴¹¹

As indicated above, the changes were also influenced by experiences of parties’ attitudes and the likelihood of resolution being negatively impacted when extensive assessments or investigations were conducted prior to a referral to conciliation. Examples of changes in practice included limiting the assessment of complaints and convening conferences without requiring written responses to complaints. For some respondents, the reasons provided for these changes also reflected a move from more procedural approaches to complaint handling to approaches informed by ADR theory and practice. These interview respondents articulated the advantage of early conciliation as enabling interest-based approaches to dispute resolution and avoiding parties becoming entrenched in positions.⁴¹²

⁴⁰⁹ See Appendix E.6 for breakdown of comments on the reasons for shifts to early conciliation and perceived advantages.

⁴¹⁰ Interview with DEO-1, Conciliator (1 June 2011).

⁴¹¹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

⁴¹² Some of these respondents reflected the approaches to ‘interest-based negotiations’ and the need to shift parties from ‘positional bargaining’ which are articulated in seminal text of Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random House, 2nd ed, 1991).

The advantages of not requiring a written response is that parties are less likely to become entrenched in positions and the time and effort that can be put into a written response can be focused on trying to resolve the matter.⁴¹³

It gets more and more positional the longer the wait for responses ... there was a real disadvantage to waiting for the response and scheduling the conciliation down the track.⁴¹⁴

Our experience has been that the earlier you get in there and conciliate, the better, and the lack of a [written] response does not necessarily hinder, and in some cases can improve, capacity for conciliation. When they are not locking themselves into writing, it seems to make a big difference to their thinking.⁴¹⁵

Two interview respondents were, however, equivocal about the efficacy of adopting early conciliation as a preferred practice, pointing to the possible compromise of a person's substantive rights and fairness of the process:

The risk of using such an approach is that a person's rights may be compromised by accepting, for instance, an apology for a case that may be a strong case [of alleged discrimination] ... The use of early conciliation requires careful assessment and a sophisticated approach to ensure a fair process.⁴¹⁶

It [early conciliation] it is a conundrum because the argument could be put [as to] ... why should you involve a respondent in a conciliation process ... when you haven't made a judgment on the merits of the complaint ... I guess the pragmatic response might be that if it is early conciliation, and the parties are prepared to attend then it might resolve the issue that is presented.⁴¹⁷

⁴¹³ Interview with DEO-9, Director/Manager (15 April 2011).

⁴¹⁴ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

⁴¹⁵ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

⁴¹⁶ Interview with DEO-9, Director/Manager (15 April 2011).

⁴¹⁷ Interview with DEO-3, Director/Manager (3 March 2011/ 5 September 2012).

The above comments point to the need for statutory bodies to articulate the objectives of their conciliation model, and the extent to which the conciliator has an advisory or evaluative role in respect to the merits of the complaint or substantive fairness of the process.

4.9 Conclusion

This chapter has demonstrated the diversity of approaches and models of conciliation of the statutory bodies participating in this research and highlighted some inconsistencies between NADRAC's definition of statutory conciliation and the way in which conciliation is described in the public documentation of most of the statutory bodies. The advisory, evaluative or interventionist roles of conciliators were not commonly articulated by interview respondents or in the public descriptions of conciliation processes. On the other hand, some interview respondents described the role of the statutory body and/or the conciliator as being 'an advocate for the law'. There was, however, a high degree of consistency in approaches used by the different statutory bodies, with the majority using face-to-face conferences, separate meetings with parties, telephone conferences and shuttle conciliation processes. All statutory bodies also identified a number of significant legislative and contextual factors which affected referrals to conciliation, such as the availability of other complaint resolution options or external avenues such as tribunal or regulatory processes. Perhaps most significant was the finding of a clear trend towards the adoption of 'early conciliation models' and 'presumptive approaches' to the suitability of matters for conciliation. The implications of this trend for approaches and criteria used in decision making on individual matters for conciliation will be explored in the following chapter.

CHAPTER FIVE

APPROACHES AND CRITERIA USED IN DECISION MAKING ON THE SUITABILITY OF MATTERS FOR CONCILIATION

5.1 Introduction

This chapter presents the findings on the approaches and criteria being used by participating statutory bodies in decision making on the suitability of individual matters for conciliation. These findings are examined in the context of the key considerations identified in the literature and research on the determination of the suitability of disputes for ADR and the likelihood of resolution or ‘success’. Approaches to assessment and decision making are also explored in the context of the adoption by many statutory bodies of a ‘presumptive approach’ to decision making about the suitability of matters for conciliation. Despite the dominance of this presumption of suitability, the willingness and attitudes of parties to participate in conciliation were identified as a key consideration and challenge for most statutory bodies. This chapter introduces the notion that decision making on the suitability of disputes for conciliation process is an interactive process which needs to take into account how the statutory body or officer is able to work with the particular challenges associated with the characteristics of the parties or the nature of the dispute. This concept will be explored further in Chapter Six in relation to access and participation of people with disabilities. This chapter concludes with the proposition of ‘rethinking’ approaches to determining the suitability of matters for conciliation and changing the question for statutory bodies from *‘Is this matter suitable for conciliation?’* to *‘How could we make this matter suitable for conciliation?’*

5.2 Overview of findings on approaches and criteria used in decision making

The findings considered in this chapter focus on the factors and criteria considered in decision making on the suitability of individual matters for conciliation. The specific factors and criteria discussed in this chapter need to be understood in the context of the diversity of approaches to conciliation, legislative requirements and the contextual factors affecting referrals which have been outlined in Chapter Four.

In order to identify both explicit and implicit criteria being applied in decision making on the suitability of matters for conciliation, the surveys and interviews requested statutory bodies to identify the range of factors taken into account in these decisions, as well as the most common reasons why a matter may be found not to be suitable for conciliation. Respondents were also asked to outline the most common reasons for decisions to cease conciliations after referral, with the view that these answers may shed light on implicit decisions which may not have been made at the outset about suitability. These answers are particularly relevant for statutory bodies operating with an 'early conciliation' model with limited assessment being undertaken prior to referral. The results revealed that decisions that matters were unsuitable for conciliation were made 'rarely' or 'not often' by the majority of statutory bodies, with an associated trend towards the adoption of a 'presumptive' approach to suitability.

While decisions of unsuitability of matters for conciliation were reported as being infrequent, all statutory bodies reported similar factors and criteria that were taken into account in decision making. These factors and criteria were examined with reference to the types and categories of criteria related to the appropriateness of referral to ADR identified in the literature and research on validity of criteria for predicting successful resolution.⁴¹⁸ Overall, the factors identified by the statutory bodies reflected the types of 'descriptive criteria' associated with the characteristics of parties or disputes that Mack identified as being most common in her review of criteria reported in the literature in relation to referrals to ADR processes.⁴¹⁹ When examined in relation to NADRAC's recommendations that criteria should be limited to 'negative criteria' for when a matter may not be suitable and 'criteria based on principle',⁴²⁰ the survey and interview responses included the use of 'positive criteria' of expectations of parties, such as to 'demonstrate good will' and be 'willing to accept a negotiated agreement'. There were also limited examples of criteria based on principles.⁴²¹ Of interest is that only three

⁴¹⁸ See discussion on the key considerations from the literature and ADR research in Chapter Two [Part 2.6] of this thesis.

⁴¹⁹ Mack, above n 28, 55; see discussion in Chapter Two [Part 2.6] of this thesis.

⁴²⁰ National Alternative Dispute Resolution Advisory Council, above n 35, 8–9, 16; see also Mack, above n 28, 8, 57–60.

⁴²¹ Interview with HDS-1, Conciliator (1 June 2011); Survey Response HS-2. See discussion on findings of positive and negative criteria used by statutory bodies in Chapter Five [Part 5.5] and examples in Table 5.

statutory bodies identified power imbalances or capacity of parties as reasons why a matter may not be suitable for conciliation, in contrast to the common focus on these factors by the critics of statutory conciliation.⁴²² The implications of this finding for enabling appropriate access and participation for people with disabilities are explored in Chapter Six.

Statutory bodies were also asked about the use of policies or documented criteria to inform decision making on suitability of matters for conciliation. Only five statutory bodies had such documentation, with the majority indicating the use of ‘working criteria’ or factors which were commonly taken into consideration. Some interview respondents, however, reflected some of the key considerations in the literature on approaches to assessment of the suitability of matters for ADR, highlighting the complexity of assessing the variable factors affecting suitability in each case and the need for ‘sophisticated judgment’ by officers.⁴²³ A key consideration and challenge reported by most statutory bodies was the willingness and attitudes of parties to participate in conciliation. Other common challenges included defining the threshold of public interest or safety issues as exclusionary criteria for referral of such matters to conciliation.

Approaches to assessment and decision making varied according to the extent to which statutory bodies had adopted a presumptive approach to suitability and/or an ‘educative approach’ to addressing issues of willingness of parties or other negative factors in assessment and pre-conciliation processes. Approaches to the willingness of parties to participate in conciliation also varied in the extent to which they were informed by ADR theory and practice, particularly in relation to non-adversarial paradigms and theories of conflict.⁴²⁴ For example, some interview respondents described working with parties in

⁴²² See discussion in Chapter Two [Part 2.4] and [Part 2.5] of this thesis.

⁴²³ See discussion in Chapter Two [Part 2.6] of this thesis; see especially Boulle above n 3, 314–24; The need for ‘sophisticated judgment’ by officers was articulated in the interview with DEO-9, Director/Manager (15 April 2011).

⁴²⁴ National Alternative Dispute Resolution Advisory Council, above n 35, 8–9, 16; see also Mack, above n 28, 57–60.

pre-conciliation processes to identify underlying interests and options for resolution.⁴²⁵ An examination of these approaches identified the way in which decisions about the suitability of matters for conciliation can be dependent on the skills and resources within an organisation, as well as the model of conciliation adopted and the objectives articulated by the statutory body. This was crystallised in the approach articulated by one interview respondent:

Rather than deciding whether a matter is suitable for conciliation, we look at what approaches may be needed to make it suitable. The key question is ‘How do we make conciliation suitable?’⁴²⁶

The findings on the approaches and criteria used in decision making by the statutory bodies in this research point to the need to rethink approaches to determining the suitability of disputes for conciliation, as suggested by the above comment. The findings also highlight that decision making on the suitability of disputes for conciliation should be recognised as an interactive and interdependent process which is influenced by the capacity of the statutory body or officer to work with the particular challenges associated with the characteristics of the parties or nature of the dispute. These propositions are developed through the following detailed analysis on decision making on referrals to conciliation, and the reported factors and criteria that are taken into account in these decisions.

5.3 Decision making on referrals to conciliation

5.3.1 Frequency of decisions on the unsuitability of matters for conciliation

A significant finding of this research is that the majority (12 out of 17) of statutory bodies reported that decisions on the unsuitability of matters for conciliation were made either ‘rarely’ or ‘not often’, which is consistent with the reported shifts to models of early conciliation and a presumptive approach to suitability. Seven statutory bodies (42 per cent) reported these decisions were rarely made, while five (29 per cent) reported that decisions were not often made that a matter was unsuitable for conciliation.⁴²⁷

⁴²⁵ Examples were provided in the following interviews: Interview with DEO-9, Director/Manager (15 April 2011); Interview with HDS-1, Conciliator (1 June 2011); Interview with HDS-3, Conciliator (15 November 2010); Interview with DEO-2, Director/Manager (10 September 2012).

⁴²⁶ Interview with DEO-9, Director/Manager (15 April 2011).

⁴²⁷ See Appendix E.7 Frequency of decisions on the unsuitability of matters for conciliation.

This is a very positive finding in respect to the research question on how decision making can ensure appropriate access to conciliation, particularly for people with disabilities, as it indicates that there is a high threshold for determining that matters are not suitable for conciliation. The extent to which people with disabilities may be affected by the factors that are used to find matters unsuitable will be explored in Part 5.4 and in more detail in Chapter Six.

Statutory bodies with conciliation as their main form of complaint resolution were more likely to report that decisions were rarely made that matters could not be referred to conciliation. One respondent considered that decisions were often made that matters were not suitable for conciliation primarily because of the options of more flexible complaint resolution options.⁴²⁸ Three respondents felt unable to accurately answer the question on frequency of these decisions on unsuitability because of either the limited number of conciliations conducted or limitations in available data on these matters.

5.3.2 Adoption of presumptive approach to suitability

As indicated in Chapter Four, the shift to models of ‘early conciliation’ was commonly associated with the adoption of what was described by a number of interview respondents as a ‘presumption of suitability’ of matters for conciliation. In adopting a presumptive approach to suitability of matters and ‘early conciliation’ models, some interview respondents spoke of interpreting ‘outdated’ legislative requirements within a contemporary ADR framework, such as interpreting ‘may be resolved’ through conciliation to ‘may have potential benefits’ to the parties. Nine of the 17 statutory described their approach to decision making on referrals to conciliation in these terms:⁴²⁹

The starting point is that it will go to conciliation – we have a presumptive approach – unless there is a reason not to.⁴³⁰

There is a presumptive approach/model of all matters being suitable for conciliation ...
The Commission always attempts to conciliate.⁴³¹

⁴²⁸ Interview with HS-3, Director/Manager (11 May 2011).

⁴²⁹ See Appendix E.7 for breakdown of comments made about ‘presumptive approaches to suitability’.

⁴³⁰ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

⁴³¹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

We believe most things can be resolved, and this has been borne out in practice ... The Act says that if we believe 'that a complaint may be resolved by conciliation' we must try.⁴³²

The latter comment also reflects the way in which the adoption of 'presumptive' approaches to suitability have been informed by the common legislative imperative for statutory bodies to 'endeavour to resolve' the complaint by conciliation, which was discussed above in Part 4.3.2. The adoption of presumptive approaches to suitability for conciliation was also explained by interview respondents who drew on experiences of not being able to predict outcomes of conciliation and of witnessing the potential benefits for parties in disputes where resolution had appeared unlikely:

You can see how powerful the process can be. Our conciliators come out of each conciliation [and often say] 'learnt something from that I didn't know before'. We cannot presume anything, as each case is different.⁴³³

These observations are consistent with the research findings on the lack of reliable or empirically validated criteria on which to predict success in ADR processes.⁴³⁴ There was, however, no indication that the adoption of presumptive approaches by statutory bodies had been informed by knowledge of these research findings and the literature on this area.

Most of respondents who articulated a 'presumptive approach' to suitability for conciliation still highlighted the need to assess factors which should be taken into account to ensure the appropriateness of referrals, fairness of process and the likelihood of resolution:

The Commission's approach to conciliation is a presumptive model of suitability, with a focus on assessing and using appropriate formats and approaches to uphold the principle of informed decision making and optimise the potential for resolution.⁴³⁵

⁴³² Interview with DEO-7, Director/Manager (7 September 2011).

⁴³³ Interview with DEO-8, Director/Manager (9 March 2011).

⁴³⁴ National Alternative Dispute Resolution Advisory Council, above n 35, 8; see also Mack, above n 28, 55–68.

⁴³⁵ Interview with DEO-9, Director/Manager (15 April 2011).

Some interview respondents also put forward the need for consideration of the appropriate threshold for adopting a presumptive approach with respect to an assessment of the substance of a complaint and the purpose of conciliation:

The Commission will generally not proceed to conciliation where a matter is assessed as clearly lacking in substance, as there are ethical considerations in requiring/requesting respondents to conciliate in such matters.⁴³⁶

We still need to reach that level of satisfaction that the matter is amenable to conciliation ... Sometimes we have to ask what is the purpose of the conference? And it overlays with the questions of merit.⁴³⁷

While decisions of unsuitability of matters for conciliation were ‘rarely’ made by the statutory bodies with presumptive approaches, the factors and criteria that were applied by these bodies were nonetheless similar to those of the other statutory bodies, as will be discussed in Part 5.4 below.

5.3.3 Policies or documented criteria for decision making

Only six statutory bodies had developed a policy or documented criteria for decision making on suitability. However, all of these statutory bodies reported that they planned to review their policy or criteria, with one interview respondent advising that the criteria had been replaced with an emphasis on the need for a ‘sophisticated approach’ to determining suitability in each case.⁴³⁸ The examples of documented criteria which had been developed by statutory bodies reflected a ‘checklist approach’ of criteria or factors which would indicate that a matter was not suitable for conciliation. In all examples, the criteria were descriptive of party characteristics or the nature of dispute. In some examples, these include what would be described as ‘positive criteria’ for assessing the likelihood of resolution such as:

That the subject matter and complainant’s objectives lend themselves to amicable negotiation ... That both parties have a desire to resolve the complaint.⁴³⁹

⁴³⁶ Interview with DEO-9, Director/Manager (15 April 2011).

⁴³⁷ Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

⁴³⁸ Interview with DEO-9, Director/Manager (15 April 2011).

⁴³⁹ Survey Response and Interview with HDS-2, Commissioner/Statutory Head (10 May 2010).

In other examples, the policies provided guidance that ‘in most instances conciliation should be attempted unless there is a good reason’. Examples of ‘negative criteria’ for referral to conciliation included:

Where a party is not able to effectively participate in the conference because of their disability and their participation cannot be managed adequately and their ability to participate will not improve within a reasonable time.⁴⁴⁰

The specific reference to a person’s disability as a reason for considering a matter not suitable for conciliation reinforces the importance of including the particular focus in this research on appropriate access for people with disabilities. While this was the only documented example of a criterion specifying consideration of a person’s disability and capacity to participate, the potential for implicit criteria to influence access and participation of people with disabilities in conciliation will be explored further in Part 5.4 and Chapter Six.

In contrast to criteria developed by statutory bodies for guidance on internal decision making on the suitability of matters for conciliation, an example of information provided to the public focuses on the nature of the dispute and the types of outcomes sought:

- where there has been a breakdown in communication
- where explanations are required and the parties want to understand or explain what happened and why
- where the complainant is seeking an improvement in the quality of the particular health service
- where there is a claim for damages, compensation or remedial treatment.⁴⁴¹

The way in which statutory bodies approach the assessment of suitability of matters for conciliation and consider the range of factors is therefore important to examine in order to identify both the explicit and implicit criteria used in this decision making.

⁴⁴⁰ Survey Response and Interview with DEO-7, Director/Manager (7 September 2011).

⁴⁴¹ Health Complaints Commissioner Tasmania, *Conciliation – ‘What Complaints are Suitable for Conciliation?’*

<http://www.healthcomplaints.tas.gov.au/__data/assets/pdf_file/0008/254456/Conciliation.pdf>.

5.3.4 Approaches to assessment of suitability

Approaches to assessment and decision making on the suitability of matters for conciliation varied according to the threshold of assessment required by each statutory body prior to referral to conciliation. While the majority of interview respondents referred to ‘working criteria’ or lists of factors considered in the assessment of suitability, five respondents articulated the need for individualised assessments and reliance on the skills and training of officers to determine the suitability of individual matters for conciliation:

The approaches to conciliation are documented more in the training material [which] includes case studies and exercises on how to apply the considerations as to whether a matter should be referred to conciliation or how to design the process to address the issues that raise questions about suitability ... [A] checklist or procedural approach to assessment is not appropriate.⁴⁴²

There are so many factors that come into account. You have the entire circumstance of the complainant, and the entire circumstance of the respondent, and then you have the entire aspects of the merits ... and the ability of the parties to participate in a meaningful way. But also what sort of outcomes are being mooted can also influence your decision. ... To list the factors would be listing everything.⁴⁴³

One statutory body used a ‘complaint analysis matrix’ to assist with decision making by mapping the inter-relationships between ‘the nature of the complaint’ on one dimension and ‘the attitude of the parties’ on another dimension.⁴⁴⁴ This was described as a ‘ready reckoner’ to assist officers to determine the strategies that may be required to resolve the complaint, assess the likelihood of resolution and the suitability of matters for either conciliation or other complaint resolution options. This type of decision-making tool was, however, unique, with interview respondents more commonly focusing on the role of individualised judgments and skills of officers:

⁴⁴² Interview with DEO-9, Director/Manager (15 April 2011).

⁴⁴³ Interview with DEO-8, Director/Manager (9 March 2011).

⁴⁴⁴ Interview with HS-3, Director/Manager (11 May 2011). This decision-making tool mapped the complexity and numbers of issues in disputes on one dimension and the views and attitudes of the complainant and provider on the other dimension, ranging from ‘co-operative, willing to negotiate/resolve the complaint’ at one end and ‘seeking punitive damages’ or ‘using resolution process to access a different option’ at the other. Officers used this tool to map the divergence of views about the dispute and attitudes of the parties, in order to identify strategies that may ‘move a party’s position’ or resolve the complaint.

I think it is so difficult to put rules around what we do. [Through] the development of the trust and the communication with the parties ... you make an assessment as best as you can that these two people can have a rational conversation.⁴⁴⁵

There were some common themes on the value of using ‘pre-conference calls’ or ‘pre-conciliation’ meetings to assess suitability for conciliation and parties’ capacity to participate as described in the comment above. These themes reflected the commentary in the literature on the importance of intake processes or pre-conciliation meetings.⁴⁴⁶ Five respondents reported pre-conciliation meetings as a standard part of their practice, while the majority used some form of pre-conference call or contact with the parties depending on available resources or the nature of the case.⁴⁴⁷ For those respondents who regularly used pre-conciliation processes, these meetings or calls with parties were often articulated as being the primary assessment process for suitability for conciliation, even if a referral to conciliation had already been made:

We always meet with parties for pre-conciliation. Can’t imagine doing it without that first ... In fact that’s where, for me, that we make the decision about suitability ... [the first threshold] is that the person is prepared to come in to discuss conciliation.⁴⁴⁸

I also make assessments in pre-conciliation ... it’s a two-stage process.⁴⁴⁹

There has to be a certain level of threshold around the capacity of the agency and the person to be able to deal directly with each other. That’s a big thing for us and we assess that first.⁴⁵⁰

Pre-conciliation processes were also described as having a dual purpose of assessment and addressing issues or party attitudes which may affect the likelihood of resolution. The descriptions of these processes were similar in character and purpose to the ‘preliminary

⁴⁴⁵ Interview with DEO-8, Director/Manager (9 March 2011).

⁴⁴⁶ See discussion in Chapter Two [Part 2.7]; see especially Payget, above n 38, 193; Shurven, above n 210; Sourdin, above n 3, 441–9.

⁴⁴⁷ Some respondents reported changes in the ability to hold pre-conciliation meetings due to resource and staffing constraints. See, eg, Interview with DEO-8, Director/Manager (9 March 2011).

⁴⁴⁸ Interview with DEO-1, Conciliator (1 June 2011).

⁴⁴⁹ Interview with HDS-1, Conciliator (1 June 2011).

⁴⁵⁰ Interview with DS-1, Director/Manager (10 September 2012).

conference or intake' processes which have been included in the updated practice standards for the National Mediator Accreditation System.⁴⁵¹

Pre-conciliation is invaluable for setting the scene for reaching agreements, and you are more likely to get durable outcomes because it does a lot of ground work – it gets them thinking the right way. It also finds out if they've got good will.⁴⁵²

We use pre-conference calls to all parties to explain the process and manage any reluctance to participate in conciliation.⁴⁵³

I think it that pre-conciliation process is really vital, in terms of talking to someone about how they listen to information they don't want to hear, and how they have to be open to coming to the meeting knowing that might happen ... it comes down to what the process is aiming to achieve.⁴⁵⁴

The above comments highlight the ways in which assessments about the suitability of matters for conciliation can be affected by the extent to which officers actively address issues of party attitudes to conciliation, and how they define the expectations of behaviour and the objectives of the process.

5.4 Factors and criteria used in decision making on suitability

5.4.1 Overview of reported factors taken into account in decision making

All of the statutory bodies identified multiple factors that were taken into account in their decision making on the suitability of matters for conciliation. These factors largely reflected the factors that are commonly identified in the literature on referral criteria for ADR processes.⁴⁵⁵ The survey and interview responses were combined to produce a comprehensive list of factors used by the participating statutory bodies, which were then grouped according to whether they related to party characteristics, the nature of the

⁴⁵¹ Mediator Standards Board, above n 39, 10; section 3.2 of the NMAS Practice Standards outlines standards for preliminary conference or intake processes and includes: '(a) assessing whether mediation is suitable and whether variations are required' ... '(e) assisting participants to prepare for the mediation meeting including consideration of any advice or information that may need to be sought and/or exchanged'.

⁴⁵² Interview with DEO-1, Conciliator (1 June 2011).

⁴⁵³ Interview with DEO-7, Director/Manager (7 September 2011).

⁴⁵⁴ Interview with HDS-3, Conciliator (15 November 2010).

⁴⁵⁵ Boule, above n 3, 314–24.

dispute/substance of the complaint, a combination of the two, or other external factors. As Mack identified in her review of referral criteria, these categorisations are in a sense arbitrary and contestable as the categories are dependent on how the issues are conceptualised. For example, ‘power imbalance’ or ‘risk of violence’ may be regarded as either party characteristics, factors in the nature of the dispute, or criteria based on principle.⁴⁵⁶ Taking into account these limitations, the categorisation of the responses of statutory bodies was nonetheless useful for identifying the relative frequency of factors commonly associated with party characteristics compared to those factors more commonly associated with the nature of the dispute.

Table 4 below provides a breakdown of the range of factors reported by statutory bodies and shows that factors relating to the attitudes or willingness of parties featured in the responses of 11 of the 18 of the interview respondents, with more factors identified in relation to party characteristics than to the nature of the dispute. Not surprisingly, the most common generic factor taken into account by statutory bodies was an assessment on the likelihood of resolution or positive outcome, given that this is a common legislative requirement for referral of matters to conciliation.⁴⁵⁷ None of the interview respondents, however, indicated an awareness of the research findings on the lack of reliable or empirically validated criteria on which to predict success in ADR processes,⁴⁵⁸ with responses suggesting a reliance on anecdotal ‘evidence’ or views formed from individual experiences. There was also limited reference to criteria that are identified in the literature as criteria based on principle, such as concerns about power imbalances, violence, and ‘capacity of parties to participate safely and effectively’.⁴⁵⁹ The different types of factors reported by interview respondents and potential implications for decision making and appropriate access to conciliation will be analysed in Part 5.5 below.

⁴⁵⁶ See discussion by Kathy Mack on the challenges associated with categorisation of criteria according to characteristics of parties, the nature of disputes, or criteria based on principle: above n 28, 55–7.

⁴⁵⁷ See discussion of the legislative requirements for referrals to conciliation in Chapter Four [Part 4.3.2] of this thesis.

