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LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 5 June 2008

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Mr L. Harkin, Commissioner,

Ms L. Coulson Barr, Principal Conciliation Officer, Disability Services Commissioner.

The CHAIR — The Law Reform Committee welcomes Laurie Harkin and Lynne Coulson Barr to the hearing. Thank you very much for coming, and thank you very much for sending along some material from the commission. As you know, the discussions here are subject to parliamentary privilege, so anything that you say here is afforded that privilege, but if you say the same things that are not that flattering about some organisations or individuals outside the confines of this hearing, you will not be afforded that privilege. Hansard is recording our discussion this morning, and you will be sent a transcript of that; you can make some minor changes to that, but obviously the substance of it will be the way it is. We have just under 45 minutes, and we will throw it open to you. Before I begin, I should congratulate you on coming up to your first anniversary. Is it on 1 July?

Mr HARKIN — Yes, it is.

The CHAIR — It has probably been a very big year for you. No doubt we will hear about some of that during our discussions. I will throw it open to you. If you do not cover some things, we will come back on those.

Mr HARKIN — Certainly. Firstly, thank you and thanks for the opportunity to come along to the committee; we appreciate that. Yes, the clicking sound you can hear is our heels that are clicking together celebrating the first anniversary of the work of the office. The thing to say of particular note is that this is emerging work; it has not been done before. Of relevance from our point of view for your particular piece of work is that we have a range of views — informed certainly by our relatively short history at this time, but nonetheless informed — that would suggest to us that one of the more useful things that might happen for people of lesser capacity, particularly those folk with whom we deal, is to provide opportunities for less-formal, less-foreboding, more user-friendly arrangements that do not confound people. That would be a useful thing to be embedded in the way that people are able to express concern or grieve about their circumstances more generally, and the ways in which people and systems react to them might be better characterised by a respectful response rather than a response that is frightening for a lot of folk. Indeed, even the simplest of things can be pretty foreboding for people with significant disabilities. The prospect of them being afforded opportunities to be more able to be heard and their concerns appreciated is a good thing.

You are probably aware that the legislation under which I function has been significantly informed by the legislation that has now been in place for about 20 years for the Health Services Commissioner of Victoria. A lot of the emphasis that informs those parts of the act under which I function has been informed by that experience. I guess there are some significant differences that I would point to between the Health Services Commissioner's work and the work of my office. If you examine the work of people who present to the Health Services Commissioner, it is the case that people with disabilities are underrepresented — that would be the polite and correct way to describe it. I suggest that the answer as to why that is the case is obvious. It is not that the Health Services Commissioner's legislation, or indeed the business of the office, seeks to achieve that outcome. it is rather a feature of people being perhaps less empowered and less able to bring their issues of concern to a body that might perhaps be able to be more sensitised in dealing with them.

To that end we have sought to establish arrangements of a very flexible kind. We have given you — to the extent to which you find it useful, and I hope you do — kits that we would normally use in explaining the business of the office to users of it. I guess one of the significant differences that I point to is that anybody can bring an issue to me. They do not have to be the person who is experiencing the adverse circumstances as they would see it. We bring, in our response to that work, an open-mindedness, a lack of bias, in terms of do we assume that people who express concern are necessarily correct in the concern they express or do we assume that people are wrong in the responses that they have given to people.

What is interesting for us thematically to date, if we look at what sits behind the reasons for people bringing concerns to us, is that over 90 per cent of the issues with which we deal can be traced back to communication, or the lack of it. It is more a matter of: did the person who was expressing concerns about their experience feel that their concerns were heard and understood? The process, under development and still again part of the emerging work, is one of education within the sector and bringing to people's minds the need to understand that whilst I might say something to you, did you hear what I meant you to hear or did you interpret something in a particular way to suit the paradigm that might inform your view of the world? What is evident is the lack of testing of those sorts of concerns. I think that goes back to the question of fundamental respect about how folk are dealt with.

I thought perhaps just to make some general comments of that kind. I might invite Lynne, with your indulgence, to make some particular comments about how the processes unfolded for us. Lynne heads up the office which is in three parts. Lynne heads up that part which is concerned with conciliation, which means that she manages the initial assessment process, mediation, conciliation and, where necessary, the more foreboding investigation of the work of the office. One of the other two parts of the office is concerned with capacity development — that is, the community education elements in particular — and driving cultural change throughout the sector. The other part of the office is concerned with supporting the ministerially appointed Disability Services Board, resource management, and research and development more generally. For your purposes, we thought that Lynne's commentary might be most useful and relevant.

Ms COULSON BARR — Perhaps if I give you the context of our work and then I will talk about the models that we are developing and what we have learnt to date. In terms of our jurisdiction, I am not sure how much you aware of, so will I start from that?

The CHAIR — Yes.

Ms COULSON BARR — The complaints that can be made to us are limited to those that are about registered disability support providers. They are providers who are registered by the Secretary. They are either the Department of Human Services as a service provider or those services that are funded by the Department of Human Services and have a status of a registered service provider. They are the only complaints that we can consider.

We have found in our early work that because we have the title 'disability services commissioner' we attract a whole range of issues related to disability, particularly because people with a disability do not feel that they have had a specific complaints body to address their needs. So a good part of our work has been in terms of assessing whether something is in scope and referring people or helping people get to the door of where they can take their issues. We see that as a very important part of our work, in terms of people having access to other avenues to address their concerns and also having the experience of their contact with our office being a helpful one and knowing that we can provide them with information about our services, should they need them in the future.

The complaint can be about any aspect arising from disability service provision, so it is very broad. They have to be receiving a service, but in that we have many issues about people's access to service. That is technically out of scope, but we have to look at whether they are still getting a service, whether there are issues around their assessment and need, and how their concern around inadequacy of service has been addressed. We work around those issues even though we do not have direct jurisdiction over the question of access or allocation of resources. Most of the complainants are already receiving some service, and while the complaint can be essentially around access to service, it can be as much about whether their needs have been understood and whether the service provider who has been requested for the service has appreciated the range of current needs, changes and circumstances. So we do look at that aspect.

Another complaint that can be made is about the way that a complaint has been handled by the service provider. As you would imagine, many of the complaints have a combination of both those dimensions. It is rare that we get one or the other; there is usually a combination. If people are coming to the office, they are normally dissatisfied about the way that their complaint has been handled by the service provider. So we look at both those issues.

In the preliminary assessment of the complaints we are looking at whether something is in scope. In the act we have the provision that we can attempt to informally resolve complaints. A good part of our work is in that process of getting a response from the provider, and when we ask the service provider to respond to the complaint one of our key focuses is on what steps they see could resolve this issue. So in the assessment process, while we are also looking at whether we should formally consider the issue, we are really trying to exhaust all opportunities for the service provider to resolve it with the service user.

In terms of the numbers and characteristics of complaints and issues that we have had to date, in the first 11 months we have had approximately 275. We have not completed the year, so we have not finalised those statistics. They are inquiries and complaints — all the approaches to our office. Approximately 25 per cent of those inquiries eventuate in formal complaints, where we are seeking formal response from the service provider. As I mentioned earlier, a lot of our work is in that early stage of seeing whether it can be informally resolved and whether we can facilitate the person making the complaint to make a direct approach to the service provider. Our approach is wherever possible to facilitate the resolution of complaints at that local level.

About one-third of the complaints were formally considered. A decision to formally consider a complaint under the act means that the complaint is referred to either conciliation or investigation — they are the two avenues. In making a decision to formally consider a complaint, we have to be satisfied that all reasonable steps have been taken to resolve the issue and that the matter is in scope. We can decide not to formally consider a complaint if we feel that is appropriate. There are a range of provisions in the act that cover when a complaint is misconceived, lacking in substance, vexatious or out of scope or when it should be more appropriately considered by another body.

I mentioned that the majority of our matters are referred to conciliation. That is a presumption in the act. The way the act is constructed, it is assumed that the majority of matters will be resolved through being referred to conciliation. That is reinforced in the provisions that deal with investigation. There is provision that if at any point when we are investigating a matter we find that a matter is suitable for conciliation, it must be referred to conciliation. So there is an emphasis in the act on resolving matters through that process.

The majority of matters that we have formally considered — around 85 per cent — have been referred to conciliation. Because we are in developmental stages, we are still talking about small numbers. We have got about 20 matters at the moment, and the majority of those are still in process, so we are not able to talk to you about the outcomes of those matters, but we can talk to you about what we have learnt to date in terms of the models that we are using, and I will come to that in a moment.

With the complaints that are not formally considered, we have found that they have either been out of scope, or substantially addressed during the assessment stage, or misconceived. They are the main three reasons why we are not formally considering them. The other matters we are informally resolving, and it is by agreement between the complainant and the service provider that no further action is needed.

The CHAIR — What do you mean by ‘misconceived’? Could you explain that a bit?

Ms COULSON BARR — It can be about expectations from the service user about what the provider is able to provide. It might be expectations, for instance, about what a case management service could provide and expecting more than that service is able to provide. What we look at in that complaint is around expectations and communications. Usually there has been a breakdown in terms of what the service user, or the person making the complaint on their behalf, expects from the service.