⁴⁵⁸ National Alternative Dispute Resolution Advisory Council, above n 35, 8; see also Mack, above n 28, 55–68. See discussion in Chapter Two [Part 2.6] of this thesis.

⁴⁵⁹ See Mack, above n 28, 57–60.

Table 4. Factors taken into account in decision making on suitability for conciliation⁴⁶⁰

Decision making factors (more than one factor per statutory body)	Interview respondents n=18
<i>Factors of both parties and dispute</i>	
Likelihood of positive outcome or resolution	14
Whether parties are making an informed decision/self-determination re participation in conciliation	3
Whether process will be fair/party not be disadvantaged	3
<i>Party characteristics</i>	
The attitude of parties towards resolution / willingness of parties	11
Complainant's expectations of outcome	8
Potential benefits to parties	6
When there is an ongoing communication or relationship issue/ history of dispute	4
Risk of detriment/violence/harm to parties/escalation of conflict	3
Capacity of parties to participate	3
Power imbalances	2
<i>Nature of dispute/substance of complaint</i>	
The nature/complexity of complaint	9
Significance or substance of complaint/use of resources	7
Specific matter that has a requirement for investigation or other process (e.g. professional conduct matter)	7
Ability to address systemic issues and conciliate	3
Complaint is warranted/acknowledged by provider	2
<i>Other/ Factors external to parties and dispute</i>	
Consequences/Lack of service options if do not resolve	2
Other processes (e.g. legal representation) not present or effective	1
External recommendation (e.g. board)	1

5.4.2 Most common reasons why matters are assessed as not suitable for conciliation

In order to gain greater insight into how the above factors influenced assessments on the likelihood of resolution or overall suitability of matters for conciliation, these factors were compared to the most common reported reasons why matters were found to be unsuitable for conciliation by statutory bodies.⁴⁶¹ The analysis revealed a reverse emphasis on 'low prospects of resolution' rather than likelihood of resolution, and a higher prevalence of factors indicating 'negative' party characteristics. By far the most

⁴⁶⁰ This table is also provided in Appendix E.10 for ease of comparison with other tables of results.

⁴⁶¹ See table in Appendix E.11 Most common reasons why matters are assessed as not suitable for conciliation.

common reason for assessing matters as not suitable for conciliation was described in terms of parties being unwilling, uncooperative or not approaching conciliation in ‘good faith’. This was reported by 13 out of the 18 interview respondents, or 72 per cent. Of note also was the higher number of interview respondents identifying risks to parties such as threat of violence as the reason for assessing matters as not suitable for conciliation. While only three statutory bodies included the factor of ‘risk of detriment/violence/harm’⁴⁶² as a factor that was generally taken into account in decision making, seven interview respondents identified this factor as one of the most common reasons why matters are found to be unsuitable. Where factors associated with the nature of the dispute were reported as common reasons why matters were found not to be suitable for conciliation, these were largely consistent with those factors that were generally taken into account in decision making.⁴⁶³ Of interest is that none of the statutory bodies excluded particular types of matters, such as sexual harassment complaints, as being unsuitable for conciliation.⁴⁶⁴

5.4.3 Most common reasons why conciliations are ceased after referral

The focus on party characteristics was even more pronounced in the types of reasons given by statutory bodies for ceasing conciliations. A breakdown of these reasons is provided in Appendix E.12. Only five respondents provided reasons related to the nature of the dispute or the complexity of the issues, which featured significantly less than concerns about party attitudes and behaviour such as being uncooperative or ‘unable to reach an agreement’. While the inability of the parties to reach an agreement would need to be understood in the context of the nature of the dispute, factors related to the dispute such as the nature of alleged discrimination or the severity of the complaint about the standard of health care did not feature in the reasons given by respondents.

5.5 Analysis of explicit and implicit criteria used in decision making

The above overview and breakdown of factors taken into account by statutory bodies in decision making on the suitability of matters for conciliation highlights the complexity of

⁴⁶² See Appendix E.11 Most common reasons why matters are assessed as not suitable for conciliation.

⁴⁶³ See comparative breakdowns of factors in Appendix E.10 and Appendix E.11.

⁴⁶⁴ This finding contrasts with the views put forward by Baylis on the inappropriateness of sexual harassment complaints for conciliation. See Baylis, above n 51, and discussion in Chapter Two [Part 2.4].

this decision making. This complexity makes it difficult to discern the relative influence of each factor and the implicit criteria which may underpin decisions that are made. It is, however, clear that there was a predominant focus on party characteristics. Of note is that these characteristics were expressed in terms of both ‘positive’ and ‘negative’ criteria used to determine suitability for referral to conciliation, which will be analysed below. The extent to which factors reflected criteria based on principle will also be explored, together with the way in which interview respondents considered key factors associated with willingness of parties, concepts of good faith and assessment of public interest issues.

5.5.1 Positive and negative criteria relating to party characteristics

In contrast to NADRAC’s recommendations that criteria should be limited to ‘negative criteria for when a matter may not be suitable’ or ‘criteria based on principle’,⁴⁶⁵ the survey and interview responses included the use of ‘positive criteria’ of expectations of parties or attributes required for conciliation as shown in Table 5 below. When all the different factors reported by statutory bodies were analysed in terms of being positive or negative criteria or neither, it is significant that almost a third (32 per cent) of these factors were expressed as ‘positive criteria’, being factors that were expected to be present in order to assess a matter as suitable for conciliation. This was almost as high as ‘negative criteria’ at 35 per cent, with the remaining factors, such as ‘complexity of dispute’, assessed as being neither positive nor negative.⁴⁶⁶

⁴⁶⁵ National Alternative Dispute Resolution Advisory Council, above n 35, 8–9,16; see also Mack, above n 28, 57–60.

⁴⁶⁶ See Appendix D.9 for graph showing proportions of factors assessed as either positive or negative criteria.

Table 5. Examples of positive and negative criteria relating to party characteristics

Negative criteria	Positive criteria
<ul style="list-style-type: none"> • ‘negative attitudes of parties/hostility between parties’⁴⁶⁷ • ‘parties unwilling to participate’/no ‘goodwill to resolve’⁴⁶⁸ • ‘parties not acting in good faith’⁴⁶⁹ • ‘unrealistic expectations of complainants’⁴⁷⁰ • ‘power imbalances’⁴⁷¹ • ‘long histories’, ‘previous attempts to resolve matter’⁴⁷² • ‘fixed levels of aggression of parties’/ risk of violence/high level conflict/ vilification⁴⁷³ • ‘mental health issues’/‘no capacity to communicate’/‘cannot participate effectively because of disability’⁴⁷⁴ 	<ul style="list-style-type: none"> • ‘demonstrate goodwill in communication’, ‘have to be open to hearing things they don’t want to hear’⁴⁷⁵ • good faith of the parties to enter into negotiations⁴⁷⁶ • ‘desire/willing to resolve dispute/willing to accept a negotiated agreement’⁴⁷⁷ • ‘complainant’s objectives lend themselves to amicable negotiations’⁴⁷⁸ • ability to agree to ‘acceptable behaviour’ in conciliation/‘to deal directly with each other’⁴⁷⁹

⁴⁶⁷ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011); Interview with DS-1, Director/Manager (10 September 2012); Interview with HDS-3, Conciliator (15 November 2010).

⁴⁶⁸ Interview with HDS-1, Conciliator (1 June 2011); Interview with DS-1, Director/Manager (10 September 2012).

⁴⁶⁹ Interview with DEO-1, Conciliator (1 June 2011); Interview with HS-4, Director/Manager (4 May 2012).

⁴⁷⁰ Interview with HS-4, Director/Manager (4 May 2012); Interview with HS-1, Director/Manager (15 April 2011).

⁴⁷¹ Survey Response DEO-6; Survey Response DEO-5.

⁴⁷² Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

⁴⁷³ Survey Response DEO-5; Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012); Interview with HDS-1, Conciliator (1 June 2011); Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012); Interview with DS-1, Director/Manager (10 September 2012); Interview with HDS-3, Conciliator (15 November 2010); Interview with HDS-2, Commissioner/Statutory Head (10 May 2010).

⁴⁷⁴ Interview with HDS-1, Conciliator (1 June 2011); Interview with HDS-2, Commissioner/Statutory Head (10 May 2010).

‘Positive criteria’ were most commonly expressed in terms of attitudes or behaviour of parties, with examples provided in Table 5 above. Some of these expressions of ‘positive criteria’ appear to reflect some of the common meanings of ‘conciliatory’ behaviour, which raises questions as to how conciliation is conceptualised as a process by individual officers.⁴⁸⁰ This raises the further question of the extent to which officers making decisions are influenced by the ‘facilitative’ descriptions of conciliation identified in the public documentation produced by the majority of statutory bodies, and some of the ‘aspirational’ approaches to describing the objectives of the process.⁴⁸¹ As outlined in Part 4.4.1, some of these descriptions appeared to emphasise the consensual nature of the processes, with the aims being to resolve complaints in a ‘collaborative’ or ‘mutually acceptable way’, enable parties to ‘settle matters on their own terms’ or with ‘mutual satisfaction’.⁴⁸² This will be explored further below in relation to the discussion of approaches to the issue of willingness and attitudes of parties.

While criteria on party characteristics were often expressed in positive or negative terms, interview respondents often qualified the way in such criteria may be applied:

I always test the ability of each party to put themselves in the other person’s shoes. But

⁴⁷⁵ Interview with HDS-1, Conciliator (1 June 2011); Interview with HDS-3, Conciliator (15 November 2010).

⁴⁷⁶ Survey Response HS-4; Survey Response HDS-4.

⁴⁷⁷ Survey Response DEO-1; Survey Response HDS-1; Survey Response HS-4; Survey Response HDS-4; Survey Response HS-4; Survey Response DEO-5; Interview with HS-3, Director/Manager (11 May 2011); Interview with HDS-3, Conciliator (15 November 2010).

⁴⁷⁸ Survey Response HDS-2; Interview with HS-4, Director/Manager (4 May 2012).

⁴⁷⁹ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011); Interview with DS-1, Director/Manager (10 September 2012).

⁴⁸⁰ See discussion in Chapter Two [Part 2.3] of this thesis on the potential influence of the common or dictionary meanings of ‘to conciliate’ such as ‘to win the goodwill or regard of, to reconcile conflicting views’, ‘to overcome the distrust or hostility of, by soothing or pacifying means’. *Concise English Dictionary* 1985, above n 91, and *Macquarie Dictionary*, above n 93.

⁴⁸¹ Boulle, above n 3, 13. See discussion on these approaches to defining mediation and ADR processes in Chapter Two [Part 2.3].

⁴⁸² See summary table of examples in Appendix F.1; see also ACT Human Rights Commission, above n 311; Australian Human Rights Commission, above n 308; Health Complaints Commissioner Tasmania above n 315; Health and Disability Services Complaints Office, WA, above n 315.

even with that, sometimes it really doesn't matter because a person can think it's black, and the other can think it's white, but if they both really want to resolve it, it really doesn't matter if they disagree whether it's black or white.⁴⁸³

The degree of conflict or hostility itself wouldn't be a reason not to conciliate ... it would be in terms of physical safety, as we wouldn't expect anyone to come into a meeting where they thought it was going to be physically threatening to them.⁴⁸⁴

We would not [make a decision] not to refer to conciliation on the basis of personal characteristics for example [but] ... we would certainly examine whether parties were entering into conciliation in good faith.⁴⁸⁵

Respondents in interviews also spoke about the need to weigh up the factors related to party characteristics with the nature and seriousness of the issues in dispute, together with the likely impacts if the matter was not resolved. Some respondents highlighted the need to consider the likely impact on ongoing relationships between parties or future service provision if a matter was not resolved.⁴⁸⁶ The above comments reflect the dynamic and complex way in which criteria may be applied in decision making on individual matters, which point to the benefit of criteria based on principles, as highlighted in NADRAC's recommendations and Mack's review of referral criteria for ADR processes.⁴⁸⁷

5.5.2 Criteria based on principles

Mack described 'referral criteria based on principle' as being 'the most important general criteria ... which indicate features essential to a minimally fair process or to allow the ADR process to function at all'.⁴⁸⁸ Threats of violence and risks of harm or detriment to parties were the most common criteria based on principle identified by interview respondents, reflecting the principle identified in the literature of the 'capacity of parties

⁴⁸³ Interview with HDS-1, Conciliator (1 June 2011).

⁴⁸⁴ Interview with HDS-3, Conciliator (15 November 2010).

⁴⁸⁵ Interview with HS-4, Director/Manager (4 May 2012).

⁴⁸⁶ Interview with DS-1, Director/Manager (10 September 2012).

⁴⁸⁷ Mack, above n 28, 8, 57–60.

⁴⁸⁸ Ibid 8.

to participate safely and effectively’.⁴⁸⁹ Examples of these types of criteria commonly referred to considering risks such as:

- Risk of physical/psychological/other detriment to the parties.
- Risk of intensifying the dispute/escalating the conflict.
- Risk of physical/psychological detriment to staff.⁴⁹⁰

A number of interview respondents, however, qualified the application of these criteria by pointing to the need to first consider options for adapting processes to mitigate any risks in order to enable the opportunity for the dispute to be resolved:

There would have to be a real threat to the parties meeting physically or where there wasn’t another way of working with the parties to reach settlement.⁴⁹¹

Power imbalances were similarly seen as not being determinative in assessments of the suitability of matters for conciliation. Only two statutory bodies specifically referred to power imbalances as factors that they took into account in decision making on the suitability of matters for conciliation.⁴⁹² This finding is in stark contrast to the calls by critics of statutory conciliation for power imbalances to be a key consideration in assessing the suitability of disputes for conciliation.⁴⁹³ This finding, however, may also reflect the observations by these critics of the ‘inherent inequality of parties’ in most matters referred to statutory conciliation.⁴⁹⁴ All statutory bodies were asked about approaches to dealing with issues of power imbalances and capacity of parties to participate. These responses, which will be discussed in detail in Chapter Six, indicated that power imbalances were seen as a responsibility of conciliators to address in the way they conducted and designed the process.

Similarly, while three interview respondents identified capacity relating to a person’s disability or mental health issue as a reason why a matter may be assessed as unsuitable

⁴⁸⁹ See Mack, above n 28, 57–60.

⁴⁹⁰ Survey Response DEO-9.

⁴⁹¹ Interview with DEO-2, Director/Manager (10 September 2012).

⁴⁹² Survey Response DEO-4; Survey Response DEO-6.

⁴⁹³ See eg, Baylis and Carroll, above n 15; see also discussion in Chapter Two [Part 2.4] and [Part 2.5] of this thesis.

⁴⁹⁴ See eg, Thornton, above n 15; see also discussion in Chapter Two [Part 2.4] and [Part 2.5] of this thesis.

for conciliation, respondents more commonly spoke of the need to identify supports, such as an advocate or representative to enable the matter to be conciliated. Approaches to questions of capacity and the participation of people with disabilities in conciliation will also be discussed in more detail in Chapter Six.

There were other factors identified by respondents which can also be defined as criteria based on principles linked to underlying values and objectives of conciliation for those statutory bodies. Three respondents referred to informed decision making as a key factor, linking this to the need to ensure fairness in process. One respondent also identified the principle of self-determination as a factor considered in decision making, and the need to ensure that a person will not be disadvantaged:

The key considerations in determining suitability are that the process will support informed decision making and self-determination. In considering the suitability of conciliation for a matter involving a person with a disability, conciliators need to ensure that the person will not be disadvantaged.⁴⁹⁵

We've been trying to work towards how people can make an informed choice. ... Our obligation is to run a process that is fair and inclusive and gives every opportunity to the parties to resolve [the matter], but also to provide them with other options if that is what they need.⁴⁹⁶

We adopt an informed decision-making approach, so we try to inform the parties before they are called upon to make those decisions about what outcomes they want, and what they are prepared to give.⁴⁹⁷

There was also a common theme in responses which was based on the value of providing the opportunity to resolve the dispute, together with the principle of 'do no harm':

It might be that people walk away not feeling any better, but you don't want people to walk away feeling worse.⁴⁹⁸

⁴⁹⁵ Interview with DEO-9, Director/Manager (15 April 2011).

⁴⁹⁶ Interview with DEO-2, Director/Manager (10 September 2012).

⁴⁹⁷ Interview with DEO-7, Director/Manager (7 September 2011).

⁴⁹⁸ Interview with HDS-3, Conciliator (15 November 2010).

Six statutory bodies also identified potential ‘positive benefits’ for the parties as a factor which influenced decisions to refer matters to conciliation. This approach was often associated with an equal concern for potential negative impacts if a dispute was not resolved in circumstances where ongoing relationships were important:

The outcomes can be as much about relationships ... sometimes we’ve trying to rebuild people’s confidence in the hospital as they want to use it in the future. So what we are looking at may be different than in other states where there are more choices in providers. It has a big influence.⁴⁹⁹

In the disability area, [we conciliated] a significant dispute between the family and the agency [in] a regional area with limited options. The family couldn’t really afford to burn any bridges.⁵⁰⁰

The above examples point to the importance of changing the assessment question to ‘How can we make this dispute suitable for conciliation?’, which will be discussed in proposed approaches to ‘rethinking the question about suitability’ in Part 5.6 below.

5.5.3 Willingness and attitudes of parties

As indicated above, the willingness and attitudes of parties to participate in conciliation was identified as a key consideration and challenge for most statutory bodies. Those statutory bodies that had not adopted a presumptive approach were more likely to focus on positive criteria or attributes of parties such as a willingness to listen to the other party or openness to resolution as positive criteria for suitability for conciliation. The existence of negative attitudes and resistance by parties to the idea of conciliation were, however, identified as key challenges by most respondents, including those statutory bodies with presumptive approaches to suitability.

Respondents in interviews pointed to the common need to explain and educate parties about conciliation, and the challenges in addressing adversarial or entrenched attitudes of both complainants and respondents. These challenges were often attributed to parties’ lack of knowledge about conciliation or negative views of the process:

⁴⁹⁹ Interview with HDS-1, Conciliator (1 June 2011).

⁵⁰⁰ Interview with DS-1, Director/Manager (10 September 2012).

Complainants may not see the value of conciliation.⁵⁰¹

Conciliation is a new concept for providers and we are getting resistance.⁵⁰²

Respondents in interviews particularly identified complainants' lack of knowledge or misconceptions about conciliation as being a common issue. Of interest is that respondents did not identify the potential difficulties for complainants to distinguish conciliation as a process from the common meanings of 'conciliatory' behaviour. As 'conciliatory' may be interpreted as being willing to compromise and to stop feeling angry or aggrieved, it is reasonable to assume that this may be a factor in some complainants' resistance to conciliation.⁵⁰³ A common theme, however, was the perceived need to educate parties about the benefits of conciliation, which in some cases were expressed in terms of 'selling':

We have to sell the benefits of conciliation.⁵⁰⁴

[We talk] about the benefits of conciliation. It will depend on the degree of preconceived ideas about conciliation.⁵⁰⁵

There was also a theme of respondents reacting as 'complaint targets' and resisting conciliation on the basis of the validity or substance of the complaint.⁵⁰⁶

A lot of respondents don't want to conciliate as they may think there isn't any validity to the complaint ... we would still try to conciliate that because we would be trying to persuade them that it is their interest.⁵⁰⁷

Referrals to conciliation can be relatively meaningless when you've got a provider who doesn't want to meet, provide any information or provide a response.⁵⁰⁸

⁵⁰¹ Interview with HDS-2, Commissioner/Statutory Head (10 May 2010).

⁵⁰² Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵⁰³ See discussion in Chapter Two [Part 2.3] of this thesis on the potential influence of the common or dictionary meanings of 'to conciliate'; see *Oxford Dictionary*, above n 92, and *Macquarie Dictionary*, above n 93.

⁵⁰⁴ Interview with DEO-2, Director/Manager (10 September 2012).

⁵⁰⁵ Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

⁵⁰⁶ See discussion in Chapter Two [Part 2.4] of this thesis; see especially Charlton, above n 22, 7.

⁵⁰⁷ Interview with DEO-7, Director/Manager (7 September 2011).

⁵⁰⁸ Interview with HDS-3, Conciliator (15 November 2010).

We've had some [small] agencies where you are absolutely 'head-butting' against a brick wall just to get them to respond to a complaint, and in those situations it's hard to see what resolution would look like ... Getting them in the room actually might even be more inflammatory.⁵⁰⁹

The analysis of the most common reasons for decisions on the unsuitability of matters for conciliation, together with the most common reasons for ceasing conciliations, pointed to a predominant concern about the qualitative dimensions of party behaviour and attitudes and the degree of hostility, conflict and 'reasonableness' expressed. This is further highlighted by the negative criteria identified by interview respondents in relation to party characteristics, with examples such as:

Complainant being unrealistic in the outcomes sought, non-co-operative or argumentative.⁵¹⁰

No reasonable prospect of resolving, a high level of conflict.⁵¹¹

This focus on party characteristics and complainants' unrealistic expectations mirrors findings of research by the Victorian Equal Opportunity and Human Rights Commission in 2007 on reported barriers to resolution, where these factors were identified in more than half of the unsuccessfully conciliated matters in the study.⁵¹² Of note is that while that study identified a related factor of party 'readiness' for resolution or 'ripeness' of the matter for resolution,⁵¹³ the interview respondents in this research did not identify this as a factor associated with issues of willingness and attitudes of parties to conciliation. As discussed in Chapter Two [Part 2.6], the concept of 'ripeness' of a matter for resolution has been identified in the ADR literature as a common consideration for determining the

⁵⁰⁹ Interview with DS-1, Director/Manager (10 September 2012).

⁵¹⁰ Interview with HS-1, Director/Manager (15 April 2011).

⁵¹¹ Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

⁵¹² Victorian Equal Opportunity & Human Rights Commission, 'Factors Influencing the Resolution of Complaints Lodged under the *Equal Opportunity Act 1995*' (Preliminary Study Paper, internal publication, August 2007)14–16.

⁵¹³ Ibid 11. This study identified the need to consider whether the parties were 'ready' for settlement, referring to ADR literature on the concept of 'ripeness' for settlement and the need for parties to go through stages of emotion before they are ready to resolve the dispute. See, eg, Astor and Chinkin, above n 15, 280; Sourdin, above n 3, 449–50; Boule, above n 3, 320–4.

timing of mediation and likelihood of resolution. While Boulle points to the inconclusive nature of evidence for assessing the appropriate timing of matters for a mediation or conciliation, the concept of ‘ripeness’ or ‘readiness’ of disputes for ADR processes is nonetheless premised on the need to consider the dynamics of conflict between parties and the potential need for parties to process stages of emotions before they are ready for a resolution process.⁵¹⁴

This raises the question of the extent to which these assessments are influenced by an individual officer’s knowledge base, comfort and skill level in managing conflict and working with party expectations. It also raises the question of how each statutory body determines the threshold for acceptable behaviour and attitudes of parties, and takes into account the skills and resources of the organisation to work with high conflict disputes and resistance of parties to engaging in a resolution process.

5.5.4 Requirements of good faith

For some interview respondents, considerations of willingness or attitudes of parties to conciliation were also connected with assessments as to whether parties would participate in good faith. Three interview respondents identified ‘lack of good faith’ as one of the most common reasons why a matter would be assessed as unsuitable for conciliation. ‘Good faith’ was also identified as a requirement for conciliation in the public documentation or ‘agreements to conciliate’ produced by five of the statutory bodies.⁵¹⁵

While requirements for good faith have received considerable attention in recent times in the context of legislating for ADR in civil and commercial disputes,⁵¹⁶ good faith is not

⁵¹⁴ See Boulle, above n 3, 320–4; see also Barbara Wilson, ‘Dispute “Ripeness” and Timing in Mediation’ (2006) 8(6) *ADR Bulletin* 10. Rhonda Payget also identifies the need to assess ‘psychological readiness’ for mediation through intake processes: above n 38, 195.

⁵¹⁵ HDS-1, DEO-1, DS-1, DEO-4, HDS-4; see, eg, Equal Opportunity Commission of South Australia, *Conciliation Fact Sheet. Good Faith*.

<<http://www.eoc.sa.gov.au/sites/eoc.sa.gov.au/files/attachments/Good%20faith%20in%20conciliation.pdf>>

⁵¹⁶ See, eg, Tania Sourdin, ‘Good Faith, Bad Faith? Making an Effort in Dispute Resolution’ (2012) *Good Faith*. Paper 1, Civil Justice Research Online <<http://www.civiljustice.info/goodf/1>>; Harry Orr Hobbs, ‘The Dispute Resolution Act 2011 (Cth) and the Meaning of “Genuine Steps”: Formalising the Common Law Requirement of “Good Faith”’ (2012) 23(4) *Australasian Dispute Resolution Journal* 249; Nadja

specified as a legislative requirement or consideration for any of the participating statutory bodies.⁵¹⁷ Not surprisingly, there were variable interpretations of ‘good faith’ and the extent to which this should be demonstrated a ‘positive criterion’ for referral to conciliation:

Good faith implies a level of consciousness and that you might form an intent to act in bad faith. ... I think you should be presuming that people will act in good faith and that we should be saying instead to people – these behaviours will assist the process and if these behaviours emerge, this won’t support this.⁵¹⁸

Where parties sort of express that they really just want to gather information to prepare their case – like a fishing trip – where you really get the sense that they are not really coming in good faith, they just want to have a go at the other person.⁵¹⁹

The term ‘good faith’ was also sometimes conflated with ‘goodwill’ and associated with an assessment of a party’s ‘willingness to resolve’ the complaint. It was also associated with an assessment by the statutory body whether resources should be committed to referring the matter to conciliation and trying to resolve the dispute:

We do rely on the good faith of the parties to enter into these negotiations in a way that is constructive.⁵²⁰

Alexander, ‘Good Faith as the Absence of Bad Faith : The Excluder Theory in Mediation’ (2009) 11(4) *ADR Bulletin* 75. The updated July 2015 Practice Standards for the National Mediator Accreditation System (NMAS) added a reference to good faith in the reasons why a mediation may be terminated: ‘5.1(c) a participant is not engaging in the mediation in good faith’: Mediator Standards Board, above n 39, 10.

⁵¹⁷ See discussion of legislative requirements for referrals to conciliation in Chapter Four [Part 4.3] of this thesis; of interest is that the *Health Ombudsman Act 2013* (Qld), which repealed the legislation for the Health Quality and Complaints Commission in Queensland, introduces at section 139 the ‘Requirement to negotiate in good faith’ for conciliation and provides six examples of ‘demonstrating good faith, such as ‘agreeing to meet at reasonable times proposed by another party’ and ‘not capriciously adding or withdrawing items for negotiation’.