Mr HARKIN — And a person may simply be wrong, and we have the capacity to say, ‘You are wrong; I am not considering this’. You need to explain why, obviously.

Ms COULSON BARR — It fundamentally has to do with expectations when something is misconceived. While we may not be formally considering a complaint, we do quite a bit of work in that assessment period to look at how we can address those expectations and work with the service user and the service provider about they might work on those. It may be that there are agreements by the service provider to meet with the service user and go through those issues.

The CHAIR — So there are ‘out of scope’ and ‘misconceived’, and what was the third one you said?

Ms COULSON BARR — When matters are substantially addressed. Many of our complaints have multiple factors in them. As part of the assessment of the complaint it may be that the majority of issues that have been raised have been substantially addressed. The complainant might still be unhappy with a couple of things that were not resolved to their satisfaction, but it is our view that the key issues have really been addressed. The reality is that we will not be able to get consensus on all matters; it is about the extent to which we can resolve matters and that both parties are able to work on issues in the future.

Mr HARKIN — We have adopted a deliberate use of language; we have not used the term ‘consensus’ in anything we have published. We have used the term ‘resolution’ because it is foolishness to imagine that we are going to get agreement from everybody about issues in dispute.

Ms COULSON BARR — Many of our matters are informally resolved in the assessment stage, so the majority of our work has been at that level. We are refining our approach and how to do that. In our early days we did a lot of that on the phone, in terms of facilitation between the assessment officer and the service provider and the service user. Our learning to date is that we could fast-track many of those processes if we got people around the table and we did more face to face. That is fairly obvious, but I guess we are learning how to refine that, because we are also conscious of the potential of protracting our complaint by trying to informally resolve it through a phone tag process, and we have found that that can be less than effective. We are looking at ways of fast-tracking, because our aim is also that the conflict does not escalate. Because the complainants or the service users and the service providers normally have ongoing relationships, there is a current relationship that is in place, so we are conscious that we need to resolve things as quickly as possible, being mindful of that ongoing relationship and often dependency on the service provision.

Mr HARKIN — A noteworthy observation here — and you might find it unsurprising — is that a lot of folk with disabilities have not expressed concern about their experience because they are actually afraid to. They fear that something will occur to them, and fear is the right word — that they will be somehow dealt with or receive some diminished outcome as a consequence of actually speaking up. This is very much around saying, ‘No; this is okay. You ought to be able to say what you think’, and reinforcing that that is an all right behaviour.

The CHAIR — Do they believe you?

Mr HARKIN — That is an interesting question. Increasingly with our experience in forums — we have conducted forums throughout the state, and we have addressed over 1500 people — with a lot of people the reaction will be, ‘Yes! Independent boys stand up for rights et cetera. That is good; that is what we would like. We just do not have it. That is not our experience’. A lot of people can get angry and say, ‘That would be good if life was like that, but it is not how it is for us’. Then it is a question of bringing cultural change along in a way that takes people on a journey, as distinct from being insistent on, ‘No, you must do things these ways; these are the right ways’. Is there a right way? That is one of the key features of how the work has emerged from our point of view. It is not so strict and structured; it needs to be flexible. It is very much about alternative ways of resolving issues in dispute, from our point of view.

The CHAIR — When you finish the assessment process or get a resolution and you work through that, you have got to protect the issue that Laurie has just mentioned. You have got to make sure that the provider has their dignity intact.

Mr HARKIN — Yes.

The CHAIR — And has a sense of where to go next.

Ms COULSON BARR — Yes.

The CHAIR — And all those sorts of things. That is part of your work.

Mr HARKIN — Absolutely.

Ms COULSON BARR — That is why a key focus of our work is looking at what steps there can be to resolve it, and looking at the relationship issues as well — how they might work with differences in the future. A big part of looking at the resolution of a complaint might be around a particular issue that has triggered it, but it is usually deeper than that in terms of the nature of the relationship around the service provision. It is looking at how people could communicate about disagreements in the future, who they need to speak to and how that would be handled. Setting that foundation for the future is really important.

The CHAIR — I think I interrupted you just before.

Ms COULSON BARR — That is okay.

Mr HARKIN — You were just about finished, were you not?

Ms COULSON BARR — No; I have got another page!

Mr HARKIN — Oh, have you? No, I think you were just about finished!

The CHAIR — Press on, Lynne!

Ms COULSON BARR — Unless you want a break to ask questions?

The CHAIR — No; please!

Mr HARKIN — We can talk the leg off a wooden horse, but is that what you want?

Ms COULSON BARR — Kate alerted me to the type of issues you might be interested in, so that is why I have focused on this, but I am happy to be — —

The CHAIR — No; please go on. It is called evidence gathering, so let us get the evidence.

Ms COULSON BARR — I was told you would be interested in some of the demographics of people bringing issues to us. Our experience to date is that the majority of matters are brought to us by either a parent or guardian — just over half of the matters are brought by parents and guardians. Around 8 to 10 per cent are by service users themselves — the person with the disability — and that can be by themselves or with the assistance of an advocate. Between 7 and 10 per cent are raised by an advocate or a friend directly making complaints. That is not surprising. We know the reluctance of people with disabilities to bring issues themselves, so our aim is to look at ways of increasing that capacity for people to bring issues directly, and I will talk about that shortly — about our communication strategies.

Even in the short time we have been operating we have seen a little bit of an increase over time, with people bringing matters by themselves. Whenever someone lodges a complaint on a person's behalf we also always endeavour to try and speak to the person affected directly to make sure that it is representing their wishes and concerns. That can be a complex process, depending on the capacity and circumstances of the person, but our principle is that we will do that wherever possible.

Mr HARKIN — Perhaps a further point to make is that it can be the case that you can find yourself dealing with zealous advocates who are pushing a particular perspective for a particular cause or reason which does not necessarily trace back to being in the best interest of the person who they are seeking to represent, so we would seek almost to clarify just what the motivations are and be clear about what it is that we are dealing with.

Ms COULSON BARR — In terms of the types of disabilities that people have, we aim to have a non-intrusive process, so at the inquiry stage we are not asking questions of people to identify the type of disability. It may not always be volunteered. In about 40 per cent of our inquiries people do not volunteer their disability. They will identify that they have a disability, but not volunteer its nature. By the time we get to considering a complaint we have awareness of the type of disability, so in terms of the statistics we have a picture on 60 per cent of our complainants.

The biggest proportion are people with an intellectual disability, and that is not surprising in terms of the proportion of people with a disability, intellectual disability, accessing disability support services. Around 50 per cent to 60 per cent of people coming to us would be people with an intellectual disability. Many of the people have multiple disabilities; it is intellectual disability that has been identified as the primary disability. Around 20 per cent of people identified as having a physical or neurological impairment, and around 10 per cent an acquired brain injury. These are the statistics that we need to look at for how we are going to refine the collection in the future.

The CHAIR — What was the middle group again?

Ms COULSON BARR — Physical or neurological. That is a challenging one to collect data on because of how people define what is physical and what is neurological. We are aware that that is a challenge of how best to collect that information. That is in terms of the demographics; are there any other particular areas of interest in terms of the demographics for people, because I am going to talk about accessibility next?

The CHAIR — I would just be interested in the age profile and also gender and maybe ethnicity. Do you do any of that analysis?

Ms COULSON BARR — I did not bring those. We have not analysed that.

The CHAIR — Okay, maybe we can follow that up later.

Ms COULSON BARR — We will be needing to look at this in terms of our first annual report. We have not actually analysed that to date. It is certainly something we will be tracking at another time.

The CHAIR — Fair enough.

Ms COULSON BARR — I believe you are interested in accessibility of processes. One of the key points is having a consistent communication strategy to promote awareness of the office. We feel we have been reasonably successful in that. Having the 270-plus numbers of inquiries is quite significant if you look at the context of our work and the history of a reluctance of people with disabilities bringing the issues. We feel that is a significant indication that people are aware of our office, and we expect that over time the numbers will increase. Though what we need to balance that with is that a good part of the work of our office is also educating service providers to pick up complaints at the earliest possible level. The success of our office cannot be measured just on the number of people bringing matters to us; it will also be measured by the number of matters resolved at the earliest possible stage with the service provider. It is about having that balance and ensuring that people are aware of our body as an independent body where they can bring their issues, at the same time as service providers are picking up those issues at the earliest possible point.

Mr HARKIN — And we would always ask the question of people and be clear about whether or not they felt that they have taken the matter to the provider and expressed their disquiet and got nowhere, or they have not. If they have not, reasonably they need to be guided and taken back to that point, because otherwise it is not fair to the provider.

The CHAIR — But given what you said before about fear, how are they supported to do that first step? Because that might be the biggest hurdle.

Mr HARKIN — Yes, indeed, and that is something that we think is legitimate for us to do. If we form a view that the matter that people have brought to us is out of scope and as a response is inadequate, we would work with people to have them understand why the issue is not in the scope for us and then assist them to get to the point of prosecuting — in inverted commas — their issues in the right place. But we are absolutely crystal clear that we do not become their advocates; we merely take them to that doorway and say, ‘There you are’.