⁵¹⁸ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵¹⁹ Interview with HDS-1, Conciliator (1 June 2011).

⁵²⁰ Interview with HS-4, Director/Manager (4 May 2012).

It [good faith] is also a tool to assist us to try to minimise wasting time and having people come along and doing something that is unproductive.⁵²¹

None of the respondents referred to any of the common law tests of good faith, nor indicated an awareness of the debates in the literature around the assessments of ‘good faith’ compared to ‘absence of bad faith’.⁵²² The concept of ‘good faith’ was therefore not well developed as a criterion and appeared to rely largely on judgments made by individual officers about party characteristics and attitudes.

5.5.5 Threshold for public interest issues

Respondents in interviews also identified challenges in determining the threshold for issues of ‘public interest’ or safety, as a criterion for deciding that a matter is not suitable for conciliation. As discussed in Chapter Four [Part 4.3], the majority of statutory bodies, particularly those dealing with health or disability complaints, are required by legislation to ‘take into account the public interest’ when considering referrals for conciliation, or specifically exclude such matters from conciliation.⁵²³ Legislative schemes variously provide for issues of public interest or safety to be referred to investigation, regulatory bodies such as AHPRA or professional boards, tribunals or other authorities.⁵²⁴ The interview responses revealed variable approaches adopted by statutory bodies to exclude issues on the basis of the complaint raising issues of ‘public interest’ or safety, and the extent to which conciliation was seen as being able to incorporate such issues. Some approaches to determining the threshold for a public interest issue included:

In considering the threshold for ‘public interest’ the conciliator considers the extent to which the complainant’s concerns represent issues of a more ongoing nature [or] whether the matter represents a systemic issue or flawed processes by a practitioner/provider

⁵²¹ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

⁵²² See, eg, Sourdin, above n,516; Alexander, above n 516.

⁵²³ See, eg, *Health and Community Services Complaints Act 2004* (South Australia) s 36; *Health Quality and Complaints Commission Act 2006* (Qld) s 75; *Health Complaints Act 1995* (Tas) s 32.

⁵²⁴ See discussion in Chapter Four [Part 4.3] of the role of the Australian Health Practitioner Regulation Authority (AHPRA) and the impact of the *Health Practitioner Regulation National Law*, above n 288. See, eg, *Health and Community Services Complaints Act 2004* (South Australia) s 36, s 43, ss 57–66; this legislation provides for exclusion of issues of public interest from conciliation and for matters to be investigated by the Commissioner and/or referred to a ‘registration authority’. See also *Anti-Discrimination Act 1998* (Tas) s 78(c), which provides for the Commissioner to refer a complaint if s/he ‘believes that the nature of the complaint is such that it should be referred for inquiry’.

where the issue may be likely to reoccur and [be] considered a threat to the public.⁵²⁵

[where there is] a significant departure [from standards] or a significant threat or risk to the public.⁵²⁶

[where there are a] series of allegations such as a boundary violation ... or that there was coercion in respect to a medical procedure.⁵²⁷

Where there are issues of safety on a community level. ... It's assessed on a case-by-case basis [not in a policy].⁵²⁸

A common issue identified by interview respondents was the lack of definition or policy guidance for determining when a public interest issue should exclude consideration of conciliation. A key consideration was how the 'protective function' of statutory bodies was conceptualised in relation to the role of resolving individual complaints:

[We have an] overriding responsibility to protect the public, promote public confidence in [the] quality of health services and to deal with complaints.⁵²⁹

Our complaints are not based on public interest matters because the complaint is about someone pursuing a private interest in that they have been discriminated against, but in an area of public life. So it's in a hybrid of private and public life. Public interest is, I guess, not defined. [The Commissioner/ Statutory Head] has discretion to define.⁵³⁰

The ways in which the criterion of 'public interest' was applied by statutory bodies also depended on legislative options for 'splitting complaints', as well as the interpretation of the legislative provisions for conciliation to incorporate such issues. One respondent spoke of the benefit of being able to 'split a complaint' so that some matters of concern to the complainant could be conciliated while issues of public interest were investigated or referred to other authorities:

⁵²⁵ Interview with HS-1, Director/Manager (15 April 2011).

⁵²⁶ Interview with HS-3, Director/Manager (11 May 2011).

⁵²⁷ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵²⁸ Interview with HDS-1, Conciliator (1 June 2011).

⁵²⁹ Interview with HS-1, Director/Manager (15 April 2011).

⁵³⁰ Interview with DEO-8, Director/Manager, (9 March 2011).

... not all public interest issues in my view have always have to ‘trump’ the individual [interest]...The law allows me to split complaints.⁵³¹

In contrast, another interview respondent outlined the ways in which conciliation could be designed to address issues of public interest:

There is a question of determining the threshold for a public interest issue because of the ways in which systemic changes can be achieved through conciliation. Possible systemic issues and areas for system improvement are noted in the conciliation report to the Commissioner. The Commissioner then writes to the provider highlighting these issues in an ‘education letter’ and asks what has been done. This enables systemic change and improvements to be an outcome of individual conciliations.⁵³²

Thus, while the majority of interview respondents identified public interest or systemic issues as reasons why a matter may be unsuitable for conciliation, the model of conciliation adopted by one of the statutory bodies included the potential to achieve systemic improvement as a reason to refer a matter to conciliation. This demonstrates the way in which decision making on the suitability of matters for conciliation is dependent on the particular model and approach to conciliation that has been adopted by each statutory body.

5.6 Decision making as an interactive and interdependent process

A key finding from the above analysis of explicit and implicit criteria and decision making processes used by statutory bodies is that decision making about the suitability of matters for conciliation is a complex process which is ‘interactive’ rather than a one-way diagnostic process. This is a largely unrecognised and unique issue for decision making on the suitability of matters for conciliation by statutory bodies. While criteria are most often described in terms of the characteristics of the parties or the dispute, the determination of suitability is also implicitly dependent on the capacity and resources of the organisation, and skills of individual officers, to address issues of willingness and attitudes of parties to conciliation and options for resolution. The decision making

⁵³¹ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵³² Interviews with HS-2, Commissioner/Statutory Head& Director/Manager (10 May 2011, 27 August 2012).

process therefore relies on an interactive consideration of factors relating to the parties and the nature of the dispute, and the capacity, skills and resources of the statutory body to work with the identified issues.

The findings on the use of ‘positive criteria’ on party characteristics such as the ability to ‘demonstrate good will in communication’ also suggests that decisions can also be influenced by the extent to which conciliation is conceptualised as a ‘consensual’ and ‘facilitative’ process. The predominance of concerns about the willingness and attitudes of parties also indicates that decisions may be influenced by individual officers’ skills or preparedness to work with levels of high conflict, emotion and entrenched positions. Given the focus on the subjective dimensions of party characteristics and conflict, there is also the question of potential influences of the types of cognitive or unconscious biases that have been identified in the literature on the psychology of decision making.⁵³³

At an organisational level, decisions may also be directly related to the resources available to devote to pre-conciliation meetings to prepare parties for conciliation or assisting them to make an informed decision to participate. As outlined in Chapter Four, interview respondents also identified co-conciliation as a way of increasing their capacity to deal with complex matters, particularly those involving multiple parties or high conflict. The majority of respondents, however, identified that co-conciliation was not often used, due to resource constraints. Decision making on suitability can thus be dependent on the capacity, skills and resources within an organisation, as well as the model of conciliation adopted. It can also be affected by a combination of organisational resources and external constraints, as highlighted by two interview respondents commenting on the challenges of complaints about health services:

We are limited in what we can do in a meeting because of the time health care providers can attend. And we often can’t have more than one meeting.⁵³⁴

It’s extremely hard to get doctors away from hospital – even to get their time on the premises.⁵³⁵

⁵³³ See discussion on the subjective nature of the assessment of the suitability of matters for ADR in Chapter Two [Part 2.6] of this thesis; see especially Sourdin, above n 214.

⁵³⁴ Interview with HDS-3, Conciliator (15 November 2010).

In addition, the determination of suitability may also depend on how each statutory body defines the threshold of ‘public interest’ issues and the extent to which these issues are addressed within the model and objectives of conciliation. The way in which conciliation is described in public documentation by statutory bodies and the extent to which systemic outcomes are ascribed to conciliation may also influence the attitudes of complainants who are motivated by a desire to prevent the same thing occurring for others. As discussed in Chapter Four, the role of conciliators as being ‘advocates for the law’ is not articulated in most descriptions of conciliation.⁵³⁶ Given the diversity of applications of conciliation, there may also be the need for each statutory body to correct parties’ misconceptions about the processes and potential outcomes of conciliation.

The concept of decision making as an interactive process was not articulated in the survey or interview responses. The way in which decision making is interdependent on the skill, capacity and resources of the statutory body to respond and address the particular issues and dynamics of the dispute was sometimes implied in responses but was not commonly recognised. The need for conciliators to educate and work with the parties on the potential benefits of conciliation was, however, a common theme in the responses on decision-making processes of statutory bodies.

5.6.1 Role of the conciliator as educator and adviser

As indicated earlier in the discussion in Part 5.3.4 on approaches to assessment of suitability, many interview respondents highlighted the importance of educating parties on the potential benefits of conciliation and options for resolving the dispute. Some respondents described this as being a positive duty of conciliators to enable informed decision making by parties:

The conciliator has a duty to talk in quite an open way about the benefits or advantages and disadvantages of conciliation.⁵³⁷

⁵³⁵ Interview with HDS-1, Conciliator (1 June 2011).

⁵³⁶ See discussion on ‘Ways in which conciliation and role of conciliator are defined and conceptualised’ in Chapter Four [Part 4.4] of this thesis.

⁵³⁷ Interviews with DEO-3, Director/Manager (3 March 2011/ 5 September 2012).

The initial discussion with the parties is the really important thing. It's how you package the dispute resolution process and reality-check the benefits of ADR.⁵³⁸

We introduce the discussion of conciliation right from the beginning ... You give people information in bite-sized chunks so they can absorb it.⁵³⁹

The examples of educative approaches to informed decision making did not, however, include specific approaches to enabling people with cognitive impairments to understand the information on conciliation, such as use of 'Easy English' materials or visual communication aids.⁵⁴⁰ These issues will be explored further in Chapter Six.

Respondents in interviews also outlined various approaches they may take to prepare parties for conciliation and to shift attitudes and approaches to conciliation:

The other thing I do is educate and help with reframing what they want to say. It's about trying to shift their approach and increase their ability to reach an agreement.⁵⁴¹

The conciliators generally provide a lot of coaching about how to approach the conciliation with the parties.⁵⁴²

It's about [trying] to get them thinking about the different ways and about what we could do to try to resolve this rather than deciding who is right or who is wrong.⁵⁴³

Respondents also talked about the need to take into account the outcomes sought by parties, and the challenges of providing advice on other available options such as tribunal decisions and litigation:

⁵³⁸ Interview with DEO-2, Director/Manager (10 September 2012).

⁵³⁹ Interview with DEO-8, Director/Manager, (9 March 2011).

⁵⁴⁰ See discussion on the use of 'Easy English' information and visual communication aides to explain conciliation processes in Lynne Coulson Barr, 'Finding the Right Key: Unlocking Approaches to Making Decisions about Suitability of Disputes for Conciliation. A Focus on Access for People with a Disability' (Paper presented at the 10th National Mediation Conference, 9 September 2010).

⁵⁴¹ Interview with HDS-1, Conciliator (1 June 2011).

⁵⁴² Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

⁵⁴³ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

In terms of assisting people to make an informed decision ... [it's] more straightforward if they are wanting acknowledgment of what happened, but a more complicated decision when they are seeking legal and financial outcomes.⁵⁴⁴

[We] attempt to understand from the complainant what would success of process and success of outcome look like.⁵⁴⁵

People may not get the vindication that what they want [by the tribunal]. There is always the risk with hearings that the outcome may not reflect either party's outcome.⁵⁴⁶

The role of conciliators as educators and advisers will be explored further below in terms of 'rethinking' approaches to determining suitability and the shift in emphasis on looking at 'ways in which the complaint can be made suitable for conciliation'.

5.7 Rethinking approaches to determining suitability

The findings on the complex interaction of factors that need to be taken into account in decision making about the suitability of matters for conciliation, point to the need to rethink approaches to determining suitability. The lack of reliable empirical criteria on which to base decisions, and the shifts towards presumptive approaches to the suitability of matters and 'early conciliation models', provide further support for rethinking the question of the suitability of a matter for conciliation. As discussed above, the question '*Is this matter suitable for conciliation?*' was turned around by one interview respondent, who emphasised the need to focus on 'what approaches may be needed to make it suitable'.⁵⁴⁷

Reframing the question in this way shifts decision making from a one-way diagnostic process to an approach which recognises the interactive and interdependent dimensions of determining suitability of matters for conciliation. 'Rethinking' the question about

⁵⁴⁴ Interview with HS-1, Director/Manager (15 April 2011).

⁵⁴⁵ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵⁴⁶ Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

⁵⁴⁷ Interview with DEO-9, Director/Manager (15 April 2011). This interview respondent added that 'The assessment involves asking what approach is right for this matter – this involves applying the legislation and ADR theory.'

suitability requires consideration of the findings on the range of explicit and implicit criteria discussed above, along with the findings on the contextual factors outlined in Chapter Four. These combined findings support the proposition that the primary assessment question for statutory bodies should change from *‘Is this matter suitable for conciliation?’* to *‘How could we make this matter suitable for conciliation?’*

Shifting the focus to approaches needed to ‘make a matter suitable for conciliation’ points to the need to take into account the skills and experience of conciliators, and identify strategies to address identified barriers to participation and resolution such as the key factors of willingness and attitudes of parties which were identified by statutory bodies in this research. It also requires clarity about the threshold used to determine public interest and systemic issues, and the extent to which these are addressed and included in the objectives and model of conciliation. Factors such as the availability of other complaint resolution options or other avenues to address the issues in the complaints, such as investigation or tribunal processes, need to be taken into account in providing the context for identifying approaches which may ‘make a matter suitable for conciliation’. Adopting this approach also requires statutory bodies to interpret the legislative requirements to make judgments about whether a matter is suitable or ‘may be resolved’ through conciliation in a similar way to the ‘presumptive’ approaches to the suitability of matters for conciliation.

While only one interview respondent reframed the key question as being *‘How do we make this matter suitable for conciliation?’*, the examples of the educative approaches adopted by conciliators, particularly in pre-conciliation processes, suggest that this way of thinking about suitability is implicit in some of the approaches adopted by statutory bodies in this research. Interview respondents also identified a range of other approaches which could be conceptualised as ways of ‘making matters suitable’ for conciliation. These included the development of ‘dispute resolution plans’ to address identified barriers to resolution, not asking about outcomes in complaint forms to enable more open exploration of outcomes, and ‘safeguarding’ options such as arrangements for parties to seek independent advice prior to finalising agreements.⁵⁴⁸ These types of strategy will be explored further in Chapter Six in relation to approaches to power imbalances, capacity

⁵⁴⁸ Examples provided by HS-3, DEO2, DEO-5, DEO-9, DEO-7.

and participation of people with disabilities. Further examples included a focus on the skills and strategies used by conciliators to deal with high levels of emotion or parties' negative attitudes to each other and/or conciliation:

[We] spend a lot a time with ... hostile parties ... explaining what we would do and how [we] will address the situation. That is where we might use, say, co-conciliation, as a strategy.⁵⁴⁹

[We] encourage people to understand that they may have strong feelings and how to manage them. Because [the conciliator] is experienced at this area ... we can get the necessary confidence or guarantees that we can get the behaviour that is needed to support the conciliation.⁵⁵⁰

The proposed change in approach to decision making on the suitability of matters for conciliation is also consistent with the emphasis articulated by a number of interview respondents on giving parties the opportunity to resolve the matter through conciliation rather than judging the likelihood of resolution:

Our obligation is to run a process that is fair and inclusive and gives every opportunity to the parties to resolve [the matter].⁵⁵¹

We're trying to set it up for the greatest opportunity for resolving the matter.⁵⁵²

Sometimes, when a matter is put into conciliation even though there is the feeling that people won't participate, [conciliators] can use their skills to talk to people about the value of participation and this can lead to a successful conciliation.⁵⁵³

These comments suggest implicit support for the proposition of developing a framework for decision making which starts with the question of '*How do we make this matter suitable for conciliation?*' and takes into account the interactive and interdependent dimensions of decision making on the suitability of matters for conciliation.

⁵⁴⁹ Interview with HDS-3, Conciliator (15 November 2010).

⁵⁵⁰ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵⁵¹ Interview with DEO-2, Director/Manager (10 September 2012).

⁵⁵² Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁵⁵³ Interview with HDS-3, Conciliator (15 November 2010).

5.8 Conclusion

While decisions on ‘unsuitability’ are reported as being made ‘rarely’ or ‘not often’, the willingness and attitudes of parties to participate in conciliation were identified as key considerations and challenges for most statutory bodies. Almost a third of reported factors taken into account in decision making on the suitability of matters for conciliation were expressed in terms of ‘positive criteria’ of attitudes or behaviour expected of parties. On the other hand, interview respondents also reported a trend towards presumptive approaches to suitability, and examples of criteria based on principles of fairness or informed decision making. The key findings point to the need to recognise decision making on the suitability of matters for conciliation as an interactive and interdependent process which needs to take into account how the statutory body or officer is able to work with the particular challenges associated with the characteristics of the parties or nature of the dispute. The benefits of rethinking approaches to determining suitability from the question of *‘Is this matter suitable for conciliation?’* to *‘How could we make this matter suitable for conciliation?’* will be further explored in Chapter Six in relation to matters involving people with disabilities.

CHAPTER SIX

APPROACHES TO POWER IMBALANCES, CAPACITY AND PARTICIPATION OF PEOPLE WITH DISABILITIES

6.1 Introduction

This chapter explores the way in which approaches adopted by participating statutory bodies take into account factors of parties' capacity and power imbalances in decision making on the suitability of disputes for conciliation. As outlined in Chapter Five, these factors were not commonly identified by statutory bodies as reasons why a matter would be found unsuitable for conciliation, or identified as key factors considered in decision making. This chapter, however, explores the extent to which approaches to issues of capacity of parties and power imbalances ensure appropriate access to conciliation, particularly in respect of direct participation of people with disabilities in conciliation processes. The concept of decision making on suitability of matters for conciliation as being 'interactive and interdependent' on the capacity, resources and skills of the organisation or individual officers to address potential barriers to effective participation in conciliation, is further explored in this chapter in relation to assessments of capacity. These approaches are considered in the context of contemporary rights-based approaches to capacity assessments and 'supported decision making' for people with disabilities. This chapter concludes with a discussion on the need to incorporate these approaches as part of 'rethinking' overall approaches to determining the suitability of matters for conciliation.

6.2 Overview of approaches to factors of power imbalances and capacity to participate

As discussed in Chapters One and Two, power imbalances and the capacity of parties to participate have been identified by NADRAC and ADR commentators as factors that should be taken into account in the determination of the suitability of matters for ADR. Concerns about the impact of power imbalances also feature in the criticisms of statutory conciliation, in terms of risks of compromise of substantive rights and fairness of process for vulnerable parties, and of potential harm or trauma through engaging with the

respondent in matters such as sexual harassment complaints.⁵⁵⁴ As these factors are particularly relevant for people with cognitive impairments or mental health issues, this research included a specific focus on how these factors were taken into account in decision making on the suitability of disputes involving people with disabilities.

As discussed in Chapter Five, only two statutory bodies specifically referred to power imbalances as factors taken into account in decision making on the suitability of matters for conciliation.⁵⁵⁵ This finding is somewhat surprising in light of the focus on power imbalances in ADR literature and in the particular criticisms of statutory conciliation. This result could, however, be explained by views held by interview respondents that power imbalances were to a large extent ‘inherent’ in matters referred to statutory conciliation and were the responsibility of conciliators to address in the way they conducted and designed the process. These views and approaches are explored in Part 6.3 below.

It is also possible that including a specific question in the survey about factors of power imbalances or capacity to participate may have acted to exclude these factors in answers to the general question about what factors were taken into account in decision making about the suitability of matters for conciliation. In any event, all respondents in the interviews indicated that these factors were carefully considered for all matters, with a common focus on what approaches or modes of conciliation may be needed to address these issues. Most responses indicated that approaches to power imbalances and questions about capacity to participate were often aimed at addressing both issues. As can be seen in Table 6 below, the most common approach used by statutory bodies was the involvement of advocates, support people or guardians in the processes, followed by adapting the mode of conciliation, such as the use of shuttle conciliation processes rather than face-to-face conferences. The way in which these approaches specifically addressed issues of power, or alternatively, aimed to facilitate access and participation of people with disabilities, will be explored in Parts 6.4–6.6 below.

⁵⁵⁴ See, eg, Baylis and Carroll, above n 15; see also discussion in Chapter Two [Part 2.4] and [Part 2.5] of this thesis.

⁵⁵⁵ Survey Response DEO-4; Survey Response DEO-6.

Table 6. Statutory bodies’ approaches to capacity to participate or power imbalances⁵⁵⁶

How are factors such as capacity to participate or power imbalances taken into account? (may be more than one comment per statutory body)	Interview respondents n=18
Encourage use of advocates/ support people/ legal representative /guardian	10
Mode of conciliation may change/be flexible to needs of parties (e.g. shuttle conciliation)	8
Being aware of the issue/taking it seriously/taking it into account in way conciliation is conducted	5
Supportive conciliation process, including through skills and approach of conciliators and clear explanation/language/ communication	4
Allow for cooling off period for agreements/settlements	3
Maintain/clarify impartiality of conciliator	3
Use of interpreters (including Auslan)	2
Use pre-conciliation processes to prepare both parties and ensure common ground	1
Matching conciliator skills/personal qualities to needs of parties	1
Apply principle of 'do no harm'	1

6.3 Specific approaches to addressing power imbalances

As discussed Chapter Two, ADR commentators and critics of statutory conciliation have pointed to the complex dynamics of power which may be present in matters considered for statutory conciliation, and the need to understand the different types of power in the context of the relationship between the parties.⁵⁵⁷ The way in which power was described by interview respondents most commonly reflected the notion of ‘structural power’ associated with objective resources, authority or options available to the parties.⁵⁵⁸ One interview respondent, however, highlighted an awareness of the need to ‘be careful not to

⁵⁵⁶ This table is also provided in Appendix E.13 for ease of comparison with other tables of results.

⁵⁵⁷ See, eg, Baylis and Carroll, above n 15, 289–90. See also Astor and Chinkin, above n 15, 126–7; Bryson, above n 20.

⁵⁵⁸ See discussion on types of power in Mayer, above n 171, 54; see also Baylis and Carroll, above n 15, 287–8; Condliffe, above n 5, 30.

make the assumption that the power imbalance is always one way',⁵⁵⁹ indicating an awareness of forms of power that complainants may bring to a dispute. The concerns raised by respondents about the challenges of dealing with issues of safety or hostility between parties were not commonly described in terms of power, but could also be seen as issues of 'emotional, psychological, cultural, physical or gender power'.⁵⁶⁰ Power imbalances in relation to people with disabilities were more likely to be described in terms of a combination of 'structural power' and 'personal' power linked to individual characteristics such as knowledge, capacity and communication skills.⁵⁶¹

Of interest is that the most common approach for addressing power imbalances was to involve advocates, support people, legal or other representatives in the conciliation process. The degree of reliance, however, ranged from one interview respondent who specified that 'it's the role of the conciliator to address that power imbalance, not the support person',⁵⁶² to another who put forward that power imbalances were addressed 'mostly through support people'.⁵⁶³ This latter approach contrasts with the focus in the literature on power imbalances being addressed through the skills, interventions or knowledge applied by conciliators, or modes of conciliation used.⁵⁶⁴ There was, however, a common view expressed by interview respondents of the role of the conciliator as being to 'level the playing field':

With power imbalances, I think advocacy support and support people help, but I think the pre-conciliation processes are the key for us to ensure that both parties are on a level playing field when they come into the conciliation process.⁵⁶⁵

The conciliators use their skills when dealing with power imbalances to 'level the playing field' ... conciliators are making adjustments or compensating to deal with power

⁵⁵⁹ Interview with DEO-8, Director/Manager (9 March 2011).

⁵⁶⁰ See Baylis and Carroll, above n 15, 287–8.

⁵⁶¹ Mayer, above n 171, 54. See also Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75.

⁵⁶² Interview with HDS-3, Conciliator (15 November 2010).

⁵⁶³ Interview with HDS-1, Conciliator (1 June 2011).

⁵⁶⁴ See, eg, Baylis and Carroll, above n 15, 289–90. See also Astor and Chinkin, above n 15, 126–7; Bryson, above n 20; Raymond, above n 1; Raymond, above n 20.

⁵⁶⁵ Interview with HDS-3, Conciliator (15 November 2010).

imbalances.⁵⁶⁶

Of interest is that the conduct of conciliation by the statutory body, in itself, was identified by one respondent as a key factor in addressing power imbalances between parties:

Power imbalances are probably not such an issue for us, as us being at the table pretty much addresses power imbalances reasonably well.⁵⁶⁷

It was, however, more common for respondents to identify ways in which the conciliation processes would be adjusted to address power imbalances. Such approaches were discussed in Chapter Five [Part 5.7] with respect to ways of ‘making a matter suitable for conciliation’.⁵⁶⁸ Eight of the 17 statutory bodies outlined specific ways in which processes would be adapted to address power imbalances, including issues of potential violence and perceived power imbalances associated with a person having a disability:

We would try for instance telephone or email negotiation ... shuttle or a telephone conference. So we can negotiate ways of dealing with it [other than face-to-face conference].⁵⁶⁹

We also do shuttle approaches to ameliorate power imbalances or where there has been a history of conflict.⁵⁷⁰

We are very focused on ensuring that we level up the playing field [for people with disabilities] and my way of doing that in that circumstance was to have the respondents in another room and do the shuttle.⁵⁷¹

The last example raises the question as to whether alternative approaches could be adopted to address the perceived power imbalance without limiting the participation of the person with the disability in the conciliation process.

⁵⁶⁶ Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

⁵⁶⁷ Interview with DS-1, Director/Manager (10 September 2012).

⁵⁶⁸ The approach was articulated in the interview with DEO-9, Director/Manager (15 April 2011).

⁵⁶⁹ Interview with DEO-2, Director/Manager (10 September 2012).