Mr CLARK — Many ADR providers, like, say, the electricity and water industry ombudsman, spell out very clearly up-front, ‘Take your complaint to your service provider first before you come to us’. You have not done that. Do I take it from what you have been saying that that is sort of a conscious decision and that you do not think that is reasonable to expect necessarily of a person with a disability, so you are happy for them to come to you first and then you will encourage them to go to the service provider?

Mr HARKIN — Happy is the wrong word, but I understand the point you are making. We have said that that is what people should do first, but the act also has some other provisions which are peculiar to my office. The act requires that if the parties to an issue in dispute tell me that the issue is resolved, I stop dealing with it, unless I am of the mind that there has been some coercion, intimidation and it is not all as it seems, as it appears. That is influenced by the decision I need to take about whether or not the health and wellbeing of the individual who has expressed the concern in the first place is being appropriately met. Then I do not have to stop dealing with it; I will continue to deal with it because I think that something untoward occurred. I think that is a difference between, say, all of the other types of the bodies to which you refer and other like bodies, given the constituents that we would ordinarily find ourselves dealing with and the difference that is significant for them. It is a noteworthy distinction in my view.

Ms COULSON BARR — The act provides a discretion to accept or formally consider a complaint without being satisfied that reasonable steps have been taken to resolve it. We can do that where we are satisfied that there is an issue of health, safety and wellbeing. It means that people do have the right to bring issues directly to us and that we have discretion to formally consider them without requiring the steps — though in practice we are looking at what steps have been taken to try to resolve the complaint.

Mr CLARK — Is that the reason you have not actually said in your literature, ‘Go to your service provider first’? Is that correct?

Ms COULSON BARR — It is not put as a requirement, because also under the act the preliminary assessment stage can be used as an opportunity to facilitate people going back to the provider and steps being taken to resolve. There is a provision for people to come to us if they have real concerns about how they can make that complaint directly. We always explore supports for how they could do that. If they have not got the supports to do it directly and we cannot engage an advocate, we can facilitate making that request directly to the service provider to look at it in the first instance, but acknowledging to the service provider that they have not had the opportunity to address it, and we give them time to look at that first. The preliminary assessment stage can be used as a facilitation, and that is also recognising that people can be reluctant, particularly in this area, to complain.

Mr HARKIN — I guess a further amplification to your point and Lynne's commentary is that ordinarily you would expect in dispute resolution arrangements that the parties would be notified of the fact that there is a dispute, and that is a requirement of the act under which I work. But there is also a further provision that allows me not to notify all the parties if I am of a view that it would be inappropriate to the circumstances of the individual. Now that is something that you would exercise judiciously, obviously, but I think it further makes the point around the extent to which there is a view that people would, in the disability sector if you like, have been notionally and not necessarily so empowered as other folk might have been.

The CHAIR — Had you finished, Lynne? I feel like we have thrown it open already. If you just want to end up, that is fine.

Ms COULSON BARR — I was just going to go through, just quickly the accessibility of our process and something about our model of conciliation, unless you would like to ask more questions?

The CHAIR — No, that is fine. Do not feel pressured; just go ahead. We have not been backward in coming forward, so we will probably jump in if we need to.

Ms COULSON BARR — In terms of accessibility, one of the important factors is to have a consistent message, and I think you can see it in our brochures, that 'It's OK to complain'. Also the other consistent messages that we are giving are of the benefits of resolution at the local level. In terms of accessibility of our process, we have publications in plain English with pictures. This is for people with limited literacy skills. We have a AAA-rated website; we have brochures in Braille, audio and large print; complaints can be made by phone, fax, email, website; and what we have found is that it is also important to offer the option of people doing it in person and having complaints recorded on people's behalf, particularly people with physical or intellectual and sensory impairments. One of the functions of the assessment team can be assisting with the recording and formulation of a complaint. We have got a TTY machine, we use the national relay service, and also telephone interpreters. The other part of the accessibility of our process is the model that we use when matters are formally referred, and that is a flexible model of conciliation. If you like, I can just run through some of the things we have been developing to date.

The CHAIR — Yes, please.

Ms COULSON BARR — To understand the model of conciliation it is important to bear in mind that the issues that we are dealing with to date, for the most part, have a history of disputes, where most of the matters that are referred to us have a context of often a 10, 20-year relationship between the service provider, service user and the family. That is the context of the disputes we are looking at. In all but one matter we are currently dealing with there is an ongoing relationship into the future. That adds layers of complexity and it creates an onus on us in terms of looking at how that process can assist the ongoing relationship between the service provider and family and service user.