⁵⁷⁰ Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

⁵⁷¹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

Other approaches to addressing power imbalances included the provision of advice and ‘reality testing’ on proposed agreements, and the ‘safeguarding’ option of not requiring agreements to be signed on the day of the conference. These approaches reflect the adoption of a clear advisory role of the conciliator, as envisaged by NADRAC’s definition of statutory conciliation.⁵⁷² As one interview respondent explained:

If there was an agreement outside the range you would expect, we would heavily reality test that and would give them the time to think about it before signing an agreement. It’s a way of safeguarding when there are questions of capacity or if there is a concern that, because of power imbalance, a party may not be in a position to give informed consent to an agreement on the day of the conference ... otherwise it would not be fair.⁵⁷³

The focus on power imbalances as a factor to address within conciliation, rather than one which would preclude conciliation, is in many ways consistent with the revised references to power in the updated practice standards of the National Mediator Accreditation System (NMAS). Previous NMAS standards specified that: ‘Some disputes may not be appropriate for mediation processes because of power imbalance, safety, control and/or intimidation issues.’⁵⁷⁴ The July 2015 NMAS standards shift the focus to the responsibilities of the mediator to ‘consider the safety and comfort of participants’ and ‘be alert to changing balances of power in mediation and manage the mediation accordingly’.⁵⁷⁵ The steps and strategies recommended in the NMAS practice standards to manage issues of power and safety in mediation are similar to those outlined by interview respondents, such as using separate sessions and involving support people.⁵⁷⁶

6.4 Access and participation of people with disabilities

Interview respondents also provided examples of adjusting processes to accommodate the needs of people with disabilities, and often identified the need for conciliation processes

⁵⁷² See discussion of NADRAC’s definition of conciliation in Chapter Two [Part 2.2]; National Alternative Dispute Resolution Advisory Council, above n 68, 4–7.

⁵⁷³ Interview with DEO-7, Director/Manager (7 September 2011); similar approaches were articulated in interviews with DEO-2 and DEO-9.

⁵⁷⁴ National Mediator Accreditation System, *Australian National Mediator Standards: Practice Standards* (Amended March 2012) 12, ‘4.1 Power Issues’.

⁵⁷⁵ Mediator Standards Board, above n 39, 11, Part III Practice Standards ‘6. Power and Safety’.

⁵⁷⁶ *Ibid.*

to be ‘supportive’ of the needs of the person with the disability.⁵⁷⁷ These accommodations included shortening the amount of time set for conferences, having more than one conference, deferring conferences until the person was well enough to participate, and also a greater emphasis on the safeguarding option of deferring the signing of any agreement reached at a conference.⁵⁷⁸

We are very mindful of the time we set for the conference and give parties the option of having the conference over two days ... there’s nothing worse than if people are getting exhausted.⁵⁷⁹

[We consider if] someone for whatever reason – physical capacity or psychological, mental or emotional capacity – can’t continue, then we would call it a day and find another time. The important thing there is that we engage the complainant in the process and if that means adjusting the process, we would. It’s part of our policy on making us an accessible service.⁵⁸⁰

Flexible approaches are taken to support the person with the disability and enable them to participate as much as is possible, and a range of people [may be] involved in playing a support role to the complainant.⁵⁸¹

Of interest, is that when interview respondents were asked about approaches to conciliations involving people with a mental illness, there were notably fewer examples of accommodations compared to those provided for people with cognitive impairments or intellectual disabilities.⁵⁸² Apart from involving advocates or support people, the most common example provided was to postpone the conciliation until the person was ‘able to participate’.⁵⁸³ Three interview respondents put forward the need to consider not

⁵⁷⁷ See Appendices E13.1 and E13.2 on specific approaches adopted for people with cognitive impairments/disabilities and mental illness.

⁵⁷⁸ Examples of these types of adjustment were provided in interviews with HDS-3, DEO-2, DEO-3, DEO-4, DEO-7, DEO-8, DEO-9.

⁵⁷⁹ Interview with DEO-2, Director/Manager (10 September 2012).

⁵⁸⁰ Interview with DEO-8, Director/Manager (9 March 2011).

⁵⁸¹ Interview with DEO-4, Director/Manager & Conciliator (7 January 2011).

⁵⁸² See comparisons between reported approaches for people with cognitive impairments/disabilities and people with mental illness in Appendices E13.1 and E13.2.

⁵⁸³ See, eg, Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

proceeding with the conciliation if it was not going to be ‘productive’, while another three respondents highlighted potential dangers if a party was mentally ill, and the need for risk assessments.⁵⁸⁴

The above comments raise questions of whether such approaches are consistent with the obligations for equality of access and non-discriminatory processes under the *United Nations Convention on the Rights of Persons with Disabilities* and Commonwealth and state legislation.⁵⁸⁵ As discussed in Chapter Two [Part 2.7], the work by Dan Bernstein in the United States on ‘mental health mediation’ draws attention to the way in which biases and preconceptions about behaviours attributed to people with mental illnesses may inappropriately limit access to mediation. Bernstein advocates that ‘universal design principles’ should be applied to create mediation processes which are accessible and supportive for all participants, including people with disclosed or undisclosed mental illnesses.⁵⁸⁶ These principles will be considered as part of the proposed framework for ‘an enabling model of decision making’ for the suitability of matters for conciliation, which will be discussed in the concluding chapter.

Statutory bodies dealing with discrimination complaints were more likely to identify decisions on suitability to be discriminatory for a person with a disability if they were based on judgments on capacity to participate. As one respondent observed:

⁵⁸⁴ These issues of risk associated with mental illness were raised in interviews with HDS-1, HDS-4, and DEO-5.

⁵⁸⁵ See discussion in Chapter One [Part 1.4] on the obligations for equality of access and non-discriminatory processes under the *United Nations Convention on the Rights of Persons with Disabilities* and Commonwealth and state legislation.

⁵⁸⁶ Bernstein, above n 225. The ‘universal design principles’ put forward by Bernstein include: ‘Equitable Use’, ‘Flexibility in Use’, ‘Simple and Intuitive in Use’, ‘Perceptible Information’, ‘Tolerance for Error’ and ‘Appropriate Space’. As discussed in Chapter Two [Part 2.7] ‘Universal design’ is defined in the *United Nations Convention on the Rights of Persons with Disabilities* as ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design’: *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), Article 2 Definitions.

I don't think we would ever discount the possibility of conciliation because of issues of a person's capacity. In fact, I think that would be problematic under our Act if we were to do that. It could be seen as discrimination.⁵⁸⁷

Other respondents spoke in terms of obligations to prioritise access to their complaints processes and to ensure that the person with a disability would not be disadvantaged:

We give priority to people with disabilities, particularly with psychiatric or mental illness. If there are issues of access to do with mobility, [or] disabilities we also give that priority.⁵⁸⁸

In considering the suitability of conciliation for a matter involving a person with a disability, conciliators need to ensure that the person will not be disadvantaged.⁵⁸⁹

Some respondents also questioned whether a person's disability was relevant to decision making on referrals to conciliation:

We deal with people with a disability but I'm not sure that it impacts in terms of suitability for conciliation or criteria. If a matter is suitable then it's suitable for conciliation. It doesn't really matter, it just affects what adjustments you might need to make.⁵⁹⁰

I would say that this would not necessarily impact on whether or not we would conciliate.⁵⁹¹

A more significant issue identified in responses was the difficulty most interview respondents had in providing many examples of people with cognitive impairments or a mental illness directly participating in conciliation processes.⁵⁹² This was commonly attributed to the perceived barriers to making a complaint for people with these disabilities:

⁵⁸⁷ Interviews with DEO-3, Director/Manager (3 March 2011, 5 September 2012).

⁵⁸⁸ Interview with DEO-8, Director/Manager (9 March 2011).

⁵⁸⁹ Interview with DEO-9, Director/Manager (15 April 2011).

⁵⁹⁰ Interview with HS-4, Director/Manager (4 May 2012).

⁵⁹¹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

⁵⁹² See, eg, Interview with HDS-1, Conciliator (1 June 2011) who replied to the question about examples of conciliations involving people with cognitive impairments or a mental illness, 'Not many, actually'.

We don't have many [complaints] because people with intellectual impairments tend to go to specialised services and people tend not to complain because they worry that they will lose the service.⁵⁹³

We struggle with how to best involve a person with a disability ... The percentage of people with a disability who make complaints themselves is incredibly low. The majority of complaints in the disability area are made by family members and advocates.⁵⁹⁴

The responses to questions on the participation of people with disabilities in conciliation therefore pointed to a more fundamental question about access to complaints processes for people with disabilities and the extent to which potential barriers to making a complaint are addressed by statutory bodies. Most interview respondents expressed a desire to increase the accessibility of their processes for people with a disability, noting the limited occasions where people with cognitive impairments access complaint processes or directly participate in conciliation processes. The barriers to people with disabilities making a complaint and accessing ADR processes have been well documented, with many commentators highlighting the need for proactive strategies to ensure equal and fair access to these processes.⁵⁹⁵

⁵⁹³ Interview with HS-3, Director/Manager (11 May 2011).

⁵⁹⁴ Interview with DS-1, Director/Manager (10 September 2012).

⁵⁹⁵ Bernadette McSherry and Susan Klauber, for example, document the potential barriers and issues of accessibility of complaint processes for mental health consumers in jurisdictions across Australia: see Bernadette McSherry and Susan Klauber, 'Who Do I Turn to? Resolving Complaints by Mental Health Consumers and Carers' (2011) 18(4) *Journal of Law and Medicine* 669. Daphne Wood also outlines the barriers experienced by mental health consumers to making a complaint, including power imbalances, concerns about consequences of complaining and not being viewed as 'credible': see Daphne Wood, 'Acting on Complaints about Mental Health Services: Implications of Power Imbalances' (1996) 10(3) *Journal of Management in Medicine* 31. The Disability Services Commissioner, Victoria produced a guide for services to develop an accessible complaints process for people with disabilities: Disability Services Commissioner, *Good Practice Guide and Self Audit Tool: Developing an Effective Person Centred Complaints Resolution Culture and Process* (Office of the Disability Services Commissioner, Victoria, 2nd ed, 2013). Chapter Four of this guide outlines the barriers and fear associated with making a complaint for people with disabilities; see also discussion on issues of access to ADR processes for people with disabilities in Tania Sourdin, 'An Alternative for Who? Access to ADR Processes' (2007) 10(2) *ADR Bulletin* 26; Tania Sourdin and Louise Thorpe, 'How Do Financial Services Consumers Access Complaints and Dispute Resolution Processes?' (2008) 19(1) *Australasian Dispute Resolution Journal* 25.

6.5 The role of advocates, representatives and support people

As outlined in Part 6.2 above, the most common approach used by statutory bodies to address issues of capacity to participate or power imbalance was to involve advocates, representatives and/or support people in the processes. This was particularly evident in the interview responses on approaches adopted for people with cognitive impairments/disabilities.⁵⁹⁶ This reliance on advocates or support people raises questions about the extent to which decision making processes take into account the right of a person with a disability to *directly* participate in conciliation on an equal basis to other people, and ways in which the conciliator could facilitate this. Interview respondents commonly expressed reservations about proceeding with a conciliation involving a person with a cognitive impairment or mental health issue if they did not have an advocate or support person:

I don't think I've ever done one where the person (with a cognitive impairment/intellectual disability) has been on their own. If that were the case, I would try to explore this in pre-conciliation and talk to them about having a support person. If they wanted to go ahead without a support person, I wouldn't say no. I have a role to make sure that the person is heard and not disadvantaged.⁵⁹⁷

If someone didn't want to bring a support person, and we didn't think it would be damaging, we would give it a go.⁵⁹⁸

One of the things we are very conscious of is that if it would appear that someone is likely to need an advocate, we will try to refer and engage one. That is a really big thing.⁵⁹⁹

Despite this reliance on advocates, some interview respondents put forward concerns about the variability of advocates to adequately represent their clients and the negative impact of adversarial approaches adopted by some advocates and legal representatives. These concerns reflect the commentary in ADR literature on the need to address the 'assumptions of an adversarial culture' which legal representatives and advocates may

⁵⁹⁶ See Appendix D11.1 Approaches to people with a cognitive impairment/disability.

⁵⁹⁷ Interview with HDS-1, Conciliator (1 June 2011).

⁵⁹⁸ Interview with DEO-1, Conciliator (1 June 2011).

⁵⁹⁹ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

bring into a conciliation process.⁶⁰⁰ Interview respondents, however, did not refer to any preferred models or roles of advocates, or indicate an awareness of applicable standards such as the National Disability Advocacy Standards, which include a focus on enabling the person with a disability to participate as fully as possible in decisions.⁶⁰¹

The experience of involving advocates is variable as some advocates can be demanding of rights and not willing to conciliate. Some advocates can, however, translate their approach into a conciliation process. The presence of advocates can sometimes be a reason for not succeeding in conciliation.⁶⁰²

If you are going to try to resolve the complaint, they [people with disabilities] still have to participate in some way. Usually conciliation is most effective when the parties to the

⁶⁰⁰ See, eg, Boulle, above n 3, 296. Boulle discusses the way in which lawyers may see their main role in mediation/conciliation as being to advocate for the merits of their clients' case in terms of liability and damages; a number of commentators have highlighted the need for 'new advocacy' roles for lawyers in mediation and for clarity of the type of contribution the lawyer will make to the process. See, eg, Olivia Rundle, 'A Spectrum of Contributions that Lawyers Can Make to Mediation' (2009) 20(4) *Australasian Dispute Resolution Journal* 220; Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (CCH Australia Ltd, 2010); Donna Cooper, 'The "New Advocacy" and the Emergence of Lawyer Representatives in ADR' (2013) 24(3) *Australasian Dispute Resolution Journal* 178; Olivia Rundle, 'Lawyers' Perspectives on "What is Court Connected Mediation for?"' (2013) 20(1) *International Journal of the Legal Profession* 33; Donna Cooper, 'Representing Clients from Courtroom to Mediation Settings: Switching Hats between Adversarial Advocacy and Dispute Resolution Advocacy' (2014) 25(3) *Australasian Dispute Resolution Journal* 150; Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40 (3) *Monash University Law Review* 758; Bobette Wolski, 'On Mediation, Legal Representatives and Advocates (Australia)' (2015) 38(1) *University of New South Wales Law Journal* 5.

⁶⁰¹ Department of Social Services, *Disability Advocacy Standards and Key Performance Indicators* (2012) Standard 3. <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/standards-and-quality-assurance/disability-services-standards-advocacy-standards-2012>>. See also discussion by Jim Simpson on the variety of different models of advocacy and support for people with disabilities, and the need to ensure that the person's rights or interests are protected by the model being used in ADR processes: above n 222. One of the participating statutory bodies, the Australian Human Rights Commission, has endeavoured to address the general role and expectations of advocates and legal representatives in conciliations by producing a specific information sheet. See Australian Human Rights Commission, *Information for advocates and lawyers participating in conciliation* <<https://www.humanrights.gov.au/information-advocates-and-lawyers-participating-conciliation>>.

⁶⁰² Interviews with HS-2, Commissioner/Statutory Head & Director/Manager (10 May 2011, 27 August 2012).

dispute participate directly and actively in particular in the exploration of the issues and generating options ... We get all sorts of problems with advocates not understanding the jurisdiction [and] ADR processes.⁶⁰³

The above comment was one of the few that highlighted the importance of direct participation of the person with a disability, and the need for the conciliator to take an educative and potentially interventionist role in conciliation to ensure an effective resolution process. One respondent, however, raised questions about the capacity of a conciliator to adequately facilitate the participation of a person with cognitive impairments or mental health issues, pointing instead to the need to consider the inclusion of ‘supported decision makers’ in conciliation processes:

I think it’s fanciful to imagine around complex or sensitive issues that a person can do it in their own right and indeed that a conciliator can have the dual capacities to conciliate with the parties and also deal with those communication issues ... I think that’s where [supported decision making’s] a very promising area ... I think there is merit in thinking about the role of a supported decision maker for the person with whatever their impairment is.⁶⁰⁴

The above interview respondent was the only one who conveyed an awareness of ‘supported decision making’ as a model for supporting people with disabilities to effectively exercise legal capacity on an equal basis with other members of the community, as is required under Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities*.⁶⁰⁵ While advocates and representatives may provide support to a person with a disability, ‘supported decision making’ is distinguished by its emphasis on a ‘process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters’,⁶⁰⁶ with the key feature

⁶⁰³ Interview with DEO-7, Director/Manager (7 September 2011).

⁶⁰⁴ Interview with HDS-4, Commissioner/Statutory Head (6 January 2011).

⁶⁰⁵ Article 12(3) of the *United Nations Convention on the Rights of Persons with Disabilities* states that: ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

⁶⁰⁶ Definition of ‘supported decision making’ provided by the United Nations Office of the High Commissioner (2009), cited in Gooding, above n 62, 432.

being that ‘control over decision-making rests with the supported person’.⁶⁰⁷ Supported decision making relies on knowledge and a relationship with the person, and differs from the ‘representative’ model often adopted by advocates.⁶⁰⁸ A supported decision-making framework requires explicit consideration of the types of support a person may rely on to assist them to process information and make decisions, rather than assuming that an advocate or someone nominated as a support person can play this role. The apparent lack of awareness of supported decision-making frameworks among interview respondents and the predominant reliance on advocates and support people for conciliating matters involving people with disabilities point to the need for greater clarity on the perceived roles of advocates and support people in ‘making matters suitable’ for conciliation.⁶⁰⁹

As part of this research, Graeme Innes, who at the time held the position of Disability Discrimination Commissioner with the Australian Human Rights Commission, was invited to comment on approaches to access and participation of people with disabilities in conciliation and potential roles of supported decision makers. Of particular interest is his view that the roles of advocates and support people in conciliation processes should not be seen as any different for people with disabilities than for people without disabilities:

I believe there are real benefits of having advocates and support people in a conciliation process. ... I think there are two key benefits in my view. And neither have anything to do with disability. One is that, often in those tense and sometimes stressful situations, it’s useful to have someone there who is on your side, so to speak. But the other reason ... is that they can often play that agent of reality role which no one in the process can play

⁶⁰⁷ Penny Weller, ‘Developing Law and Ethics. The Convention on the Rights of Persons with Disabilities’ (2010) 35(1) *Alternative Law Journal* 8, 10. Weller highlights that while the full meaning of ‘supported decision making’ is ‘yet to be settled’, its ‘definitive feature’ is that ‘control over decision-making rests with the supported person’. See also People with Disability Australia, Australian Centre for Disability Law and Australian Human Rights Centre, Submission to Australian Law Reform Commission, *Review of Equal Recognition Before the Law and Legal Capacity for People with Disability*, January 2014, 1. People with Disability <<http://www.pwd.org.au/pwda-publications/submissions.html>>.

⁶⁰⁸ See discussion on the features of supported decision making in Gooding, above n 62, 431.

⁶⁰⁹ One interview respondent explicitly linked the presence of advocates or support people to the suitability of matters involving vulnerable people, including people with a mental illness, stating ‘It often can change something that would otherwise be unconciliable [sic] to something that is.’ Interview with DEO-1, Conciliator (1 June 2011).

effectively. And the reason why no one else can do this as effectively is because no one else is really on your team. ... So for me, an advocate or support person has nothing to do with the person's disability, it's about facilitating a mediation process ... It is up to the ... conciliator to ensure that ... their disability does not too radically impact on the power imbalance.⁶¹⁰

The above approach to the involvement of advocates or support people is similar to the 'universal design approach' advocated by Berstein, which focuses on creating processes that facilitate the participation of all parties and 'normalises' the types of supports or adaptations that may be required to provide an effective resolution process.⁶¹¹ These concepts are particularly relevant when considering approaches to issues of the capacity of a person to participate in conciliation.

6.6 Approaches to issues of capacity to participate in conciliation

As discussed in Chapter Five, capacity to participate was identified by only three statutory bodies as a factor considered in decision making about the suitability of matters for conciliation, and only one respondent identified 'Risk to parties of participating due to disability/mental illness of complainant' as a common reason why a matter may not be referred to conciliation.⁶¹² The low number of responses could be attributed to the inclusion of a specific question about 'capacity to participate' in the survey, and mirrors the proportion of responses which identified power imbalances as a factor that was taken into account in decision making about the suitability of matters for conciliation. These results could also be attributed to the reported low numbers of people with disabilities accessing and participating in conciliation processes, as discussed above in Part 6.4.

The interview responses to approaches to matters involving people with disabilities, however, indicated that capacity to participate was a significant consideration, and that it was most commonly addressed through the involvement of advocates, representatives and support people. This reliance on advocates, representatives or support people was also reflected when the question of capacity to participate was pursued in interviews:

⁶¹⁰ Interview with DEO-10, Graeme Innes, Former Disability Discrimination Commissioner (Sydney, 13 September 2012).

⁶¹¹ See Berstein, above n 225; see also discussion in Chapter Six [Part 6.4] of this thesis.

⁶¹² See Chapter Five [Part 5.4.1] and [Part 5.4.2] and Appendices E.11 and E.12.

If there is any question mark about capacity, then we would be following that up and if they haven't got the capacity to enter into an agreement, then we would look into guardianship issues.⁶¹³

If you get an indication that someone may not have capacity, either from the complaint or how they interact with us, we will explore that with them and find out if there is any support for them.⁶¹⁴

We wouldn't not refer a matter to conciliation for those reasons [if there were questions about capacity] but we would look at the availability of advocacy support and whether we needed to have a paper-based process first.⁶¹⁵

These approaches to issues of a person's capacity to participate in conciliation reflected the types of diagnostic approaches to party characteristics which were discussed in Chapter Five. In a similar way to the identified issues of willingness and attitudes of parties to participate in conciliation, interview respondents referred to capacity as if it were an objective criterion and did not identify the interdependency of the capacity, knowledge and skills of the statutory body, or individual officer, to facilitate the person's participation in the process.

The growing literature on approaches to capacity required under the *UN Convention on the Rights of Persons with Disabilities* highlight the concept of a continuum of capacity, and of capacity being 'decision-specific' and dependent on context and the availability of support for decision making.⁶¹⁶ These concepts were not identified in any of the approaches outlined by interview respondents. As indicated above, there was also a lack

⁶¹³ Interviews with DEO-5, Director/Manager & Conciliator (29 December 2010, 28 March 2011).

⁶¹⁴ Interview with DEO-7, Director/Manager (7 September 2011).

⁶¹⁵ Interview with HDS-3, Conciliator (15 November 2010).

⁶¹⁶ See, eg, discussion of the concept of capacity and its meaning under the *United Nations Convention on the Rights of Persons with Disabilities* in People with Disability Australia, Australian Centre for Disability Law and Australian Human Rights Centre, above n 609; see also Gooding, above n 62; Weller, above n 609; Penny Weller and Cath Roper, 'Supported Decision Making as a Strategy and Approach for Recovery Focused Practice' (Autumn/Winter 2013) *New Paradigm* 6; Penelope Weller, 'Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice' (2014) 23(4) *Griffith Law Review* 498 [online].

of recognition of supported decision making as a preferred response under the *United Nations Convention on the Rights of Persons with Disabilities* ‘when a person’s decision-making ability is brought into question due to impairment or disability’.⁶¹⁷ Such concepts are identified in disability rights literature as being vital for giving effect to Article 12 of this Convention, and for enabling people with disabilities to exercise legal capacity on an equal basis with other members of the community and limit reliance on ‘substitute decision makers’.⁶¹⁸ These concepts are also emphasised in the Australian Law Reform Commission’s 2014 report on ‘Equality, Capacity and Disability in Commonwealth Laws’.⁶¹⁹ The way in which a person’s capacity and decision making can be understood as ‘contextual’ and ‘interdependent’ on the quality of communication and support available to them is highlighted by Penny Weller in her commentary on capacity,

⁶¹⁷ Gooding explains supported decision making in the following terms: ‘At the heart of supported decision-making ... is the proposition that instead of delegating a person’s decision-making power to another, the individual can be provided with necessary supports and accommodation to make and communicate decisions according to his or her wishes. This might consist of having family and friends to help the person understand information and communicate wishes, or any other situation where support would assist an individual to express and articulate a decision ... While the interdependent nature of autonomy and decision-making is often more obvious for people with disabilities, and particularly those with decision-making impairments, such interdependency is seemingly shared by all people, to a greater or lesser extent.’: above n 62, 431, 434–5.

⁶¹⁸ See *United Nations Convention on the Rights of Persons with Disabilities*, above n 605. See also Gooding, above n 62; Weller, above n 609; People with Disability Australia, Australian Centre for Disability Law and Australian Human Rights Centre, above n 607; Penny Weller, ‘Supported Decision-Making and the Achievement of Non-Discrimination: The Promise and Paradox of the Disabilities Convention’ in Bernadette McSherry (ed), *International Trends in Mental Health Laws* (Federation Press, 2008); Penny Weller, ‘The Right to Health. The Convention on the Rights of Persons with Disabilities’ (2010) 35(2) *Alternative Law Journal* 66; Penelope Weller, ‘Informed Consent, Incapacity and the CRPD: Human Rights Perspective on the Right to Consent’ (Paper delivered to 2nd World Congress on Adult Guardianship, Melbourne, 15 October 2012) <<https://wnusp.files.wordpress.com/2014/04/informed-consent-and-crp-d-weller-2012.pdf>>.

⁶¹⁹ Australian Law Reform Commission, above n 62, 3. The ALRC recommended that reforms of relevant Commonwealth, state and territory laws be consistent with ‘National Decision Making Principles’ which included the principle of ‘equal right to decisions’ and that ‘Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.’

supported decision making and Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities*:

Requiring the provision of support recognises that capacity is a variable human attribute. All persons, whether or not they have a disability, are more or less able to reason and understand the content and consequences of a course of action depending on how much information they receive, in what form and context the information is received, how much time is provided to process the information, and how much opportunity there is to discuss or test the information with trusted persons.⁶²⁰

Weller highlights these issues in relation to the right of people with disabilities to be supported to provide ‘informed consent’ to health care. These approaches, however, have equal applicability to the right of people with disabilities to be supported to make ‘informed decisions’ to participate and reach agreements in conciliation. As discussed in Chapter Five [Part 5.5.2], the principle of ‘informed decision making’ was one that was highlighted by some interview respondents as a key factor to consider in decision making on the suitability of matters for conciliation.⁶²¹ ‘Informed consent’ is also specified as an ethical principle of mediation in the practice standards of the National Mediator Accreditation System, and thus implicitly requires attention to approaches which may be required for all parties to provide informed consent or make informed decisions.⁶²²

The lack of recognition of the above concepts of capacity and supported decision making in the interview responses is not surprising, given the limited attention in ADR literature on access and participation of people with disabilities in ADR processes.⁶²³ These

⁶²⁰ Weller, above n 609, 10.