We have found it very important to use a flexible model. That is important for addressing the diversity of issues and also the varying capacity of parties. Some of the aspects of the model we are using are that we have found it is very important to include preliminary meetings with both the complainants and with the service providers. It is probably not surprising that people are not familiar with conciliation generally, and in this jurisdiction, particularly from the complainant's point of view, they are often expecting a hearing-determinative-type process, so understanding what this process is like takes time, and it needs time to prepare parties for what they can expect and to understand that what we are talking about is a different type of meeting and conversation.

Because we are dealing with people who might have had 10 or 20 meetings together and found them to be unsuccessful in the past, it takes quite a bit to shift people's perceptions of how this process could be different, and if we do not take the time in those preliminary meetings to prepare the parties, people come in with unrealistic expectations. Because there is an ongoing relationship, we need to be very careful we are not being potentially destructive in the process in terms of the complaint or the conflict escalating, if people are coming in with unrealistic expectations. So in terms of time that needs to be devoted, we are very mindful that it is worth putting in and we need to put in the time in those preliminary meetings.

Also from the service provider's perspective, this is a new process for them, and it means a sense of vulnerability for some service providers in terms of being exposed to criticisms and how they might be able to acknowledge the issues of concern and how they might be able to give an apology without feeling that is leaving them wide open. So dealing with those issues is critical, we are finding, in the preliminary meeting stage.

It is also needed in terms of assessing capacity and support requirements when, in the matters that we are dealing with, people with a disability are participating directly — for instance, we have had service users who use LiteWriters as a way of communicating, so we look at how best to position them in the room so that everyone is aware of what the person is communicating, and we look at options of whether there is capacity to hook in a laptop so people can visually see, or have voice activation, so taking time to look at how best to facilitate that process. We also look at things like concentration capacity, physical discomfort, how long meeting times need to be, so taking time to look at all those issues in terms of how the process might work.

We find that often we cannot rely on a one-conference model. There are issues in terms of physical, emotional and intellectual capacity to deal with, and to expect the issues, particularly with the length of history of disputes, to be resolved in a one-conference model is unrealistic in the matters we have been dealing with to date. It might be over time, when there is development in the field, more issues are being resolved at local levels and we have not got that long history; it may be that some of the matters might be more suitable for a one-conference-type model; but certainly the ones we have been dealing with to date have not been. So that is what we are factoring in.

We also find we need to look at the use of shuttle negotiations between conferences and to look at parties participating at different stages. When we have got a person with a disability directly involved, in some processes we have had them involved in the conference initially and then parts of the conference they have decided they do not need to be a part of, that can be too stressful for them, but we arrange a process of communicating an agreement about how the discussions and outcomes and options that have been explored can be communicated to the person with the disability and that being brought back to the conference. There needs to be a lot of flexibility in how you can ensure that the person with a disability who is affected by all this process, that their voice and their concerns are being heard at the same time as protecting them from the potential stress of detailed negotiations that can occur in a conference.

We look at the use of advocates and support people in the process, and one of our strong learnings to date is the need to think about the potential impact of a conference on a person with a disability who is going back to supported accommodation, and what support they can have after hours for dealing with the content of the conference. So it is about thinking ahead, about what supports can be available to that person after hours and looking at whether that support person can participate in the actual process and be subject to a confidentiality agreement around that. We also look at the use of pictorial aids and symbols in terms of enhancing people's understanding of issues being discussed.

The matters commonly involve a number of parties, and that is one of the complexities of our model. We might have parents, the service user, we have usually at least two people representing the service provider, if not three. We also have matters that are joint complaints. There are matters that deal with a residential facility, so there might be two or three families and service users who have shared issues, who have brought a joint complaint. We have got one of those currently under conciliation where we have got four joined parties in that matter.

At this stage in our developmental process we are using a co-conciliation model, and that is primarily because of the complexity of the issues and the number of parties. We need to pay attention to both the process of the dispute and also the content, so it is paying attention to both of those issues and also, particularly when you have got a person with a disability in the process, that there is sufficient attention to their participation and that we are not missing key signals about what is happening with them. So at this stage we are using a co-conciliation model. We are reviewing that over time. It is also helping to provide some consistency in the development of our model in terms of having that co-conciliation model.

We have one full-time conciliator, myself, and a pool of sessional conciliators, and that has been a deliberate choice of model in terms that at this stage of our process we could not predict the number of conciliations and the type of matters, so we wanted to recruit a pool of experienced conciliators that we could draw on for different types of matters on an as-needed basis. We will also be reviewing the viability of that model. That is as far as I was going to go.