⁶²¹ See discussion in Chapter Five [Part 5.5.2] of this thesis on interview responses which emphasised the principle of ‘informed decision making’ by parties as a criterion for suitability of matters for conciliation: Interview with DEO-9, Director/Manager (15 April 2011); Interview with DEO-2, Director/Manager (10 September 2012); Interview with DEO-7, Director/Manager (7 September 2011).

⁶²² Mediator Standards Board, above n 39, 10–14, Part III Practice Standards, ‘10.1 Knowledge, Skills and Ethical Principles’.

⁶²³ The literature review for this research revealed a very limited number of Australian references on the participation of people with disabilities in ADR processes or approaches to issues of capacity to participate and ‘reasonable accommodations’, in contrast to the attention to these issues in the USA in relation to mediation processes under the *Americans with Disabilities Act 1990* (ADA), as discussed in Part 6.7 of this thesis. The questions of capacity and involvement of people with cognitive impairments in mediation is,

concepts, however, have significant application to decision making about the suitability of matters for conciliation when issues of capacity to participate are raised, as they shine a light on the need to consider the ‘capacity’ of the statutory body or individual officer to facilitate effective participation through the inclusion of appropriate supports and processes. These concepts also require attention to the expected role of advocates or support people, and a focus on enabling the person with the disability to fully participate and make decisions within a supported decision-making framework. While the issue of a person’s capacity to participate was not identified as a common factor in decisions that matters were unsuitable for conciliation, the interview responses nonetheless point to the benefits of rethinking approaches to capacity and enabling access for people with disabilities. The proposed rethinking of these approaches reflects similar themes to those outlined in Part 5.7 for rethinking approaches to determining the suitability of matters for conciliation.

6.7 Rethinking approaches to capacity and enabling access for people with disabilities

The findings on criteria and approaches to decision making on the suitability of matters for conciliation which were outlined in Chapter Five identified the ‘interactive and interdependent nature’ of this decision making and the need to take into account the capacity and resources of the organisation, and the skills of individual officers, to address issues identified in relation to party characteristics or the nature of the dispute. Changing the question from ‘*Is this matter suitable for conciliation?*’ to ‘*How could we make this matter suitable for conciliation?*’ is consistent with approaches to the issue of capacity which shift the focus from assessing a person’s capacity to participate to a focus on the capacity and obligation of the statutory body or individual officer to facilitate their participation. This shift in focus or rethinking of approaches to capacity has been articulated and developed by practitioners providing disability mediation in the United States under the *Americans with Disabilities Act 1990 (ADA)*.⁶²⁴

however, receiving some attention in relation to decision making in elder care and guardianship matters. See, eg, Carroll, above n,216; see also section A. Articles/Books/Reports in the Bibliography.

⁶²⁴ *Americans with Disabilities Act 1990* 42, ch 126 USC § 12101(1990). An ADA Mediation Standards Work Group was established to develop standards which have been the subject of further development and debate through features on ‘Disability Mediation’ hosted by Mediate.com. See Judith Cohen, ‘Making

Specific guidelines and standards have been developed for ‘ADA mediation’ in the United States which focus on approaches to capacity and requirements for ‘reasonable accommodations’ to mediation processes in order to promote access and participation of people with disabilities.⁶²⁵ In contrast, the Practice Standards for the National Mediator Accreditation System in Australia do not include any reference to considerations of a party’s capacity or disability.⁶²⁶ The ‘ADA Mediation Guidelines’ require mediators to ensure that ‘all aspects of mediation are accessible’, with specific training in substantive law, procedural fairness and disability awareness, including accommodations that may be needed.⁶²⁷ Of note is that these guidelines have specifically precluded a ‘diagnostic’ approach to capacity,⁶²⁸ and have led to the development of frameworks which explicitly

Mediation Sessions Accessible To People With Disabilities’ (June 2000) Mediate.com
 <<http://www.mediate.com/articles/cohen.cfm>> ; Judith Cohen, ‘Unique Issues In Mediating ADA Disputes’ (July 2000) Mediate.com <<http://www.mediate.com/articles/cohenunique.cfm>> ; Peter Maida, ‘Key Bridge Foundation Standards Of Conduct For DOJ ADA Mediation’ (November 2000) Mediate.com
 <<http://www.mediate.com/articles/keybridgestds.cfm>>; Judith Cohen, ‘ADA Mediation – Important Challenges Remain’ (October 2002) Mediate.com
 <<http://www.mediate.com/ADAMediation/editorial3.cfm>> ; Judith Cohen, ‘ADA Mediation Guidelines: An Ongoing Endeavor’ (March 2003) Mediate.com <<http://www.mediate.com/articles/cohen4.cfm>> ; Erica Wood, ‘Addressing Capacity: What Is the Role of the Mediator?’ (July 2003) Mediate.com
 <<http://www.mediate.com/articles/woodE1.cfm>> ; Jeanne Cleary, ‘On the Question of a Party’s Capacity to Use Mediation’ (2015) Mediate.com <<http://www.mediate.com/articles/ClearyJ2.cfm>>.

⁶²⁵ See ADA Mediation Standards Work Group, Kukin Program for Conflict Resolution at Benjamin N Cardozo School of Law and the Cardozo Journal of Conflict Resolution, above n 224; see also U.S. Equal Employment Opportunity Commission, National Council on Disability and U.S. Department of Justice above n 224. Similar guidelines have also been developed in British Columbia, Canada; see British Columbia Mediator Roster Society, above n 224.

⁶²⁶ Mediator Standards Board, above n 39.

⁶²⁷ ADA Mediation Standards Work Group, Kukin Program for Conflict Resolution at Benjamin N Cardozo School of Law and the Cardozo Journal of Conflict Resolution, above n 224, 5, 8–9.

⁶²⁸ Ibid 6. The ADA Mediation Guidelines specify that ‘capacity is a decision-specific concept’ and require the mediator to determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively and not to ‘rely solely on a party’s medical condition or diagnosis’. Explaining the application of the ADA Mediation Guidelines on ‘Party Capacity’, Judith Cohen writes that: ‘This mediation capacity assessment needs to be respectful and “collaborative” ... the mediator and the party, with or without a disability, work together on identifying accommodations, modifications or adjustments that would enable the party’s fuller comprehension and participation.’ See Judith Cohen, ‘ADA Mediation Guidelines: An Ongoing Endeavor’ (March 2003), above n 624.

shift the focus from ‘determining capacity’ to ‘facilitating competencies’ of all parties to participate in mediation.⁶²⁹ These approaches are consistent with the ‘universal design principles’ advocated by Berstein, with the emphasis on creating mediation processes which are accessible and supportive for all parties.⁶³⁰

Commentators on the development of ADA mediation practice in the United States commonly emphasise that an individual’s capacity to participate in mediation is interactive and therefore dependent on the mediator whose role should be to facilitate competencies for every individual to participate, regardless of a party’s disability or other characteristics.⁶³¹ The authors who introduced the ‘competency facilitation framework’ referred to *competencies* as ‘the myriad abilities used to access mediation’ and raised the ethics of mediators ‘assessing capacity to mediate’:

The term *capacity* may mislead mediators and make a complex individual unidimensional. It centers solely on the party, not the mediator’s abilities, the relationship between the mediator and the parties, or the interrelationship of the parties ... the capacity of an individual is often intertwined with the relationships the individual has with others in the mediation.⁶³²

These approaches to capacity are consistent with the proposition advanced in Chapter Five to rethink the diagnostic approach to party characteristics for determining suitability of matters for conciliation and to change the question to ‘*How can we make this matter suitable for conciliation?*’ The alignment of these approaches is highlighted by the following reframing of the question of a party’s capacity to mediate by an ADA mediator:

⁶²⁹ Susan Crawford, Lewis Dabney, Judy T Filner and Peter Maida, ‘From Determining Capacity to Facilitating Competencies: A New Mediation Framework’ (2003) 20(4) *Conflict Resolution Quarterly* 385

⁶³⁰ See Berstein, above n 225.

⁶³¹ Crawford et al, above n 629, 391; see also Kathleen Blank ‘It’s Not a Disability Issue’ (2003) 21(6) *Alternatives to the High Cost of Litigation* 117. Blank highlights the interdependency of capacity and the availability of support: ‘Capacity and ability are also highly responsive, and indeed dependent upon, support from the outside environment. This is true for all human beings, whether or not a disability is part of their make-up.’

⁶³² Crawford et al, above n 629, 390–2.

The question is not so much ‘does the party have capacity to mediate’ as ‘can the party mediate with support?’ and ‘what can the mediator do to facilitate understanding of the party?’⁶³³

The findings on decision making and criteria on the suitability of matters for conciliation, and the approaches to capacity and the participation of people with disabilities, thus support the need to develop an ‘enabling model of decision making’ which will be outlined in the final chapter. This model of decision making shifts the focus from a party’s characteristics or capacity to the capacity of the organisation or officer to facilitate their participation in a conciliation process, and incorporates objectives of ensuring fair and effective access to conciliation as a means of resolving disputes, particularly for people with disabilities.

The approaches to disability mediations under the ADA Mediation Guidelines in the United States, as well as related initiatives in Canada, offer a range of detailed strategies and ‘accommodations’ to facilitate the participation of people with disabilities in ADR processes⁶³⁴ These include use of plain language and processes for checking understanding of the parties, use of visual and audio communication aids, reminders about what is being discussed, awareness of disability ‘etiquette’ in interactions, clarity on the role of support people, choice of venue, and timing and pace of sessions.⁶³⁵ Of

⁶³³ Wood, above n 624, 3.

⁶³⁴ See detailed strategies and requirements provided in *ADA Mediation Guidelines*, ADA Mediation Standards Work Group, Kucin Program for Conflict Resolution at Benjamin N Cardozo School of Law and the Cardozo Journal of Conflict Resolution, above n 224; see also U.S. Equal Employment Opportunity Commission, National Council on Disability and U.S. Department of Justice, above n 224; British Columbia Mediator Roster Society, above n 224.

⁶³⁵ See above n 634. See also Judith Cohen, ‘Making Mediation Sessions Accessible To People With Disabilities’, above n 624; Wood, above n 624; Blank above n 631; Maida above n 624; Cleary above n 624; Crawford et al above n 629; Judith Cohen, ‘Sophisticated Awareness Is Necessary For Effective Disabilities Act Mediation’ (1997) 15(4) *Alternatives to the High Cost of Litigation* 53; Patrick G. Coy and Tim Hedeon, ‘Disabilities And Mediation Readiness In Court-Referred Cases: Developing Screening Criteria And Service Networks’ (1998) 16(20) *Mediation Quarterly* 113; Sharon L Flower, ‘Resolving Voluntary Mental Health Treatment Disputes in the Community Setting: Benefits of and Barriers to Effective Mediation’ (1999) 14(3) *Ohio State Journal on Dispute Resolution* 881; Judith Cohen, ‘Fulfilling Your Obligations on Mediation Capacity’ (2003) 21(6) *Alternatives to the High Cost of Litigation* 117; Pattie Porter, ‘Maximizing Effective Participation’ (2003) 21(6) *Alternatives to the High Cost of Litigation* 117.

interest is the particular attention given to timing and how this may affect willingness to participate: ‘What may appear as resistance in mediation may have much to do with the needs of a party for more time to process information or be more secure with the task.’⁶³⁶ These strategies may have broader applicability to ways in which conciliation ‘may be made suitable’, given the findings in this research on the willingness and attitudes of parties being key factors affecting the referrals to conciliation. Perhaps more important is the requirement for these strategies to be underpinned by the requisite knowledge in disability rights, approaches to capacity and skills of mediators, including ‘addressing one’s own biases about disability’.⁶³⁷

The approaches to and strategies for facilitating access and participation of people with disabilities in ADR processes outlined in literature from the United States and Canada are much more extensive than those mentioned by interview respondents in this research and in literature on ADR in Australia. The majority of interview respondents, however, expressed the desire to increase the accessibility of their processes for people with disabilities and provided examples of steps that had been taken, such as production of brochures in accessible formats.⁶³⁸ While NADRAC endeavoured to promote the accessibility of ADR processes for people with disabilities through its discussion paper ‘The Issues of Fairness and Justice in Alternative Dispute Resolution’ and the resource ‘A Fair Say’,⁶³⁹ there has been limited attention in Australia to promoting the

⁶³⁶ Crawford et al, above n 629, 397.

⁶³⁷ ADA Mediation Standards Work Group, Kukin Program for Conflict Resolution at Benjamin N Cardozo School of Law and the Cardozo Journal of Conflict Resolution, above n 224, 8–9.

⁶³⁸ Examples were provided of steps that had been taken to increase the accessibility of information and the processes of making a complaint. See, eg, Anti-Discrimination Board of NSW, *Anti-Discrimination Board Complaint Handling. Working with People with Disabilities* <http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_makingacomplaint/adb1_disability.aspx>; Australian Human Rights Commission, *Complaint Information – Auslan* <<https://www.humanrights.gov.au/complaints/complaint-guides/complaint-information-auslan>>; Victorian Equal Opportunity & Human Rights Commission, *How to Make a Complaint about Discrimination – Easy English* <<http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/item/1176-information-in-easy-english>>; Health and Community Services Complaints Commissioner, SA, *Consumer brochure – Easy Read* <<http://www.hcsc.sa.gov.au/wp-content/uploads/2016/05/Health-and-Community-Services-Complaints-Commissioner-Easy-Read.pdf>>.

⁶³⁹ National Alternative Dispute Resolution Advisory Council, above n 53; above n 223.

accessibility of ADR for people with disabilities or for people with communication support needs more generally. Sourdin, for instance, notes that while visual aids have been found to be ‘extremely important in assisting understanding and decision making’, research in Victoria found that 91 per cent of mediators did not use such aids.⁶⁴⁰ Joanne Cummings similarly highlights that the ‘literacy demands’ of parties to mediation are most often not recognised or accommodated.⁶⁴¹ The approaches developed by the Disability Services Commissioner in Victoria, however, provide examples of ways of promoting the participation of people with disabilities through the design of complaint resolution processes and the use of resources such as visual aids and communication tools which explain conciliation and assist people to participate in the process.⁶⁴²

The findings of this research and the literature therefore point to areas for further research and attention to these issues to enable appropriate access to conciliation, particularly for people with disabilities.

6.8 Conclusion

The findings outlined in this chapter on approaches to power imbalances and issues of parties’ capacity to participate in conciliation have highlighted the need for these approaches to be informed by contemporary rights-based concepts of capacity and supported decision making for people with disabilities. While power imbalances and issue of capacity were not identified as common factors in decision making on the unsuitability of matters for conciliation, the interview responses and the literature nonetheless point to the benefits of rethinking approaches to focus on the ‘capacity’ of

⁶⁴⁰ Tania Sourdin, ‘Poor Quality Mediation – A System Failure?’ (2010)13 *Mediation*. Paper 3 Civil Justice Research Online <<http://www.civiljustice.info/med/3>>; Sourdin refers to the following examples of research on the use of visual aides: University of Pennsylvania, ‘Visual Learners Convert Words To Pictures In The Brain And Vice Versa, Says Psychology Study’ *Science Daily*, 28 March 2009. <<http://www.sciencedaily.com/releases/2009/03/090325091834.htm>>; Barbara Madonik, *I Hear What You Say But What Are You Telling Me? The Strategic Use of Non Verbal Communication in Mediation* (Jossey-Bass, 2001) 233–49.

⁶⁴¹ Joy Cumming, ‘Literacy Demands of Mediation: Issues of Fairness for Low Literacy Australians’ (2000) 2(10) *ADR Bulletin* 93.

⁶⁴² See Coulson Barr, above n 540.

the statutory body or individual officer to facilitate effective participation of people with disabilities through the inclusion of appropriate supports and processes. Together with findings on criteria and decision making on the suitability of matters for conciliation, the findings on approaches to capacity and the participation of people with disabilities support the need to develop an 'enabling model of decision making' which will be outlined in the final chapter.

CHAPTER SEVEN

CONCLUSION – TOWARDS AN ‘ENABLING MODEL OF DECISION MAKING’

7.1 Introduction

This chapter summarises the key findings from this research and proposes the development of an ‘enabling model of decision making’ as a way of ensuring appropriate and fair access to conciliation as a means of resolving disputes. The proposed model builds on the presumptive approaches to suitability found in this research, by paying attention to the organisation’s or officer’s role in facilitating people’s capacity and preparedness to engage in dispute resolution. The chapter proposes that such an approach to decision making requires a new way of thinking about determining suitability of disputes for conciliation and about people’s capacity to participate. This model of decision making shifts the focus from party characteristics or capacity to assessing the capacity of the organisation or officer to facilitate their participation in a conciliation process, and to address issues of substantive rights and systemic outcomes. It concludes with an outline of the key components for developing and implementing an ‘enabling model of decision making’ on the suitability of disputes for conciliation and identifies directions for further development and research.

7.2 Overview of findings

This research has sought to address the issue of efficacy of decision making on the suitability of disputes for conciliation with the following focus:

How can decision making on the suitability of disputes for statutory conciliation ensure appropriate access, particularly for people with disabilities?

The research methodology chosen for this research produced rich sources of data and findings on key themes and challenges for the participating statutory bodies in decision making on the suitability of matters which are summarised below.

7.2.1 Key considerations from the literature

The overview of the literature and research on approaches to decision making on the suitability of disputes for ADR highlighted the complex variables and potential influences on these decisions, the lack of reliable or empirically validated referral criteria for ADR processes, and the limited guidance in the statutes or standards which can inform these decisions. A key consideration identified from the literature was the lack of definitional and conceptual clarity associated with conciliation, and the importance of each statutory body articulating its model of conciliation, particularly in respect to addressing issues of power, rights and interests of parties and overall objectives of the process. The literature highlighted the challenges of combining facilitative ADR processes in the hybrid model required for statutory conciliation with ‘the obligations imposed on conciliators to guide parties towards outcomes which reflect legislative norms’.⁶⁴³ It also demonstrated the associated need to articulate the advisory, evaluative and interventionist roles of conciliators. The critics of statutory conciliation have pointed to the need to consider the extent to which substantive rights and systemic outcomes were addressed in decision making on the suitability of matters for conciliation, and the approaches to addressing these issues. These findings from the literature informed the factors explored in this research and the components for the development of an enabling model of decision making outlined below.

7.2.2 Significance of the level of response to this research

The unanimous agreement by all statutory bodies to the request to participate in the research, and the level of interest expressed in the topic, have been identified as a significant finding in itself. This outcome confirmed the relevance and importance of aims of this research. Interview respondents expressed a high level of interest in the findings and in developing a knowledge base and framework for addressing the challenges identified in decision making about the suitability of disputes for conciliation.

7.2.3 Diversity of conciliation approaches and contextual factors affecting referrals

This research first examined the models and approaches to conciliation of the participating statutory bodies, the legislative basis and requirements for conciliation and contextual factors which may affect referrals to conciliation. Not surprisingly, the review

⁶⁴³ Boulle, above n 3, 368–9.

of the governing pieces of legislation found that these contained limited guidance in relation to conciliation, with 10 of the 18 statutes providing no descriptions of conciliation or the role of the conciliator other than references to the decision to refer to conciliation, and procedural requirements relating to aspects such as attendance by parties, confidentiality and agreements. The majority of statutes, however, contained provisions which require an assessment of suitability for conciliation or the likelihood of resolution.

This research highlighted the challenges posed by these legislative requirements, given the lack of reliable, empirically validated criteria or predictors of success for ADR processes in the literature.

The research findings on the models and approaches to conciliation also reflected the commentary in the literature on the diversity of applications of conciliation. Key differences in models and approaches to conciliation included the variable requirements to assess or investigate a complaint prior to referral to conciliation, and differences in thresholds for considering the merit or substance of a complaint. These differences raise an obvious challenge in developing a common knowledge base and approach to decision making on the suitability of matters for conciliation.

All statutory bodies identified a number of legislative and contextual factors which affected referrals to conciliation. The availability of other options for dealing with the complaint, such as other 'resolution processes' or 'negotiated settlement' as well as the option to conduct formal investigations, appear to be significant contextual factors affecting referrals to conciliation. The availability of these other options points to the need for statutory bodies to articulate the model and objectives of conciliation and how it relates to other 'resolution processes', as well as to other 'protective' statutory functions which may warrant the use of investigative powers. Such articulation is necessary to guide decision making and conciliation practices of the statutory body, as well as enable parties to make informed decisions about participation and potential outcomes. Other contextual factors affecting referrals to conciliation include considerations of public interest issues, resources and alternative external avenues for dealing with the dispute, such as tribunals and courts or regulatory authorities. The availability of legislative powers to compel parties to attend conciliation was not found to have a significant

impact on referrals to conciliation, with the majority of interview respondents focusing on the willingness of parties to participate in conciliation.

A review of the public documentation produced by statutory bodies found that the majority of descriptions of conciliation reflected facilitative or consensual processes. There were limited references to advisory, evaluative or potentially interventionist roles of conciliators, or possible systemic outcomes of conciliation. While some interview respondents described the role of the statutory body and/or the conciliator as being ‘an advocate for the law’, this conceptualisation of conciliation was not commonly articulated by interview respondents or in the documentation produced by the majority of statutory bodies. Most interview respondents, however, highlighted the particular knowledge and skills required of conciliators, and the way in which accredited training courses for the National Mediator Accreditation System do not address the requirements of statutory conciliation.

Despite the diversity found in the legislative and contextual factors affecting referrals to conciliation, there was a high degree of consistency in approaches used by the different statutory bodies, with the majority using face-to face conferences, separate meetings with parties, telephone conferences and shuttle conciliation processes. A further significant finding was a trend towards ‘early conciliation’ or the adoption of other ‘early resolution’ processes by the majority of statutory bodies participating in this research. The shift towards ‘early conciliation’ or resolution processes has significant implications for the nature of referrals to conciliation and decision making on the suitability of matters for conciliation or alternative options for resolution.

7.2.4 Approaches and criteria used in decision making on the suitability of matters for conciliation

A significant finding of this research was that decisions on the unsuitability of matters for conciliation were reported as being made ‘rarely’ or ‘not often’ by the majority of statutory bodies, with an associated trend towards the adoption of a ‘presumptive’ approach to suitability. This is a very positive finding in respect to the research question on how decision making can ensure appropriate access to conciliation, particularly for

people with disabilities, as it indicates that there is a high threshold for determining that matters are not suitable for conciliation.

The willingness and attitudes of parties to participate in conciliation were, however, identified as key considerations and challenges for most statutory bodies, along with a predominant focus on party characteristics compared to factors related to the nature of the dispute. Other common challenges included defining the threshold of public interest or safety issues as exclusionary criteria for referral of such matters to conciliation.

Only five statutory bodies had policies or documented criteria to inform decision making on suitability of matters for conciliation, with the majority indicating the use of ‘working criteria’ or factors which were commonly taken into consideration. Some interview respondents, however, highlighted the complexity of assessing the variable factors affecting suitability in each case and the need for ‘sophisticated judgment’ by officers.⁶⁴⁴

Overall, the factors identified by the statutory bodies tended to be largely ‘descriptive criteria’ associated with the characteristics of parties or disputes, with few examples of ‘criteria based on principle’.⁶⁴⁵ In contrast to NADRAC’s recommendations that criteria should be limited to ‘negative criteria’ for when a matter may not be suitable, the survey and interview responses included the use of ‘positive criteria’ of expectations of parties such as to ‘demonstrate good will’ and be ‘willing to accept a negotiated agreement’. Almost a third of reported factors taken into account in decision making on the suitability on matters for conciliation were expressed in terms of ‘positive criteria’ of attitudes or behaviour expected of parties. The existence of negative attitudes and resistance by parties to the idea of conciliation were, however, identified as key challenges by most respondents, including those statutory bodies with presumptive approaches to suitability.

⁶⁴⁴ See discussion in Chapter Two [Part 2.6] of this thesis; see especially Boule, above n 3, 314–24, 320. The need for ‘sophisticated judgment’ by officers was articulated in the Interview with DEO-9, Director/Manager (15 April 2011).

⁶⁴⁵ National Alternative Dispute Resolution Advisory Council, above n 35, 8–9, 16. See also Mack, above n 28, 8, 57–60; see discussion in Chapter Two [Part 2.6] of this thesis.

Approaches to these issues varied according to the extent to which statutory bodies had adopted a presumptive approach to suitability and/or an 'educative approach' to addressing issues of willingness of parties or other negative factors in assessment and pre-conciliation processes. There was, however, limited recognition of how the willingness and attitudes of parties to conciliation may be contingent on factors such as the officer's knowledge base and skills in managing conflict, working with party expectations and identifying possible reasons for resistance. While interview respondents commonly identified a lack of knowledge or misconceptions about conciliation of parties as an issue, there was limited recognition of the way in which the statutory body's descriptions and approaches to conciliation may affect parties' willingness and attitudes to conciliation. This research has identified the need to consider the way in which descriptions of conciliation appear to emphasise the consensual nature of processes, along with the potential difficulties for complainants to distinguish conciliation as a process from the common meanings of 'conciliatory' behaviour. It is clearly important for statutory bodies to articulate the way in which conciliators work to achieve outcomes that reflect legislative norms and objectives, and provide examples of both individual and systemic outcomes of conciliation.

A key finding from this research's analysis of explicit and implicit criteria used by statutory bodies is that decision making about the suitability of matters for conciliation is a complex process which is 'interactive' rather than a one-way diagnostic process. This is a largely unrecognised and unique issue for decision making on the suitability of matters for conciliation by statutory bodies. While criteria are most often described in terms of the characteristics of the parties or the dispute, the determination of suitability is also implicitly dependent on the capacity and resources of the organisation, and skills of individual officers, to address issues of willingness and attitudes of parties to conciliation and to identify options for resolution that may meet party's needs and interests. The decision making process relies on an interactive consideration of factors relating to the parties and the nature of the dispute, as well as the capacity, skills and resources of the statutory body to work with the identified issues.

The findings on the range of factors that need to be taken into account in decision making about the suitability of matters for conciliation point to the need to rethink approaches to

determining suitability. The lack of reliable empirical criteria on which to base decisions, and the shifts towards presumptive approaches to the suitability and ‘early conciliation models’, also support the proposed shift in focus to ways of ‘making a dispute suitable for conciliation’.

7.2.5 Approaches to power imbalances, capacity and participation of people with disabilities

Only three statutory bodies in this research identified power imbalances or capacity of parties as reasons why a matter may not be suitable for conciliation. This finding was somewhat surprising in light of the common focus on these factors by the critics of statutory conciliation and in the literature on approaches to determining the suitability of matters for ADR.⁶⁴⁶ While power imbalances and issues of capacity were not identified as common factors in decision making on the unsuitability of matters for conciliation, the interview responses and the literature nonetheless point to the benefits of rethinking approaches to focus on the ‘capacity’ of the statutory body or individual officer to facilitate effective participation of people with disabilities through the inclusion of appropriate supports and processes.