The CHAIR — That is fantastic. Thank you. That is very comprehensive. We do have time for just a few questions. What I want to ask you is, given the numbers it is early days, and you have got that 275 group that you mentioned, and then it went down to 80 per cent to conciliation; only a few of them have been resolved at this point, you were saying?

Ms COULSON BARR — Yes, and we have got a number still in process.

The CHAIR — Yes, and this might be a question you are not able to reflect on with any meaning, but what is the satisfaction there? We have talked about that in the committee and we have heard evidence about it, because there is a potential to confuse satisfaction with outcome, and you are talking about resolution. Have you got any sense of how people are feeling about it when they come out of the process?

Ms COULSON BARR — I can reflect on what people have talked about to date, even in their experience of preliminary meetings. The most common reaction is that people are saying, 'This is the first time I've felt I've been really heard and understood'. Even if what they are potentially wanting fixed does not happen, if we can achieve that and have a stronger foundation about how they might deal with issues and disagreements in the future, that will be an achievement and that will be a key outcome that we are looking for. It might be that a matter is not settled. Under the act there can be a settlement that can be — I am just trying to think of the word — certified. People can request a record of settlement that is certified by the Commissioner or delegate, so it is a record of settlement. So even if matters are not formally settled, we would still be looking for what aspects of the process were positive for them, because we are looking at an ongoing relationship between the service provider and the service user.

Mr CLARK — You mentioned at the outset the 275-odd inquiries that you had had, and a large number proved to fall outside the scope of your remit. Could you give us some indication of the main categories of those that have proven to fall outside your remit? In terms of our response to these — we are trying to recommend ADR improvements — are there things that you think we should be looking at that could help those people that you were not able to help because they were outside the scope of your task?

Ms COULSON BARR — It can be things like commonwealth-funded programs. Issues with Centrelink are off measure, but we give information about their rights of appeal both internally through Centrelink and the Social Security Appeals Tribunal. The key area would be commonwealth-funded issues and things like accessibility, housing issues that are outside the line of disability service, but which are obviously key issues for the person with a disability. Companion card is one that is outside the scope. It is not a service but eligibility for this card can be an issue.

Mr HARKIN — Issues around the built environment make their way to us and are manifestly out of our scope, but the title of the office would imply to folk that it is in scope. The question that Lynne referred to earlier about the adequacy of resources more generally against programs and services is out of scope. We can form a view about the veracity or efficacy of what is provided, but it is beyond our scope to form a view or provide a comment to government about, 'You have not got enough services', or, 'You have too many'. That is not within the scope.

Mr CLARK — I suppose ultimately some of those become policy issues about the extent of resourcing.

Ms COULSON BARR — Yes.

Mr HARKIN — Yes.

Mr CLARK — For the other ones — accessibility of housing or problems with Centrelink or access to commonwealth funding — are you finding when you are trying to point people in the right direction that there either are or are not systems or processes in place that you can pass these people on to that can help them?

Ms COULSON BARR — There is not a central point for looking up this information. I notice one of the questions in your discussion paper was about a central website.

Mr CLARK — Or even of each of these bodies separately. Does the Office of Housing have somewhere where people with disabilities who have a grievance can go to to get a resolution? Does Centrelink have disability accessible dispute resolution arrangements?

Mr HARKIN — I think the answer is yes. Certainly in both of the organisations you just mentioned, most assuredly. I guess the question for me would be: how much of an integrated view and a sharing of understanding between the various bodies exists to enable, if you like, a person who has some grievance to be able to process their concerns in a relatively seamless way instead of having to get an advocate's certificate of some kind in order to try to traverse their way through issues.

Ms COULSON BARR — I have to say that even for the assessment officers it is sometimes hard to navigate and to find the right referral for the person. If it is proving a challenge for the people on our team you can imagine it is difficult for members of the public. State Trustees is another area that we often get queries about.

Mr BROOKS — I will ask a quick question about the people who do the conciliation — the conciliators if you like. You said you have a list of people you call on. Are they trained in a particular way by you guys? Is there training provided in the role they play in the organisation, or are they simply conciliators or arbitrators or mediators that have been — —

Ms COULSON BARR — It is a newly appointed panel. They were appointed — —

Mr HARKIN — A few weeks ago.

Ms COULSON BARR — It is a very newly established panel. The criteria we used was that they all had to have mediation training and experience. We were also looking for people with experience in disability as well. We were looking for people with existing expertise that we could then develop up in terms of our model. Currently we are looking at some in-house training in terms of looking at refining what model of conciliation we are using. To answer your question, yes, we will be, but our criteria was to bring onboard people who already had a depth of experience.

Mr BROOKS — Just to follow up if I can quickly, you have spoken about the conciliation model. Could you give us a quick overview of why you settled on that model as opposed to maybe a mediation model?