The interview responses to approaches to matters involving people with disabilities indicated that the capacity to participate was a significant consideration, and most commonly addressed through the involvement of advocates, representatives and support people. Interview respondents, however, noted the limited occasions where people with cognitive impairments or mental illness accessed complaint processes, or directly participated in conciliation processes. The responses to questions on the participation of people with disabilities in conciliation pointed to a more fundamental issue about access to complaints processes for people with disabilities as identified in the literature, and the extent to which potential barriers to making a complaint are addressed by statutory bodies.

The findings also highlighted the need for approaches to power imbalances and issues of parties’ capacity to participate in conciliation to be informed by contemporary rights-

⁶⁴⁶ See discussion in Chapter Two [Part 2.4], [Part 2.5] and [Part 2.6] of this thesis.

based concepts of capacity and supported decision making for people with disabilities.⁶⁴⁷ These concepts recognise the continuum of capacity, with capacity being ‘decision-specific’, dependent on context and contingent on the availability and quality of support that is provided to make informed decisions.⁶⁴⁸ While interview respondents provided examples of adjustments in processes to accommodate the participation of people with disabilities, these examples did not reflect the range of accommodations and approaches to capacity that have been developed in the United States for mediations under the *Americans with Disabilities Act 1990*,⁶⁴⁹ nor the principles of ‘universal design’ as defined in the Article 2 of the *United Nations Convention on the Rights of Persons with Disabilities* to ensure equality of access for people with disabilities.⁶⁵⁰

The approaches to issues of a person’s capacity to participate in conciliation reflected the types of diagnostic approaches to party characteristics considered as criteria for determining the suitability of matters for conciliation. In a similar way to the identified issues of willingness and attitudes of parties to participate in conciliation, interview respondents referred to capacity as if it were an objective criterion. They did not identify the interdependency of a person’s capacity to participate in conciliation with the capacity, knowledge and skills of the statutory body or individual officer, to facilitate this participation. The findings therefore pointed to the need to change the question ‘Does the person have capacity to participate in conciliation?’ to ‘What is our capacity to facilitate access and participation in conciliation?’⁶⁵¹

Together with findings on criteria and decision making on the suitability of matters for conciliation, the findings on approaches to capacity and the participation of people with disabilities support the need to rethink approaches to assessing capacity and develop an ‘enabling model of decision making’.

⁶⁴⁷ See discussion in Chapter Six [Part 6.5] and [Part 6.6] of this thesis.

⁶⁴⁸ See discussion in Chapter Six [Part 6.7]; see especially Weller, above n 607.

⁶⁴⁹ See discussion in Chapter Six [Part 6.7] of this thesis.

⁶⁵⁰ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) Article 2 Definitions; see also Bernstein, above n 225.

⁶⁵¹ See a similar question posed by Erica Wood in relation to disability mediation: above n 624, 3.

7.3 Rethinking approaches to determining suitability and assessing capacity

As outlined above, this research points to the need to recognise that decision making on the suitability of disputes for conciliation is an interactive and interdependent process which is influenced by the capacity of the statutory body or officer to work with the particular challenges associated with the characteristics of the parties or the nature of the dispute. This approach to decision making requires a new way of thinking about determining suitability. This new approach replaces a one-way diagnostic process with an interactive decision-making process which considers the capacity of the organisation or officer to enable effective access and participation in conciliation. Rethinking approaches to determining suitability and assessing capacity for conciliation in this way, involves turning around the question from *'Is this matter suitable for conciliation?'* to the following related questions:

- *How can we make this matter suitable for conciliation?*
- *What is our capacity to facilitate access and participation in conciliation?*

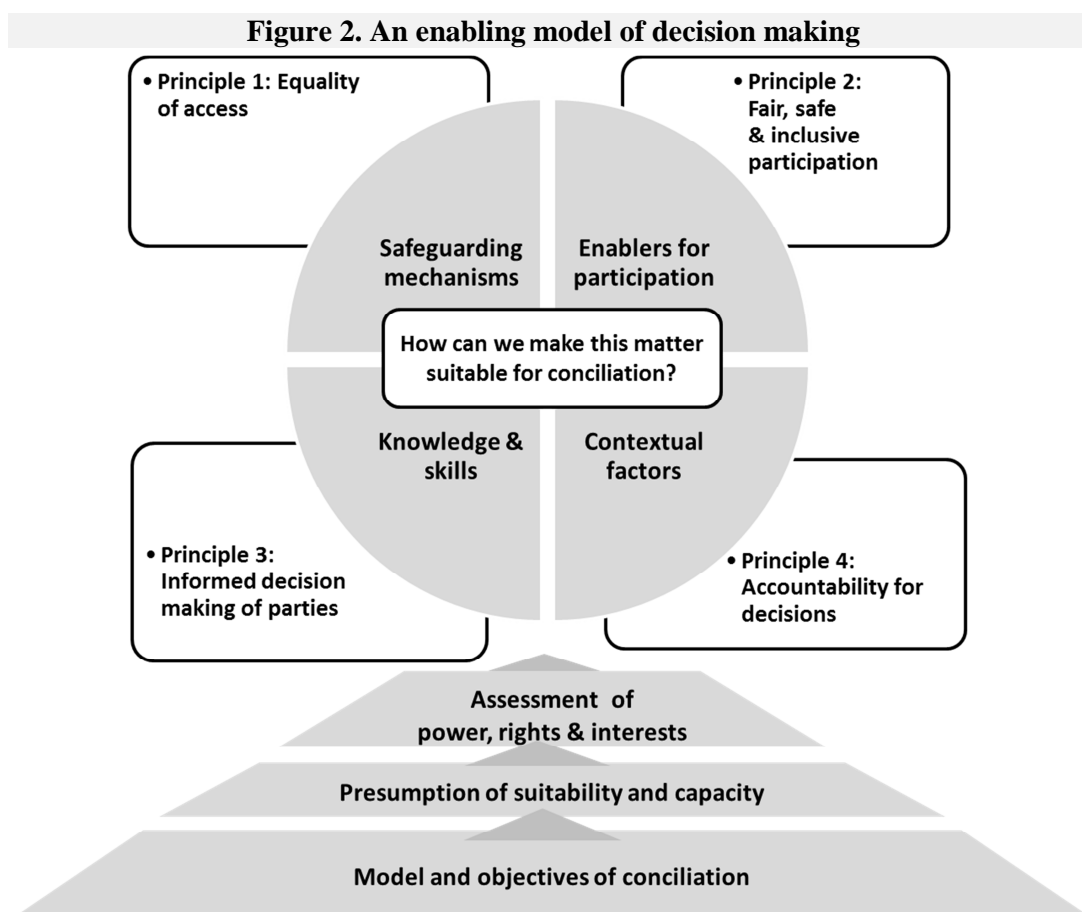
These questions form the basis for the development of an 'enabling model of decision making' as a way of ensuring appropriate and fair access to conciliation as a means of resolving disputes.

7.4 Framework for an 'enabling model of decision making'

This research has been based on the premise that decisions about the suitability of matters for conciliation are effectively decisions which determine a person's access to justice through this form of dispute resolution. The literature and findings have also pointed to a range of other potential benefits of conciliation for addressing individual needs and interests, and resolving issues which may impact ongoing relationships or future access to services. Taking into account the need to rethink approaches to determining suitability and assessing capacity for conciliation, an 'enabling model of decision making' is proposed. This model builds on the presumptive approaches to suitability found in this research, and focuses on ways of 'making a dispute suitable for conciliation'. It also builds on the rights-based approaches to capacity identified in the literature and the principle of equality of access for people with disabilities.

Adopting an ‘enabling model of decision making’ requires a purposive or ‘beneficial’ interpretation rather than a literal interpretation of the legislative requirements for determining suitability, whereby requirements such as ‘likely to resolve’ are interpreted in terms of conciliation offering ‘potential benefits’ or ‘would do no harm’. It also requires success and resolution to be defined in a way that includes a range of possible outcomes from conciliation which are not confined to settlements, such as individual outcomes which provide some closure to an adverse event or systemic outcomes achieved through an educative process with the respondent to a complaint.

The key components for developing and implementing an ‘enabling model of decision making’ have been identified from the literature and the research findings outlined in this thesis. These components are shown in Figure 2, which represents a framework for developing an ‘enabling model’ to guide decision making on conciliation by statutory bodies.



7.4.1 Foundational components of the model

The components shown at the base of Figure 2 represent the foundations for an enabling model of decision making which centres on the question ‘How can we make this matter suitable for conciliation?’ These foundational components include:

An articulated model and objectives of conciliation:

This research has pointed to the need for statutory bodies to articulate a model of conciliation and associated objectives to guide decision making and conciliation practices of the statutory body, as well as enable parties to make informed decisions about participation and potential outcomes. An ‘enabling model of decision making’ for statutory conciliation first requires a statutory body to articulate the type of hybrid model that has been adopted for combining facilitative and advisory processes, as well as the extent to which conciliators use evaluative and interventionist processes to address issues of rights, power and interests of parties.⁶⁵² The literature and the research findings have indicated the importance of statutory bodies being able to describe the way in which conciliators work to achieve outcomes that reflect legislative objectives and promote both individual and systemic outcomes. This includes articulating the use of both ‘rights-based’ and ‘interest-based’ approaches by conciliators, and being clear on the thresholds used to exclude issues of public interest and safety. In order to provide conceptual clarity on its approach to conciliation, it is also important for a statutory body to identify the objectives of conciliation, and how these relate to the statutory body’s role as being an ‘advocate for the law’. The identification of objectives or goals of conciliation can be seen as an essential foundation for decision making and assessing the efficacy of decisions.⁶⁵³ NADRAC’s broad objectives of ADR offer a useful starting point for developing objectives of conciliation, such as ‘to achieve outcomes that are broadly consistent with public and party interests’.⁶⁵⁴ Specific objectives for statutory conciliation

⁶⁵² The conceptual models for ADR processes outlined in Chapter Two [Part 2.4] and the models for statutory conciliation discussed in Chapter Two [Part 2.4] and [Part 2.5] provide options for development of a conciliation model to reflect the particular jurisdictional context.

⁶⁵³ Mack identified the importance of identifying goals in her review of criteria for referral to court-connected ADR programs, putting forward that the development of goals for ADR processes should be seen as an essential step for developing referral criteria and measuring success. Mack above n 28 15-17.

⁶⁵⁴ National Alternative Dispute Resolution Advisory Council above n 70; see also discussion in Chapter Two [Part 2.2] of this thesis.

could include objectives such as ‘to resolve disputes in a way that supports the objectives of the legislation and achieves fair and sustainable outcomes’.⁶⁵⁵

The adoption of a presumption of suitability of matters for conciliation and the capacity of parties to participate:

This component of the model builds on the presumptive approaches to suitability identified in this research and reflects the ‘universal design’ principles and approaches to capacity required by the *UN Convention on the Rights of Persons with Disabilities*.⁶⁵⁶ In many ways a presumptive approach to suitability relies upon the principles of universal design, which require processes be designed in a way to be ‘usable’ by all people, to the greatest extent possible.⁶⁵⁷ These principles provide the foundation for enabling appropriate access for conciliation. In order to safeguard the rights and interests of potentially vulnerable parties, however, a presumptive approach also relies on assessment processes and the application of guiding principles for decision making as outlined below.

Assessment of issues of power, rights and interests of parties in each matter considered for conciliation:

Issues relating to power, rights and interests of parties have been identified in the literature and in this research as key considerations for statutory conciliation. In order to enable appropriate and fair access to conciliation and identify ‘ways of making matters suitable for conciliation’, a foundational component of an ‘enabling model of conciliation’ is to implement an assessment framework to identify issues of power imbalances and dynamics, substantive rights and underlying interests of parties in each matter. The purpose of this assessment process is to identify safeguarding mechanisms to ensure a fair and safe process for all parties, and ‘enablers’ for effective participation. Safeguarding mechanisms include adjustments to processes to address power imbalances

⁶⁵⁵ This objective for conciliation was developed as an example by the author to reflect approaches to statutory conciliation identified in the literature and in this research.

⁶⁵⁶ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). See discussion of universal design principles in Chapter Two [Part 2.7], and Chapter Six [Part 6.4] and [Part 6.6].

⁶⁵⁷ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). Article 2 Definitions.

and strategies such as deferring the signing of agreements to allow vulnerable parties to seek further advice. Identifying underlying interests of parties can also be critical for enabling parties to consider the potential outcomes and benefits of conciliation and to address issues of resistance or negative attitudes towards conciliation.

7.4.2 Guiding principles for decision making

A core component for an ‘enabling model of decision making’ is the application of guiding principles for decision making. Rather than adopting specific ‘criteria based on principle’, it is proposed that decision making should be informed by four ‘guiding principles’ which have been identified from the literature and the research findings. These principles focus on the desired outcomes of decision making on the suitability of matters for conciliation:

Principle 1: Equality of access for all people, particularly people with disabilities:

This principle reflects the obligations under the *United Nations Convention on the Rights of Persons with Disabilities*,⁶⁵⁸ along with requirements under legislative schemes dealing with human rights, equal opportunity and anti-discrimination. It is proposed that an explicit principle of ‘equality of access’ should be adopted, which builds on the presumptive approaches to suitability and the recognition by some statutory bodies of the need for decisions to be non-discriminatory.

Principle 2: Fair, safe and inclusive participation of all parties:

This principle reflects some of the ‘criteria based on principle’ identified in this research and in the literature.⁶⁵⁹ Criteria identified by interview respondents included the principle of providing a ‘fair and inclusive process,’⁶⁶⁰ along with negative criteria relating to risks to safety and wellbeing of parties.⁶⁶¹ This decision making principle focuses on the need to assess the requirements for safeguarding mechanisms, ‘enablers’ of participation and

⁶⁵⁸ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) Article 12.

⁶⁵⁹ See Mack, above n 28, 8, 57–60; see discussion in Chapter Two [Part 2.6] and Chapter Five [Part 5.5.2] of this thesis.

⁶⁶⁰ See, eg, Interview with DEO-2, Director/Manager (10 September 2012) and discussion in Chapter Five [Part 5.5.2] of this thesis.

⁶⁶¹ See, eg, Chapter Five [Part 5.5.2] of this thesis.

knowledge and skills of conciliators, in order to enable fair, safe and inclusive participation of all parties. Considering the ‘inclusive participation’ of all parties also requires attention to enabling the direct participation of people with disabilities in the process and not just access to conciliation through the involvement of advocates, representatives or support people.

Principle 3: Informed decision making of parties:

This principle recognises the importance placed by interview respondents in this research, and by commentators in the literature, on parties making informed decisions about their participation in conciliation.⁶⁶² In order to apply this principle, consideration must be given to the nature and quality of information provided to parties about conciliation processes and potential outcomes and benefits. It also requires attention to potential reasons for resistance or negative attitudes towards conciliation and consideration of ways in which these issues could be addressed.

Principle 4: Accountability for decisions about access to conciliation:

This principle of accountability for decisions is particularly important given the findings in both this research and in the literature of the subjective nature of assessments of the suitability of matters for conciliation and ADR processes in general.⁶⁶³ The findings on the predominant focus on party characteristics in decisions about the unsuitability of matters for conciliation highlight the need for statutory bodies to be able to explain such decisions with reference to both the particular characteristics of the dispute and the consideration given to ways of ‘making the dispute suitable’ for conciliation. The

⁶⁶² See, eg, Interview with DEO-9, Director/Manager (15 April 2011); Interview with DEO-2, Director/Manager (10 September 2012); Interview with DEO-7, Director/Manager (7 September 2011); see also discussion in Chapter Five [Part 5.5.2] of this thesis; see also discussion of concerns raised by critics of statutory conciliation in Chapter Two [Part 2.4] and [Part 2.5].

⁶⁶³ See discussion in Chapter Two [Part 2.6] and Chapter Five [Part 5.5]; see also Samantha Hardy and Olivia Rundle, ‘Applying the inclusive model of ethical decision making to mediation.’(2012)19 *James Cook University Law Review* 70. The principle of ‘Accountability’ is also promoted by Hardy and Rundle in this article which explores the application of a model developed in the social work context by Donna McAuliffe and Lesley Chenoweth to guide practice decisions. Hardy and Rundle describe how mediators need to be able to articulate and justify their decisions, and be self-aware and transparent in their decision making processes.

principle of accountability also recognises that these decisions are effectively decisions which determine a person's access to justice through this form of dispute resolution

7.4.3 Components for 'making matters suitable' for conciliation

The four final inter-related components of an 'enabling model of decision making' represent considerations for 'making a matter suitable' for conciliation. These include safeguarding mechanisms and 'enablers' for participation, along with considerations of the knowledge and skills of decision makers/conciliators and contextual factors affecting referrals to conciliation. Examples of each of these components have been identified from the findings of this research and key considerations from the literature, and are set out in Table 7 below. Each of these components needs to be considered and explored in order to determine whether a matter 'can be made suitable' for conciliation. The key features of these components are summarised below:

Safeguarding mechanisms to promote safe participation and fair outcomes:

The need for safeguarding mechanisms to promote safe participation in conciliation for vulnerable parties and to ensure fair outcomes has been highlighted in the critiques on statutory conciliation, and reflected in approaches to issues of power and rights described by statutory bodies in this research. Examples include the provision of advice and interventions to promote outcomes which are consistent with the legislation, the use of shuttle conciliation and other adjustments to conciliation processes to address issues of safety or power, and deferring the signing of agreements reached in conciliation in order for vulnerable parties to seek advice.

'Enablers' for effective participation and strategies to remove potential barriers:

To address the question of 'how can we make this dispute suitable for conciliation?' it is critical to identify potential barriers to participation and resolution and employ strategies and approaches to address these. This research has highlighted the importance of identifying 'enablers' for effective participation, particularly for people with disabilities. Examples include adjustments to timing, pace, location and number of conferences to accommodate the needs of parties, and use of communication and visual aids/tools to facilitate understanding and participation in the process. The use of educative and advisory processes in pre-conciliation processes has also been identified as important for

enabling effective participation of parties and addressing potential resistance or barriers to trying to resolve the dispute through conciliation.

Knowledge and skills of decision makers and conciliators to address identified issues:

The critiques on statutory conciliation and the findings of this research have pointed to the critical importance of the specialist skills and knowledge of conciliators for addressing the issues of power, rights and interests of parties in statutory conciliation. A key component of an ‘enabling model of decision making’ is the need to take into account the knowledge and skills of decision makers and conciliators to identify and work with these issues. The research findings on the predominant focus on party characteristics and factors such as attitudes and levels of hostility, point to the need to consider conciliator skills in dealing with high conflict and capacity for ‘critical reflection’ on practice.⁶⁶⁴ This includes the need to guard against the use of ‘positive criteria’ of desirable party characteristics. This research has also highlighted the need to consider the level of awareness and knowledge of rights-based approaches to capacity and supported decision making for people with disabilities. While issues of gender and culture were not specifically addressed in this research, these issues are equally important for decision makers and conciliators to recognise in an ‘enabling model of decision making’.⁶⁶⁵ The examples of required knowledge and skills of conciliators provided in Table 7 could also be expanded by articulating the core competencies of conciliators for dealing with particular types of disputes.⁶⁶⁶

⁶⁶⁴ The concept of ‘critical reflection’ is identified by Hardy and Rundle as a core component of an ‘inclusive model of ethical decision making’: ‘Critical reflection is about the practitioner ‘open[ing] up their decision making to scrutiny by self and others in a way that will lead to better future practice.’ Hardy and Rundle above n 662, 80-1.

⁶⁶⁵ Lola Ojelabi, for example, highlights the need for ADR practitioners to demonstrate an awareness of issues of culture, engage actively with parties on issues of culture relevant to the dispute and take an interventionist approach where necessary. See, Lola Ojelabi, ‘Dispute Resolution and the Demonisation of Culture’ (2014) 25(1) *Australasian Dispute Resolution Journal* 30, 37-8.

⁶⁶⁶ David Bryson and Mark McPherson, for example, propose a list of ‘core competencies’ required for conciliators to balance the requirements of working within a statutory framework and the goal of seeking an agreement between the parties in the context of worker’s compensation or equal opportunity disputes. See David Bryson and Mark McPherson, ‘Pathways to Learning: Conciliator Core Competencies’ (1998)1 (3) *ADR Bulletin* 45.

Identification of contextual factors which may affect the referral of the matter to conciliation:

Factors such as the availability of other complaint resolution options and other avenues to address the issues in the complaints, such as investigation or tribunal processes, need to be taken into account when identifying approaches which may ‘make a matter suitable for conciliation’. An ‘enabling model of decision making’ requires statutory bodies to articulate the relationship between conciliation and other complaint resolution options, the threshold and criteria for referring matters to investigation or regulatory authorities, and the types of individual and systemic outcomes achieved by conciliation compared to tribunal or court processes. These processes include consideration of options such as ‘splitting complaints’ to exclude matters such as issues of alleged misconduct or public safety. This research has also highlighted the need for some statutory bodies to take an advisory or educative role with regulatory authorities such as professional boards when consulting on the option of conciliation for dealing with a complaint.⁶⁶⁷ The quality of information provided to parties about other avenues for dealing with the complaint can affect the ability of parties to make informed decisions to participate in conciliation, and their willingness and attitudes towards the process.

7.4.4 Considerations for development and implementation

The efficacy of an ‘enabling model of decision making’ will rely to a large extent on equal attention being given to the ‘enablers’ for effective participation, and to the safeguarding mechanisms which may be needed to promote safe participation and fair outcomes for parties. In order to ensure appropriate access to conciliation, this proposed model will also require statutory bodies to recognise when a matter may not be suitable for conciliation because of the limitations of skills, resources or capacity of the organisation to address the particular needs of the parties or the nature of the dispute, or the availability of adequate safeguarding mechanisms.

⁶⁶⁷ See discussion on the obligations under the *Health Practitioner Regulation National Law*, as enacted in each State and Territory in Chapter Four [Part 4.3.2] and [Part 4.6.5].

Table 7. Components of an enabling model of decision making

Ways of ‘making matters suitable’ for conciliation	
Safeguarding mechanisms	Enablers for participation
<p><i>Mechanisms and strategies include:</i></p> <ul style="list-style-type: none"> - Use of intake and pre-conciliation processes to assess issues of power, safety or potential harms - Use of advisory and interventionist roles to promote outcomes which are consistent with the legislation - Use of shuttle conciliation, teleconferences or other adjustments to conciliation processes to address issues of power or safety - Planned use of private sessions to monitor safety and fairness of process with vulnerable parties - Not requiring agreements to be signed on the day of the conference so that vulnerable parties can seek advice - Involvement of advocates, representatives or support people with specific roles to address identified issues - Appropriate matching of conciliators and parties 	<p><i>Approaches and strategies include:</i></p> <ul style="list-style-type: none"> - Use of educative and advisory processes, in pre-conciliation processes and within conciliation - Use of co-conciliation or shuttle conciliation to address the particular needs of parties or nature of the dispute - Involvement of advocates, representatives or support people - Adjustments to timing, pace, location and number of conferences to accommodate the needs of parties - Use of communication and visual aids/tools to facilitate understanding and participation in the process - Consideration of ‘supported decision-making’ processes for enabling participation and informed decision making for people requiring assistance - Use of ‘early conciliation’ approaches such as not requiring written responses by respondents
Knowledge & skills of decision makers/ conciliators	Contextual factors affecting referrals
<p><i>Key knowledge and skills include:</i></p> <ul style="list-style-type: none"> - Working with party expectations and possible reasons for resistance - Ability to recognise and address barriers to participation and resolution - Working with high conflict disputes, power imbalances and dynamics - ADR theory and practice, particularly in relation to theories of power and conflict - Knowledge of the substantive law and skills in using both ‘rights-based’ and ‘interest-based’ approaches - Awareness of potential unconscious or cognitive biases and capacity for ‘critical reflection’ on practice - Knowledge of rights-based approaches to capacity and supported decision making for people with disabilities - Awareness of issues of gender and culture - Assessment of potential trauma, harms or violence 	<p><i>Approaches to contextual factors include:</i></p> <ul style="list-style-type: none"> - Clarity on role and potential benefits of conciliation compared to other complaint resolution options - Clarity on the threshold and criteria for referring matters to investigation or regulatory authorities - Provision of information on the types of individual and systemic outcomes achieved through conciliation compared to tribunal or court processes - Consideration of ‘splitting complaints’ or referring parts of complaints to conciliation while issues of public safety/interest are being addressed by other processes - Taking a beneficial or purposive interpretation of legislative requirements to assess the likelihood of resolution through conciliation

Each of the key components outlined above represents significant areas for further development. The proposed framework for an ‘enabling model of decision making’ offers a way forward for the development and implementation of new approaches to determining the suitability and ensuring appropriate and fair access to conciliation.

7.5 Recommendations for future development and research

The findings of this research point to a number of significant areas for future development and research. These findings, including the level of interest expressed by the participating statutory bodies, indicate the importance of further targeted research on decision making about the suitability of matters for conciliation. It is recommended that future research on conciliation include empirical research on case examples of decision making on the suitability of matters for conciliation, comparative data analysis on rates of referral of matters to conciliation, and documented reasons for decisions by statutory bodies. The findings also suggest the importance of specific research on issues of resistance and negative attitudes of parties towards conciliation in order to identify underlying reasons and options to address these. The common challenges reported by statutory bodies in balancing legislative requirements to assess or investigate the substance of complaints, and to endeavour to resolve complaints through conciliation, also warrant further attention and research.

This research has also identified the impact of other complaint resolution options on referrals to conciliation, and a possible legislative trend of including more options and flexibility in approaches to complaint resolution. This suggests the importance of statutory bodies articulating not only models of conciliation, but also different models of statutory complaints resolution processes. The responses of the participating statutory bodies to this research highlighted common interests in developing shared practice frameworks for meeting the particular challenges of statutory ADR processes.⁶⁶⁸ The

⁶⁶⁸ See discussion of the formation of a ‘Statutory ADR Special Interest Group’ in Lynne Coulson Barr, ‘Coach, Compliance Officer or Peace Maker: Responding to Expectations and Practice Issues in Statutory ADR’ (Paper presented at the 12th National Mediation Conference, Melbourne, 11 September 2014) <<http://www.slideshare.net/NationalMediationConference/tuesday-savoy-room-3-16301650lynne-coulson-barr>>.

proposed ‘enabling model of decision making’ could easily be adapted and applied to other forms of statutory ADR processes.