Ms COULSON BARR — Under the act it is conciliation.

Mr BROOKS — Is it stipulated?

Ms COULSON BARR — Yes. The act is not very prescriptive other than describing conciliation as a way of facilitating informal discussions with the aim of reaching agreement. That is as prescriptive as it is. I guess it is important to state that the conciliations we conduct are conducted under the Disability Act. We are required to do that in a way that is consistent with the principles of the act; that looks at principles of the rights of a person with a disability, such as their right to exercise maximum control and independence over their life; that they have the same rights and responsibilities as others in the community; and that they have the right to develop educational opportunities et cetera. Our model of conciliation — and I probably should have mentioned it earlier — is that the conciliators need to be mindful that whatever the matter they are conciliating and settling on, it needs to be consistent with the principles of the act.

If someone is complaining on someone else's behalf, then as an office we could not be settling a matter if it was inconsistent with the principles of the act — for instance, if the parties were seeking to agree on a course of action that may be reducing a person's opportunities or the extent that they could exercise their right to control their life and make decisions. If that was happening in a conciliation the conciliators would have an advisory role to alert the parties that that would be an issue. That distinguishes from mediation in that we have obligations under the act that we need to honour.

Mr HARKIN — The act leaves it to me to form a view about the means by which I achieve ends, and investigation is perhaps another example of this. The act specifies that investigations will be conducted in the manner that I feel most useful to establish the facts and form a view, having regard to the requirements of the act and the Evidence Act and like provisions in terms of natural justice and procedural fairness et cetera. It would have been presumptuous of me, and the office more generally, to have presumed that here is a model of conciliation and we will universally apply this and it will be good for everyone. Given that it is new work and it has not been done before, it is being done with a particular constituency who have not had this kind of opportunity before, so we have tried to be flexible and sensitive. I think stone tablets may come later, but I think we have got a lot to learn still.

Mr CLARK — Are your decisions binding on service providers?

Mr HARKIN — I can require people to report to me on the remedies that they propose to take. If I form a view that a provider has behaved unreasonably, then I have the capacity to name the provider. I have to give the provider 14 days notice that my intention is to do that, and I suspect that what sits behind the legislation is a motion of coercion of some measure that people would regard being named in such a way as an ignominious thing to their reputation. I guess that is the answer I would give.

The CHAIR — We are over time. Have you got a couple more minutes?

Mr HARKIN — Yes, certainly.

The CHAIR — Terrific. It is to do with online ADR. We have heard evidence from other witnesses saying, on the one hand, ‘Yes, it is a valuable tool and will help people get information through the internet’. Others are saying, ‘No, most of the groups that we represent are not online and it would not be very useful and there other ways that are much more useful in spreading the word around of what is available’. What is your response to it for people with disabilities?

Mr HARKIN — I would have thought that you would limit any response that might be established that would be helpful to people. I think it would be foolish to say it is not of value, particularly with this constituency.

Ms COULSON BARR — Are you meaning in terms of capacity to lodge disputes and receive information online?

The CHAIR — I suppose at a baseline to have information around what services are available. I suppose what is behind my question — and you might not know this — is do the groups you are dealing with have high, low or medium access to online services?

Mr HARKIN — Yes.

Ms COULSON BARR — It varies. It has been important for a proportion of our complainants to be able to lodge by email on a website, particularly people with physical and sensory impairments. With some of our matters a lot of our liaison is by email, so it is an important factor. Also, we have found that younger complainants tend to use email.

The CHAIR — Thank you. The last point is to do with the surveys to assess consumer awareness of your work, your service. Have you had time to do any surveys or anything?

Mr HARKIN — No, but it is a good question. My response is no, but I would like to say this: it is all very well for people in offices like mine to form a view about how useful I think the performance has been each year and report it to a minister for tabling in the Parliament. I have made this point publicly, and continue to make it, that the test will be not what I say, but what the service users say. My intention is to establish reference groups with consumers and ask them what they would say. Has this been useful for them? Do they feel better as a consequence of the experience with us and their sense of empowerment more generally, and report on that rather than statistics.

The CHAIR — Thank you, Laurie Harkin and Lynne Coulson Barr, for your participation. You have been very generous with your time, and there is a lot of material there. You will be sent a copy of the transcript, as you know, and no doubt Kate and/or Kerryn will be in touch with you to follow up any matters that were not clear or ask for any further information that we need. Thanks a lot. You will be sent a copy of the report.

Ms COULSON BARR — Thank you.

Mr HARKIN — Thank you for having us. We wish you well.

Committee adjourned.