The particular focus in this research on the question of appropriate access and participation of people with disabilities in conciliation has confirmed the importance of greater attention being given to this issue and the need for more targeted research on ways of ensuring equality of access for people with disabilities to all forms of ADR processes. The research has also identified significant opportunities to develop the application of contemporary rights-based concepts of capacity and supported decision making for people with disabilities to ADR processes.

7.6 Conclusion

This research has highlighted the significant and complex issues involved in current approaches to decision making on the suitability of matters for conciliation, and the way in which those approaches may unwittingly limit access to conciliation as a means of resolving disputes. At the same time, this research has identified positive developments in the approaches being adopted by statutory bodies and opportunities to build on the presumptive approaches to suitability, models of ‘early conciliation’ and new ways of thinking about the suitability of disputes for conciliation. There are also significant opportunities to incorporate rights-based approaches to capacity and supported decision making into statutory bodies’ approaches to the participation of people with disabilities in conciliation. The findings of this research, and the proposed ‘enabling model of decision making’, therefore offer important contributions to the further development of approaches to enable appropriate and equal access to conciliation, particularly for people with disabilities.

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Anti-Discrimination Act 1991 (Qld)
Anti-Discrimination Act 1992 (NT)
Anti-Discrimination Act 1998 (Tas)
Charter of Human Rights and Responsibilities Act 2006 (Vic)
Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW)
Disability Act 2006 (Vic)
Equal Opportunity Act 1984 (WA)
Equal Opportunity Act 1984 (SA)
Equal Opportunity Act 1995 (Vic)
Equal Opportunity Act 2010 (Vic)
Health and Disability Services (Complaints) Act 1995 (WA)
Health and Community Services Complaints Act 1998 (NT)
Health and Community Services Complaints Act 2004 (SA)
Health Care Complaints Act 1993 (NSW)
Health Complaints Act 1995 (Tas)
Health Complaints Act 2016 (Vic)
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APPENDIX A PARTICIPATING STATUTORY BODIES

Name of body	Jurisdictions
1. Human Rights Commission, ACT	1a) Health Services, Disability Services 1b) Discrimination, Equal Opportunity, Human Rights (Separate responses were provided by the two Commissioners dealing separately with the above jurisdictions)
2. Health and Community Services Complaints Commission, NT	Health Services, Disability Services
3. Health Quality and Complaints Commission, Qld*	Health Services, Disability Services
4. Health and Disability Services Complaints Office (formerly the Office of Health Review), WA	Health Services, Disability Services
5. Health Complaints Commissioner, Tas.	Health Services
6. Health Care Complaints Commission, NSW	Health Services
7. Health and Community Services Complaints Commissioner, SA	Health Services, Disability Services
8. Office of the Health Services Commissioner, Vic.	Health Services
9. NSW Ombudsman	Disability Services
10. Victorian Equal Opportunity & Human Rights Commission	Discrimination, Equal Opportunity, Human Rights
11. Office of the Anti-Discrimination Commissioner, Tas. (Known as Equal Opportunity Tasmania from 15 November 2015)	Discrimination, Equal Opportunity

12. Equal Opportunity Commission, SA	Discrimination, Equal Opportunity
13. Equal Opportunity Commission, WA	Discrimination, Equal Opportunity
14. Anti-Discrimination Commission, NT	Discrimination, Equal Opportunity
15. Anti-Discrimination Commission, Qld	Discrimination, Equal Opportunity
16. Anti-Discrimination Board, NSW	Discrimination, Equal Opportunity
17. Australian Human Rights Commission (formerly Human Rights & Equal Opportunity Commission)	Discrimination, Human Rights

* The Health Quality and Complaints Commission (HQCC) ceased operations on 30 June 2014 and was replaced by the Office of the Health Ombudsman established under the *Health Ombudsman Act 2013* (Qld). The Office of the Health Ombudsman was not included in this research as the empirical research had been completed at the time of its establishment.

Note: The Victorian Disability Services Commissioner did not participate as a statutory body in this research due to the researcher's position as Deputy Commissioner and role as a decision maker on the conciliation of complaints.

APPENDIX B CODING USED FOR RESPONDENTS

The following codes were used to identify the responses to the surveys and interviews according to the type of complaints dealt with by the statutory body. Two codes were used for the ACT Human Rights Commission, as separate responses were provided for health and disability complaints, and for discrimination complaints. Two codes were also used for the Australian Human Rights Commission as separate responses were provided, one relating to the Commission's dealing with all types of discrimination complaints, and one by the Disability Discrimination Commissioner.

Type of jurisdiction	Codes
Health Services & Disability Services	HDS-1, HDS-2, HDS-3, HDS-4
Health Services	HS-1, HS-2, HS-3,
Disability Services	DS-1
Discrimination, Equal Opportunity, Human Rights	DEO-1, DEO-2, DEO-3, DEO-4, DEO-4, DEO-5, DEO-6, DEO-7, DEO-8, DEO-9, DEO-10

APPENDIX C OVERVIEW OF RESEARCH PROCESSES FOR REQUESTS AND PARTICIPATION IN THE RESEARCH

1. Process for requesting participation of statutory bodies

A letter outlining the purpose and undertakings of the research was sent by post and by email to the Commissioners or heads of the statutory bodies, using publicly available addresses. This letter requested their organisation's participation in this research, and included an explanatory statement and a form providing consent and agreement to participate.⁶⁶⁹ The correspondence was sent on Monash University letterhead, with contact details of the researcher's supervisor and the researcher's Monash University student email.

2. Agreements and consents

The consent form provided options for identification of statutory bodies participating in this research. These options included consent to be identified by name as a participant in the research and the options for the organisation's responses to be identified either by name or by the types of complaints handled. A copy of the survey form developed for this research was also included in this initial correspondence to enable organisations to make an informed choice to participate.

3. Outcome of requests to participate

All 17 statutory bodies agreed to participate in this research. For one statutory body, this required agreements being sought and obtained from two individual Commissioners with separate jurisdictional responsibilities within the one Commission, one for discrimination complaints and one for health and disability services complaints.⁶⁷⁰ This meant that there was a total of 18 respondents for interviews which were conducted for this research.

4. Consents to be identified as participants in the research

All statutory bodies provided consent to be identified as participants in the research, and 10 consents were received to identify the organisation's responses by name. A decision was made to adopt a uniform approach of using a code to identify responses only by types of complaints handled rather than identify some organisations by name and others

⁶⁶⁹ See Appendix D- Research Instruments: D.1 'Request to Participate' letter, D.2 'Explanatory Statement', and D.3 'Agreement & Consent to Participate'.

⁶⁷⁰ Australian Human Rights Commission, ACT.

by type only.⁶⁷¹ Participating statutory bodies are, however, identified by name when legislative provisions and publicly available materials such as information/fact sheets and websites are discussed separately to the responses provided in the surveys and interviews.

One exception was made to the identification of the responses from participants in the research. The former Federal Disability Discrimination Commissioner at the Australian Human Rights Commission, Graeme Innes, was interviewed for his perspectives on ensuring appropriate access and participation of people with disabilities in conciliation processes. Where appropriate, his responses are identified in the discussion in Chapter Six on this topic. This interview was conducted in addition to the interviews conducted as a follow-up to the completed surveys for this research and was not included in the collated results set out in Appendix E.

5. Conduct of interviews and confirmation of transcripts

The original research design contemplated a sample of follow-up interviews based on self-selection and willingness of statutory bodies to participate in these follow-up interviews. However, all of the selected statutory bodies agreed to participate in these interviews. Interviewees were provided with an explanatory statement about the research and a consent form which allowed for optional consent to use of audiotape, and an agreement by the researcher to provide a transcript of the interview for checking and approval.⁶⁷² For each interview a draft transcript was provided to the interviewee for checking and confirmation. In 15 out of the 19 interviews conducted, transcripts were produced from an audio recording of the interviews, with the remainder produced from notes taken at the interview. In each case, the interviewee and the organisation had the opportunity to make any amendments or additions to the record that they felt would be appropriate to reflect the practices of their organisation. For some organisations, the confirmation of interview records was delayed to allow additional information or a follow-up interview to capture the outcomes of reviews, legislative amendments or planned changes in approaches to conciliation.

6. Analysis and coding of survey responses and interview transcripts

The surveys and interview responses were analysed using an open and selective coding process. This included the analysis of 88,264 words in interview transcripts.

⁶⁷¹ See Appendix B for explanation of coding used to identify responses for each statutory body by type.

⁶⁷² See Appendix D.5 and D.6.

APPENDIX D RESEARCH INSTRUMENTS

D.1 REQUEST TO PARTICIPATE

Request letter to participate for research on ‘Decision making on the suitability of disputes for statutory conciliation’

Lynne Coulson Barr
C/- Dr Bronwyn Naylor
Senior Lecturer & Director of Equity
Law Faculty
MONASH UNIVERSITY VIC 3800

<insert Name of Commissioner/CEO>
<insert Name of Statutory Body and address>

Dear,

Request to participate for research on “Decision making on the suitability of disputes for statutory conciliation” [Project Number: CF10/2795 – 2010001586]

I write to request your participation in the above-named research project which I am conducting with Dr Bronwyn Naylor, Senior Lecturer Monash University Law Faculty, towards a Doctorate of Juridical Science at Monash University. In addition to my student researcher role, I hold the position of Deputy Commissioner with the Victorian Disability Services Commissioner which provides me with an appreciation of the work of statutory complaints bodies, and the issues associated with determining the suitability of matters for conciliation.

The aim of this research is to identify the key factors, criteria and processes that are currently being used to determine suitability of disputes for conciliation by Australian statutory complaints bodies with the following jurisdictions:

- health services
- disability services
- discrimination, equal opportunity, and human rights

This research aims to be of benefit to participating organisations by articulating current practices, and by providing a framework to inform best practice on decision making about the suitability of disputes for statutory conciliation. I am requesting your participation because your organisation is included in the target group of statutory bodies for this research.

I have provided an Explanatory Statement regarding the research, together with a scoping survey, a letter of agreement to participate and associated consent form which I request that you consider and return to me.

I would appreciate if you could complete and return the enclosed documents and survey by <insert date>

Please do not hesitate to contact me if you have any questions about this research or any of the enclosed documents.

Yours Sincerely

Lynne Coulson Barr

D.2 EXPLANATORY STATEMENT

Explanatory Statement

8 November 2010

Research Title: Decision making on the suitability of disputes for statutory conciliation

This information sheet is for you to keep.

My name is Lynne Coulson Barr and I am conducting a research project with Dr Bronwyn Naylor, Senior Lecturer Monash University Law Faculty, towards a Doctorate of Juridical Science at Monash University. This means that I will be writing a 50,000 word thesis which is the equivalent of a 150 page book.

The aim and purpose of the research

Over the past few decades, legislation has been enacted in a range of jurisdictions to provide for complaints or disputes to be referred to conciliation. Such legislation may expressly or implicitly refer to a determination as to whether a matter is 'suitable' for conciliation, but not provide any criteria for determining suitability nor define the approach or type of conciliation model to be used in the particular jurisdiction.

This research will examine how statutory complaints bodies decide whether a dispute is suitable for conciliation and what factors influence these decisions. In particular, the research will seek to identify how this decision making can ensure appropriate access to conciliation as a means of resolving disputes, particularly for people with a disability.

The aim of this research is to identify the key factors, criteria and processes that are currently being used to determine suitability of disputes for conciliation by Australian statutory complaints bodies with the following jurisdictions:

- health services
- disability services
- discrimination, equal opportunity, and human rights

The research findings will be analysed with the aim of proposing a framework of guiding principles and criteria to inform best practice in decision making about the suitability of disputes for conciliation.

Why have you been chosen as a participant?

You have been chosen because your organisation is included in the target group of statutory bodies for this research. Your details have been obtained from your website.

Possible benefits

This research aims to be of benefit to participating organisations by articulating current practices, and by providing a framework to inform best practice on decision making about the suitability of disputes for statutory conciliation.

What does the research involve?

The research involves completion of a survey and the option of participating in a follow up semi-structured interview. I can be contacted by phone or email to answer any queries regarding the research and the information being sought in the survey or interviews. (Please see contact details on next page.)

How much time will the research take?

It is anticipated that the completion of the survey will take approximately 30 minutes. The interviews are designed to take approximately one hour. Participants may be invited to participate in a follow up interview if there is mutual interest in exploring further details.

Inconvenience/discomfort

As you are being asked to provide responses based on your professional experience and role in your organisation, it is unlikely that you will experience any discomfort beyond the normal experience of everyday work or inconvenience other than the time taken to participate.

Can I withdraw from the research?

Being in this study is voluntary and you are under no obligation to consent to participation. However, if you do consent to participate and later wish to withdraw, you are requested to do this prior to the interview transcript being approved.

Confidentiality

Individual participants will not be identified in the research thesis or any publications arising from it. Your responses will be confidential and de-identified. If your organisation provides consent for an identifiable form of reporting, this identification can be limited to the type/jurisdiction of the organisation and codes will be used to distinguish responses of similar organisations.

Storage of data

Storage of the data collected will adhere to the University regulations and kept in a locked cupboard/filing cabinet for 5 years. A report of the study may be submitted for publication, but individual participants will not be identifiable in such a report.

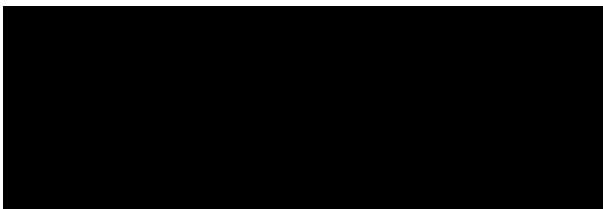
Use of data for other purposes

The de-identified data and findings of this research may also be used in presentations or publications for the purpose of contributing to the knowledge base and practice of individuals and organisations dealing with similar issues.

Results or further information

<p>If you would like to be informed of the research findings, please contact Lynne Coulson Barr on [REDACTED]</p>	<p>If you have a complaint concerning the manner in which this research [Project Number: CF10/2795 – 2010001586] is being conducted, please contact:</p>
<p>In appreciation of your participation in this research, I would be happy to give a presentation of the results to the organisation. If you would like to contact the researchers about any aspect of this study, please contact the Chief Investigator:</p>	<p>Executive Officer Monash University Human Research Ethics Committee (MUHREC) [REDACTED]</p>
<p>Dr Bronwyn Naylor Senior Lecturer & Director of Equity Monash Law Faculty Monash University VIC 3800 [REDACTED]</p>	

D.3 AGREEMENT & CONSENT TO PARTICIPATE IN RESEARCH



Dear Ms Coulson Barr

Agreement to participate for research on “Decision making on the suitability of disputes for statutory conciliation”

Thank you for your request to respond to a survey and to participate in a follow up interview for the above-named research.

I have read and understood the Explanatory Statement regarding the research [Project Number: CF10/2795 – 2010001586] and hereby agree to participate in this research. Please refer to the consent form for details of the extent and conditions of the participation of myself and my organisation.

Yours Sincerely,

<insert signature >

<insert name of the above signatory>

<insert above signatory’s position>

Consent Form – Agreement to participate in research

Title: Decision making on the suitability of disputes for statutory conciliation

NOTE: *This consent form will remain with the Monash University researcher for their records*

I agree to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records. I understand that agreeing to take part means that:

1. I agree that my organisation can be identified in the research by name as a participant ☐ **Yes** ☐ **No**
2. I agree that the responses of my organisation can be identified by name **and/or** ☐ **Yes** ☐ **No**
3. I agree that the responses of my organisation can be identified in the research by the type of complaints handled (i.e. health services, disability services, discrimination, equal opportunity, and human rights) ☐ **Yes** ☐ **No**
4. I agree to be approached for an interview by the researcher following completion of the survey ☐ **Yes** ☐ **No**
and/or
5. I agree to pass on the researcher's invitation to appropriate staff, who will contact the researcher directly ☐ **Yes** ☐ **No**

and

I understand that:

- a) my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.
- b) any data that the researcher extracts from the survey and interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics other than agreed to above
- c) a separate consent form will be provided for participation in interviews and a transcript of interviews will be provided to the interviewee for approval before it is included in the write up of the research.
- d) any information I provide, other than what is publicly available, is confidential and will not be identified in any reports on the project or to any other party unless by express agreement
- e) no information that could lead to the identification of any individual will be disclosed in any reports on the project, or to any other party unless by express agreement.
- f) The data from the survey, interview, transcript/audio-tape will be kept in a secure storage and accessible to the research team.

- g) the data will be destroyed after a 5 year period unless I consent to it being used in future research.

Participant's name.....

Position Title.....

Signature.....

Date.....

Organisation's name.....

Contact email.....

D.4 SURVEY FORM

Survey Form for Research Project: CF10/2795 – 2010001586
Title: Decision making on the suitability of disputes for statutory conciliation

Part A: Information about Research Project & Respondent details

This research is being conducted towards a Doctorate of Juridical Science. Please refer to the Explanatory Statement for details of the aims and purpose of this research. Your contribution to this research is appreciated.

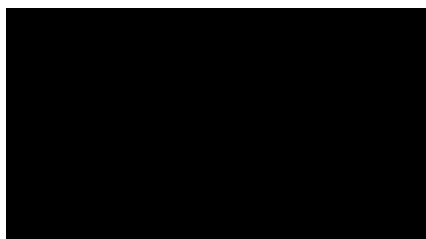
For any questions about this research or form please contact the researcher:

Name of Researcher: Lynne Coulson Barr



Return completed forms to:

Electronic responses to: Lynne Coulson Barr



Hard copy responses to:

Respondent Details:

Name of statutory body/position	
Contact details of person for clarification of survey responses if needed. Note: These details will be kept confidential and will only be used for the purposes of clarification of responses.	Name: Position: Contact details:
Date completed	

Can your organisation be approached for a follow up interview? ☐ Yes ☐ No

(If completing electronically, please use mouse to left double-click on the relevant box and choose 'checked' and 'ok')

Contact person for making arrangements for interview	Name: Position: Contact details: Requests/comments re arrangements:
---	--

Part B: Survey Questions for Research Project CF10/2795 – 2010001586

(If completing electronically, delete lines to type answers, and use mouse to left double-click on the relevant box and choose 'checked' and 'ok')

1. What documentation does your organisation have on its conciliation model and objectives?

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

Can these be made available to the researcher? ☐ Yes ☐ No

(If yes, please attach)

Comments:.....
.....
.....

2. Does your organisation have a written policy on criteria and/or decision making on suitability of matters for conciliation? ☐ Yes ☐ No

If yes, can the researcher have access to this policy? ☐ Yes ☐ No

(If yes, please attach)

Comments:.....
.....
.....
.....

3. Does your organisation's approach to conciliation include:

(Please add comments as appropriate eg 'not common', 'not possible' etc)

a) Conciliation conferences ☐ Yes ☐ No **Comments**

(face to face meetings of parties)

b) Telephone conferences (facilitated discussions) ☐ Yes ☐ No

between parties, with one or both being on the phone)

c) Video conferences (facilitated discussions) ☐ Yes ☐ No

between parties, with one or both being on a video link)

d) Shuttle conciliation (conciliator facilitating exchange of information/proposals back and forth between parties, either in addition to, or instead of, facilitating a conference) ☐ Yes ☐ No

e) Separate meetings with parties (before or during a conciliation conference, or as a separate process) ☐ Yes ☐ No

f) Co-conciliation ☐ Yes ☐ No

(two conciliators facilitating conferences)

g) Involvement of legal representatives in conferences or negotiations ☐ Yes ☐ No

h) Involvement of advocates or other support people ☐ Yes ☐ No

i) Obtaining expert or independent opinions ☐ Yes ☐ No

j) Other (please specify)

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

Which of the above approaches are most common?

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

4. Who conducts conciliations in your organisation? (Please provide position titles rather than names.)

.....
.....

5. At what stage/s in your complaints process is the decision on suitability for conciliation made?

.....
.....

6. Who makes the decision about referral of matters to conciliation and what is the process for this decision-making? (Please provide position titles rather than names.)

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

7. What factors are taken into account when deciding whether a matter should be referred to conciliation? (Please include all factors including organisational/legislative factors)

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

8. How are factors such as capacity to participate or power imbalances taken into account?

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

9. How often are decisions made that a matter is not suitable to refer to conciliation?

☐ Rarely ☐ Not often ☐ Often ☐ Very often

Comments:.....
.....
.....

10. What are the most common reasons for decisions not to refer a matter to conciliation?
.....
.....
.....
.....

11. What are the most common reasons for decisions that a matter cannot be conciliated after it has been referred to conciliation? (Please comment if different from those above.)
.....
.....
.....

12. Has your organisation made any changes over time in its approach to conciliation, or decision making about suitability, that may be relevant for this research to consider?
.....
.....
.....

13. Are there any other comments or information that you would like to provide?
.....
.....
.....

D.5 EXPLANATORY STATEMENT FOR PARTICIPANTS OF INTERVIEWS

Explanatory Statement *For participants in interviews*

8 November 2010

Research Title:

Decision making on the suitability of disputes for statutory conciliation

This information sheet is for you to keep.

My name is Lynne Coulson Barr and I am conducting a research project with Dr Bronwyn Naylor, Senior Lecturer Monash University Law Faculty, towards a Doctorate of Juridical Science at Monash University. This means that I will be writing a 50,000 word thesis which is the equivalent of a 150 page book.

The aim and purpose of the research

Over the past few decades, legislation has been enacted in a range of jurisdictions to provide for complaints or disputes to be referred to conciliation. Such legislation may expressly or implicitly refer to a determination as to whether a matter is 'suitable' for conciliation, but not provide any criteria for determining suitability nor define the approach or type of conciliation model to be used in the particular jurisdiction.

This research will examine how statutory complaints bodies decide whether a dispute is suitable for conciliation and what factors influence these decisions. In particular, the research will seek to identify how this decision making can ensure appropriate access to conciliation as a means of resolving disputes, particularly for people with a disability.

The aim of this research is to identify the key factors, criteria and processes that are currently being used to determine suitability of disputes for conciliation by Australian statutory complaints bodies with the following jurisdictions:

- health services
- disability services
- discrimination, equal opportunity, and human rights

The research findings will be analysed with the aim of proposing a framework of guiding principles and criteria to inform best practice in decision making about the suitability of disputes for conciliation.

Why have you been chosen as a participant?

You have been chosen because your organisation is included in the target group of statutory bodies for this research and you have indicated your interest in being interviewed.

Possible benefits

This research aims to be of benefit to participating organisations by articulating current practices, and by providing a framework to inform best practice on decision making about the suitability of disputes for statutory conciliation.

What does the research involve?

This part of the research involves participation in a semi-structured interview which is being conducted as a follow up to a survey completed by your organisation. I can be contacted by phone or email to answer any queries regarding the research and the information that has been obtained

in the survey or the information that will be sought in the interviews. (Please see contact details on next page.)

How much time will the research take?

The interviews are designed to take approximately one hour. Participants may be invited to participate in a follow up interview if there is mutual interest in exploring further details.

Inconvenience/discomfort

As you are being asked to provide responses based on your professional experience and role in your organisation, it is unlikely that you will experience any discomfort beyond the normal experience of everyday work or inconvenience other than the time taken to participate.

Can I withdraw from the research?

Being in this study is voluntary and you are under no obligation to consent to participation. However, if you do consent to participate and later wish to withdraw, you are requested to do this prior to the interview transcript being approved.

Confidentiality

Individual participants will not be identified in the research thesis or any publications arising from it. Your individual responses will be confidential and de-identified. Your organisation has completed a consent form which sets out whether your organisation will be identified by name, by type of complaints handled or not identified at all.

Storage of data

Storage of the data collected will adhere to the University regulations and kept in a locked cupboard/filing cabinet for 5 years. A report of the study may be submitted for publication, but individual participants will not be identifiable in such a report.

Use of data for other purposes

The de-identified data and findings of this research may also be used in presentations or publications for the purpose of contributing to the knowledge base and practice of individuals and organisations dealing with similar issues.

Results or further information

If you would like to be informed of the research findings, please contact Lynne Coulson Barr on [REDACTED]	If you have a complaint concerning the manner in which this research [Project Number: CF10/2795 – 2010001586] is being conducted, please contact:
In appreciation of your participation in this research, I would be happy to give a presentation of the results to the organisation. If you would like to contact the researchers about any aspect of this study, please contact the Chief Investigator:	
Dr Bronwyn Naylor Senior Lecturer & Director of Equity Monash Law Faculty Monash University VIC 3800 [REDACTED]	Executive Officer Monash University Human Research Ethics Committee (MUHREC) [REDACTED]

D.6 CONSENT FORM – PARTICIPANTS OF INTERVIEWS

Consent Form

Consent Form – *For participants of interviews*

Title: Decision making on the suitability of disputes for statutory conciliation

NOTE: This consent form will remain with the Monash University researcher for their records

I agree to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records. I understand that agreeing to take part means that:

- | | | |
|--|---------------------------------|-----------------------------|
| 1. I agree to be interviewed by the researcher | 1. <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. I agree to allow the interview to be audio-taped | 2. <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 3. I agree to participate in a follow up interview if requested
and if I am able and willing to make myself available | 3. <input type="checkbox"/> Yes | <input type="checkbox"/> No |

and

I understand that:

- a) my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.
- b) any data that the researcher extracts from interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics of individuals.
- c) I will be given a transcript of interview for my approval before it is included in the write up of the research.
- d) If I participate in a follow up interview, this consent will also apply to that interview unless I request another consent form to complete.
- e) any information I provide, other than what is publicly available, is confidential and will not be identified in any reports on the project or to any other party unless by express agreement
- f) no information that could lead to the identification of any individual will be disclosed in any reports on the project, or to any other party unless by express agreement.
- g) The data from the interview, transcript/audio-tape will be kept in a secure storage and accessible to the research team.
- h) the data will be destroyed after a 5 year period unless I consent to it being used in future research.

Participant's name.....

Signature.....

Date: **Organisation's name:**

Position title:.....**Contact email:**

D.7 INTERVIEW QUESTIONS/TOPICS

Questions/Topics: Project Number: CF10/2795 – 2010001586

1. Follow up questions from survey responses
 - I. Clarification of specific responses
 - II. Is there anything you would have liked to expand upon in your answers?
 - III. Are there any other areas you think should have been covered by the questions?
2. Specific questions relating to documentation reviewed e.g. conciliation policy
3. What are some of the challenges for you/your organisation in making decisions about suitability for conciliation?
4. How do you think these decisions are affected by the objectives or model of your conciliation process or the availability of other options to address the complaint?
5. Can you give an example of a decision where a matter was assessed as not suitable for conciliation?
6. If a person with a cognitive impairment or mental health issue is involved in a complaint, how is his/her capacity to participate taken into account in decision making?
7. How are power imbalances and potential risks taken into account in this decision making?
8. How does the involvement of legal representatives or advocates/support people in a matter affect the decision making about its suitability for conciliation?
9. Any comments on the legislative requirements/provisions that impact on decision making?
10. Any comments on what might be of assistance for your organisation's approach to decision making on the suitability of matters for conciliation?

APPENDIX E RESEARCH RESULTS – COLLATED RESPONSES

Open and selective coding of collated survey and interview responses

Number of statutory bodies = 17

Number of interview respondents = 18 (There were two respondents for the ACT Human Rights Commission, who provided responses for the separate jurisdictions of discrimination complaints and health/disability complaints)

Note: The interview conducted with the former Disability Discrimination Commissioner with the Australian Human Rights Commission was not included in the collated results because this interview was confined to approaches to access and participation of people with disabilities in conciliation.

E.1 TYPES OF OFFICERS WHO MAKE DECISIONS ABOUT REFERRALS TO CONCILIATION

Type/Title of officers who make decisions about referrals to conciliation (may be more than one type per statutory body)	No. of statutory bodies n=17
The Commissioner / Deputy Commissioner	10
Principal Investigation / Review / Conciliation officer	6
Manager/Team Leader	6
Director	5
Investigation / Conciliation Officer	4
Resolution / Complaint / Assessment officer	4
Case manager	2
Senior Investigation / Conciliation officer	1
Other	2

E.2 TYPES OF OFFICERS WHO CONDUCT CONCILIATIONS

Type/Title of officers who conduct conciliations (may be more than one type per statutory body)	No. of statutory bodies n=17
Conciliation/Investigation/Complaints/Resolutions officers	15
Senior Conciliators/Investigators	5
Team leaders / Managers	5
Director Complaints/Chief/Principal Conciliator	4
Independent/external conciliator	2
Case managers	1
Other	2

E.3 STAGES AT WHICH A DECISION ON REFERRAL TO CONCILIATION CAN BE MADE

Stages at which a decision on referral to conciliation can be made (may be more than one stage per statutory body)	No. of statutory bodies n=17
End (or towards the end) of assessment stage	6
At any stage of investigation complaint handling process / assessment / investigation	5
During the assessment stage	5
After matter is formally accepted	3
End of investigation	3
During initial consultations/ notification of the parties	3
Before matter is formally accepted	1
Following discussion (e.g. with Commissioner) / consideration of complaint	1
Other	2

E.4 COMMENTS ON IMPACT OF ALTERNATIVES TO CONCILIATION

Comments on impact of alternatives to conciliation (may be more than one comment per statutory body)	No. of interview respondents n=18
Matter is referred (to court/investigation) if cannot be resolved through conciliation	6
Preference of parties to resolve in conciliation is common	6
Consultation occurs with parties to explain the pros and cons of other options (e.g. court and tribunal) before decisions are made (e.g. to discuss benefits of conciliation and costs of alternatives)	6
Parties often express preference to resolve in conciliation	6
Financial impact / legal costs of court / tribunal is a barrier, supports conciliation	5
Complainant can choose to go to court/tribunal (or conciliation)	5
Extended time required for court / tribunal discussed with complainant	4
Tribunal or investigation processes can be preferred as it is seen to hold providers to account / impose consequences for issue / preference to have matter heard in court/tribunal	3
Tribunal / court being open to public and not confidential discussed with complainant	3

Complaint may be of a nature better suited to other process (e.g. tribunal, investigation)	2
Issue that mediation/conciliation is also used by tribunals	2
Funding / financial arrangements support referral to court or tribunal, less emphasis on conciliation	1
Ability of court / tribunal to award costs discussed with complainant	1
Inability to conduct conciliation/attempt resolution at same time as other process (e.g. court/tribunal)	1

E.5 COMMENTS ON TYPES OF CHANGES MADE TO APPROACHES TO CONCILIATION

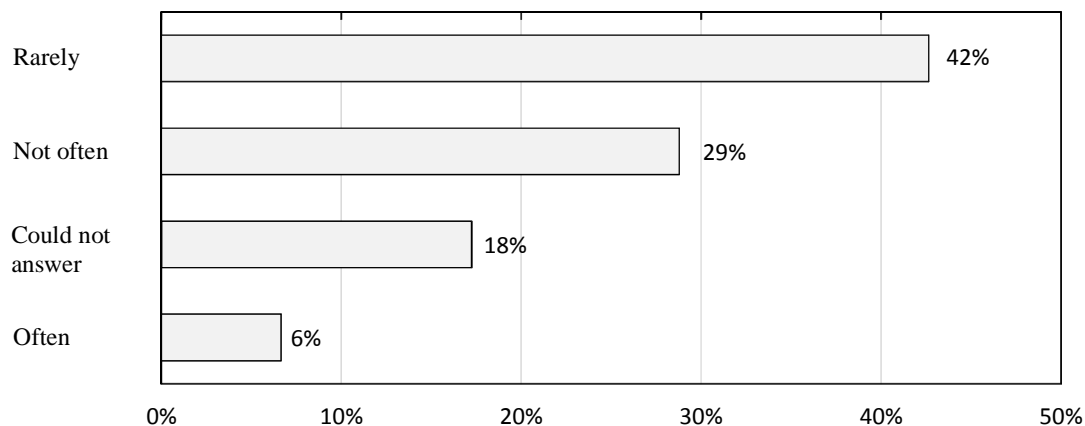
Comments on types of changes made to approaches to conciliation (may be more than one comment per statutory body)	No. of interview respondents n=18
Early conciliation/early resolution processes/reduced assessments	8
Conciliation model being reviewed	3
Streamline processes (e.g. for efficiency / resourcing reasons)	3
Modified to ensure more flexibility (including emphasis on face-to-face)	3
Increased focus on conciliation	3
Change/broadening of roles or responsibilities of officers	2
Reduced referrals due to other resolution options	2

E.6 COMMENTS ON REASONS/ADVANTAGES OF EARLY CONCILIATION

Comments on reasons/advantages of 'early conciliation' (may be more than one comment per statutory body)	No. of interview respondents n=10/18
Better outcomes – avoids entrenching positions and escalation	7
Increasingly promoted and used	6
More flexible / less process driven (avoids need for formal / written response to complaint, or judgment on substance)	4
Better use of resources	2
More timely outcomes	2

E.7 FREQUENCY OF DECISIONS ON THE UNSUITABILITY OF MATTERS FOR CONCILIATION

n=18 interview respondents



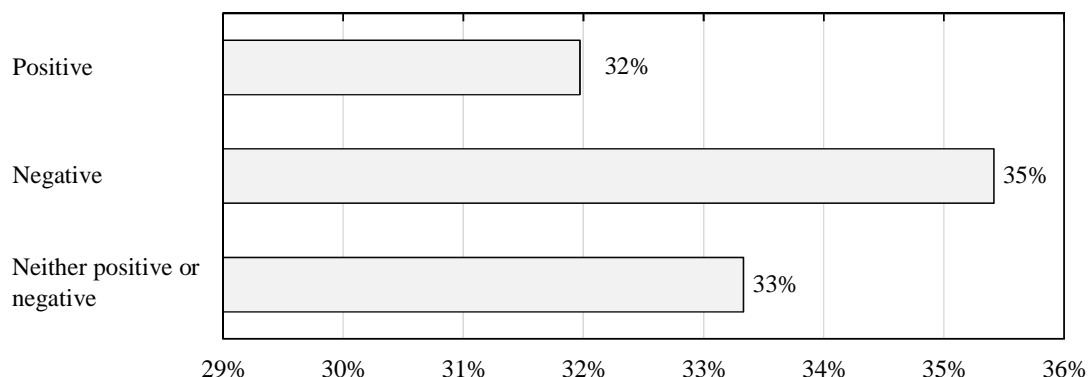
E.8 COMMENTS ON PRESUMPTIVE APPROACH TO SUITABILITY FOR CONCILIATION

Comments on presumptive approach to suitability for conciliation (may be more than one comment per statutory body)	No. of interview respondents n=18
Conciliation is the 'starting point' / presumed all cases are suitable	9
Conciliate unless there is a strong reason not to (e.g. risk or lack of fairness or lack of informed decision)	5
Likelihood of satisfactory resolution through conciliation is considered	2
Capacity of complainant to participate is still considered	2
Main reason not to proceed is when parties indicate they do not want to conciliate	1
Focus on adapting conciliation approach to ensure suitability / positive outcomes (e.g. format, approach/type, advocacy, settlement/agreement timeframe, number of conferences)	1

E.9 ANALYSIS OF FACTORS AS POSITIVE OR NEGATIVE CRITERIA FOR REFERRAL TO CONCILIATION

Analysis of reported factors

Base: All factors, n=48 factors



E.10 FACTORS TAKEN INTO ACCOUNT IN DECISION MAKING ON SUITABILITY FOR CONCILIATION

Factors taken into account in decision making on suitability for conciliation (more than one factor per statutory body)	No. of interview respondents n=18
Factors of both parties and dispute	
Likelihood of positive outcome or resolution	14
Whether parties are making an informed decision/self-determination re participation in conciliation	3
Whether process will be fair/party not be disadvantaged	3
Party characteristics	
The attitude of parties towards resolution / willingness of parties	11
Complainant's expectations of outcome	8
Potential benefits to parties	6
When there is an ongoing communication or relationship issue / history of dispute	4
Risk of detriment/violence/harm to parties/escalation of conflict	3
Capacity of parties to participate	3
Power imbalances	2
Nature of dispute/substance of complaint	
The nature / complexity of complaint	9
Significance or substance of complaint / use of resources	7
Specific matter that has a requirement for investigation or other process (e.g. professional conduct matter)	7
Ability to address systemic issues and conciliate	3

Complaint is warranted / acknowledged by provider	2
Other/External factors to parties and dispute	
Consequences/Lack of service options if do not resolve	2
Other processes (e.g. legal representation) not present or effective	1
External recommendation (e.g. board)	1

E.11 MOST COMMON REASONS WHY MATTERS ARE ASSESSED AS NOT SUITABLE FOR CONCILIATION

Reasons why matters are assessed as not suitable for conciliation (may be more than one comment per statutory body)	No. of interview respondents n=18
Factors of both parties and dispute	
Low prospect of resolution	7
Party characteristics	
Parties are not willing to conciliate/ uncooperative/ not approaching conciliation in good faith	13
Risk to parties of participating due to threat of violence or other risks	7
Complainant seeking unrealistic outcomes / punishment for respondent	4
Parties using conciliation to gather information for other purposes (e.g. court case)	3
Parties have limited capacity to participate	3
Power imbalance	1
Parties don't understand the benefits of conciliation	1
Parties want to test matter in court	1
Risk to parties of participating due to disability / mental illness of complainant	1
Nature of dispute/substance of complaint	
Requirement for investigation or referral (e.g. public interest test, systemic issue, serious matters, conduct issue)	8
Nature/complexity of matter	5
Complaint already going through legal proceedings / other jurisdiction	5
History of the issues/previous disputes or legal action between parties/pre-existing court orders	4
Delayed complaint – may prejudice outcome, limit fairness	1
Resources required for conciliation	1
Other/ Factors external to parties and dispute	
Other options exist for resolution	1
Requirement to deal with matter through another process (e.g. misconduct issue)	1
Other	4

E.12 MOST COMMON REASONS FOR DECISIONS TO CEASE CONCILIATION

Reasons for decisions to cease conciliations (may be more than one comment per statutory body)	No. of interview respondents n=18
Party characteristics	
Parties uncooperative / unable to reach agreement	11
Violence / aggression / bullying / abusive language	4
Parties do not provide consent / withdraws from process (e.g. due to change in attitudes or circumstances)	3
Conciliation a 'fishing expedition' / parties not participating 'in good faith'	3
Expectations of the parties unrealistic / cannot be met (e.g. financial settlement)	2
Where a party considers the matter should be made public / not willing to maintain confidentiality	2
Nature of dispute/substance of complaint	
Issues too complex or inappropriate for resolution through conciliation	2
Advice from legal representatives to their clients / matter in litigation	2
Issues arise during conciliation that weren't identified in initial assessment (e.g. new information or capacity issue) that make conciliation inappropriate	1
Other	
Parties unable to be contacted	1

E.13 HOW FACTORS SUCH AS CAPACITY TO PARTICIPATE OR POWER IMBALANCES ARE TAKEN INTO ACCOUNT

How are factors such as capacity to participate or power imbalances taken into account? (may be more than one comment per statutory body)	No. of interview respondents n=18
Encourage use advocates/ support people/ legal representative /guardian	10
Mode of conciliation may change / flexible to needs of parties (face-to-face, shuttle conferences, number of attendees)	8
By being aware of the issue/ taking it seriously /taking it into account in interactions	5
Conciliation process supportive, through skills and approach of conciliators and clear explanation / language / communication	4
Maintain/clarify impartiality of conciliator	3
Use of interpreters (including Auslan)	2
Allow for cooling off period for agreements / settlements	2
Use pre-conciliation processes to prepare both parties and ensure common ground	1
Matching conciliator skills/personal qualities to needs of parties	1
Apply principle of 'do no harm'	1

E.13.1 Approaches for people with a cognitive impairment/disability

Approaches for people with a cognitive impairment/disability	No. of interview respondents n=18
Encouraged to use advocates/ support people/ legal representative /guardian	11
Supportive conciliation process, including through effective communication/language/explanations and skills and approach of conciliators	7
Mode of conciliation may change / flexible to needs of parties (face-to-face, shuttle conferences, number of attendees)	7
By being aware of the issue/ taking it seriously /taking it into account in interactions	4
Discussion of the issue in pre-conciliation meetings (including to encourage using a support person)	3
Allow multiple days for conferences / meetings (e.g. to break up sessions)	3
Allow for cooling off period for agreements / settlements	2
Discussion with service about how to address imbalances	2

E.13.2 Approaches for people with mental health issues

Approaches for people with mental health issues	No. of interview respondents n=18
Encouraged to use advocates/ support people/ legal representative /guardian	4
By being aware of the issue/ taking it seriously /taking it into account in interactions	3
Terminate or do not conduct conciliation if it is doing harm/ not productive	3
Ensure safety of staff in conciliations / risk assessment / staff training on dealing with people with mental health issues	3
Flexible timing/ postpone conciliation until person able to participate in conference or made some degree of recovery	3
Mode of conciliation may change / flexible to needs of parties (face-to-face, shuttle conferences, number of attendees)	1

APPENDIX F

F.1 DESCRIPTIONS OF CONCILIATION IN PUBLIC DOCUMENTATION AND WEBSITES (as at 25 April 2016)

Statutory Body	Facilitative description	Advice on law and possible outcomes	Educate about law & prevent breaches	Impartial/ don't decide outcome	Faster/cheaper than court/tribunal	'Party control'/ mutually agreed outcomes	Other
ACT Human Rights Commission	✓	✓	✓ 'proposed resolution will ensure that the alleged discrimination stops'	✓	✓	✓ 'a mutually acceptable way of resolving the complaint'	-
NT Health and Community Services Complaints Commission	-	-	-	✓	✓ 'compared to civil litigation'	-	(refers to roles defined in legislation) 'serious matters warranting conciliation'
Qld Health Quality and Complaints Commission (as at 30 June 2014)	✓	-	-	✓	-	-	
WA Health and Disability Services Complaints Office	✓	✓ 'determine any relevant, applicable standards' 'assist with determining realistic outcomes'	-	✓	✓ 'less formal alternative to often costly legal action'	✓ 'assist parties to resolve a complaint to mutual satisfaction'	'review any medical or procedural documentation' (refers to office's broader role to) 'review the causes of complaints and make service improvements suggestions'

Statutory Body	Facilitative description	Advice on law and possible outcomes	Educate about law & prevent breaches	Impartial/ don't decide outcome	Faster/cheaper than court/tribunal	'Party control'/ mutually agreed outcomes	Other
Tas. Health Complaints Commissioner	✓	-	-	✓	✓ 'alternative to litigation for compensation claims'	✓ 'opportunity to resolve a complaint in a collaborative way'	'informal and non-adversarial' 'can assist to restore relationships'
NSW Health Care Complaints Commission	✓	-	-	✓	-	✓ 'resolution acceptable to everyone'	Refers to need for detailed explanation or compensation
SA Health and Community Services Complaints Commissioner	-	-	-	✓	-	-	Refers to conciliation as 'a more formal dispute resolution process'
Vic. Office of the Health Services Commissioner	✓	-	-	✓	✓ 'alternative to legal proceedings'	-	Role includes: 'obtaining medical records and reports from treating doctors, an independent medical opinion, an independent impairment assessment' 'Good for detailed explanation and confidential dispute resolution'
NSW Ombudsman	-	-	-	✓	-	-	'We may consider this option if there is a continuing relationship between you and the service provider'

Statutory Body	Facilitative description	Advice on law and possible outcomes	Educate about law & prevent breaches	Impartial/ don't decide outcome	Faster/cheaper than court/tribunal	'Party control'/ mutually agreed outcomes	Requires Good faith	Other
Victorian Equal Opportunity & Human Rights Commission	✓	✓ 'helps them to better understand their rights and responsibilities and come up with good solutions'	✓ 'helps them to better understand their rights and responsibilities [under the Act]'	✓	-	✓ 'aim of achieving a mutual agreement'	-	'fair, informal and easy to understand' 'committed to fairness in complaint handling'
Equal Opportunity Tasmania (Office of the Anti-Discrimination Commissioner)	✓	✓ 'explain what the .. Act says about particular situations and how it has been interpreted '	-	✓	✓ 'reach agreement without going to the Tribunal or court...and cost-effectively'	✓ 'some control of the how the complaint can be resolved'	-	'seeking fair and just outcomes in complaint-handling processes'
SA Equal Opportunity Commission	✓	✓ 'explain the law'	-	✓	✓	✓	✓	-
WA Equal Opportunity Commission	✓	-	-	✓	-	-	-	'can request additional info, witness statements etc.'

Statutory Body	Facilitative description	Advice on law and possible outcomes	Educate about law & prevent breaches	Impartial/ don't decide outcome	Faster/cheaper than court/tribunal	'Party control'/ mutually agreed outcomes	Requires Good faith	Other
NT Anti-Discrimination Commission	✓ (limited) 'informal dispute resolution process'	-	-	✓	-	✓ 'helps the parties find a solution to their problem'	-	-
Qld Anti-Discrimination Commission	✓	✓ 'specialist knowledge of the Act'	✓ 'help all parties to understand their rights and responsibilities under the Act'	✓	✓ 'save the time and cost of having to go to a formal hearing'	-	-	'informal opportunity for all parties to discuss what occurred...' 'ensure the process is fair to all parties'
NSW Anti-Discrimination Board	✓	✓	✓	✓	-	-	-	-
Australian Human Rights Commission	✓	✓ 'provide information about...possible terms of settlement...the law and how the law may apply to the complaint... how other complaints have been resolved'.	✓ (Implied)	✓	✓ 'informal, quick, and cost effective way....than court'	✓ 'settle the matter on their own terms'	-	'informal' process 'makes sure that the process is as fair as possible for everyone involved'

F.2 EXAMPLES OF CONCILIATION OUTCOMES IN PUBLIC DOCUMENTATION AND WEBSITES (as at 25 April 2016)

Statutory body	Explanation	Apology	Refund/ Costs	Compensation	Job return/ Training etc.	Other	Intro/Change to Policy/ Procedure	Staff Training
ACT Human Rights Commission	✓	-	-	‘for lost income or for hurt and humiliation’	✓	‘other gestures to show the respondent’s good will towards the complainant’ ‘provide a service that was previously denied or given in a way that was inappropriate’	✓	✓ on ‘acceptable behaviour and the law’
NT Health and Community Services Complaints Commission	✓ ‘detailed explanation’	-	-	✓	-	-	-	-
Qld Health Quality and Complaints Commission (as at 30 June 2014)	✓	✓	-	✓	-	‘improvements in safety and quality’	✓ to prevent same thing occurring	-
WA Health and Disability Services Complaints Office	✓	✓ and ‘acknowledgment’	✓	-	-	‘return of records’	✓ ‘system improvements’	-

Statutory body	Explanation	Apology	Refund/ Costs	Compensation	Job return/ Training etc.	Other	Intro/Change to Policy/ Procedure	Staff Training
Tas. Health Complaints Commissioner	✓ 'detailed explanation' 'understand what happened'	✓	-	✓	-	'improvements in safety and quality of services'	✓	-
NSW Health Care Complaints Commission	✓ 'providing better information about what happened and why'	✓ 'for poor or inappropri ate treatment'	✓				✓	
SA Health and Community Services Complaints Commissioner	-	-	-	-	-	-	-	-
Vic. Office of the Health Services Commissioner	✓ 'explanation as to what happened and why'	✓ 'apology or an acknow- ledgment of harm suffered'	✓ 'claim for refund of fees'	✓	-	'remedial treatment'	✓ 'change in systems, policies or protocol ... to prevent incident'	-
NSW Ombudsman	-	-	-	-	-	'service improvements'	-	-

Statutory body	Explanation	Apology	Refund/ Costs	Compensation	Job return/ Training etc.	Other	Intro/ Change to Policy/ Procedure	Staff Training
Victorian Equal Opportunity & Human Rights Commission	-	✓ 'public or private'	-	✓	✓	'reference, access to services, change of behaviour'	✓	✓
Equal Opportunity Tasmania (Office of the Anti-Discrimination Commissioner)	-	✓	-	-	-	'reference from employer'	✓	✓
SA Equal Opportunity Commission		✓ 'private or public'		✓ 'for financial loss or injury to feelings'	✓	✓ 'access to services previously refused'	✓	✓
WA Equal Opportunity Commission	-	✓	✓	✓ 'for specific loss .. income or emotional harm'			✓	✓
NT Anti-Discrimination Commission	-	-	-	-	-	-	-	-
Qld Anti-Discrimination Commission	-	✓	-	✓ 'for hurt feelings and lost wages'	-	-	-	✓ 'so that everyone understands their rights and responsibilities'

Statutory body	Explanation	Apology	Refund/ Costs	Compensation	Job return/ Training etc.	Other	Intro/ Change to Policy/ Procedure	Staff Training
NSW Anti-Discrimination Board	-	-	-	-	✓	-	✓	✓
Australian Human Rights Commission		✓	✓	✓	✓		✓	✓

F.3 LEGISLATIVE PROVISIONS AND OTHER FUNCTIONS WHICH MAY AFFECT REFERRALS TO CONCILIATION

Statutory Body	Assessment/Investigation of complaint prior to referral	Compulsory powers to conciliate	Alternative resolution processes	Referral or gateway to tribunal/court	Other functions affecting referral
ACT Human Rights Commission	Assessment to accept/consider	✓	Resolution in assessment or informal resolution	✓	Option to investigate Referral to Professional Boards/Councils Referral to Tribunal
NT Health and Community Services Complaints Commission	Assessment to accept/consider	-	Resolution in assessment or informal resolution	-	Option to investigate 'Serious matters' reserved for conciliation or investigation
Qld Health Quality and Complaints Commission (as at 30 June 2014)	Assessment to accept/consider	-	Resolution in assessment; Provision for 'early resolution'.	-	Option to investigate Referral to Professional Boards/Councils
WA Health and Disability Services Complaints Office	Assessment to accept/consider	-	Negotiated settlement: 'The role of the negotiator is to assist in the exchange of information and promote resolution of the complaint'	-	Option to investigate to 'look into broad systemic issues and make recommendations for service improvement' Refer to APHRA/ health professional registration board
Tas. Health Complaints Commissioner	Assessment to accept/consider	-	Resolution in assessment; Provision for 'early resolution'.	-	Option to investigate 'for systemic issues' Referral to AHPRA/ health professional registration board
NSW Health Care Complaints Commission	Assess to accept and decide on resolution or investigation	-	'Assisted resolution'; general provision for 'complaint resolution'.	-	Investigations Power to prosecute Referral to Professional Boards/Councils.

Statutory Body	Assessment/Investigation of complaint prior to referral	Compulsory Powers to conciliate	Alternative resolution processes	Referral or gateway to tribunal/court	Other functions affecting referral
SA Health and Community Services Complaints Commissioner	Assessment and ‘Preliminary Inquiry’ to accept/ consider: ‘decision about the reasonableness of the service provider’s action/inaction in the circumstances’	-	Direct resolution, ‘informal resolution’ and provision for ‘mediation’.	-	Option to investigate Refer to AHPRA /health professional registration board
Vic. Office of the Health Services Commissioner	Assessment to accept/consider – need to be satisfied reasonable steps taken to resolve directly	-	Resolution in assessment	-	Option to investigate Referral to AHPRA/ health professional registration board
NSW Ombudsman	Assessment to accept/consider – focus on standards and conduct of service	-	Can investigate, refer to the service or refer to another body	-	Option to investigate
Victorian Equal Opportunity & Human Rights Commission	Assessment in jurisdiction	-	-	- Parties can go direct to tribunal. Conciliation is an alternative to tribunal.	-
Equal Opportunity Tasmania (Office of the Anti-Discrimination Commissioner)	Assessment in jurisdiction; investigate grounds for complaint	✓	Early resolution	-	Referral for formal Inquiry by Tribunal

Statutory Body	Assessment/Investigation of complaint prior to referral	Compulsory Powers to conciliate	Alternative resolution processes	Referral or gateway to tribunal/court	Other functions affecting referral
SA Equal Opportunity Commission	Assessment in jurisdiction	✓	-	-	Referral to Tribunal
WA Equal Opportunity Commission	Preliminary assessment only for jurisdiction; refer to conciliator who 'investigates'.	✓	-	✓	Investigation is part of conciliation – 'purpose is to allow both parties to submit information or documents to reveal facts' Referral to Tribunal
NT Anti-Discrimination Commission	Assessment in jurisdiction	✓	- Can encourage early conciliation	✓	Referral to Tribunal
Qld Anti-Discrimination Commission	Assessment in jurisdiction	-	-	✓	Must conciliate within 6 weeks Referral to Tribunal
NSW Anti-Discrimination Board	Assessment to accept/consider	✓	-	✓	Referral for formal Inquiry
Australian Human Rights Commission	Assessment to accept/consider	✓	-	✓	Conduct of Inquiry by President Referral to Federal Court