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Dispute Resolution and the Retirement Villages Act 2003: A fair and independent process?

A thesis submitted in fulfilment of the requirement for
the Degree of Master of Laws at the University of
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Abstract

This thesis will explain what an appropriate process for dispute resolution in a retirement village should look like. It will also evaluate how close to that ideal the model contained in the Retirement Villages Act 2003 (RVA) is. It will conclude that the Act model fails because at both steps in its dispute resolution process, it places one of the parties, the operator, in the position of selecting, ensuring independence and paying for a mediator and a disputes panel. This thesis also finds the lack of legal status for residents' committees deprives residents of a source of support and representation. The linchpin role in the Act, the statutory supervisor, also has a disputes resolution function. This thesis finds the role of statutory supervisor also lacks independence because the selection and payment for the role is placed with the operator. Evidence suggests a large share of the market is 'captured' by one Trustee Company that does not maintain independence from operators and may not communicate with residents at a level appropriate to the age of the resident population; the average age of retirement village residents in New Zealand is 83 years. The thesis also finds that mediation is not a suitable process for people in their later years, especially older women when the contested matters surround contractual rights and include on-going fees. The key finding in the thesis is that the Act is not fair or independent for residents.

Preface and acknowledgements

October 2006 saw the implementation of the dispute resolution section of the Retirement Villages Act 2003. Part 4 of the Act covers dispute resolution, enforcement and penalties. The provisions in the Act have been long awaited and slow to be implemented with the Code of Practice not to be introduced until the 25th September 2007. At the time of writing, three dispute panel hearings have taken place without the influence of the Code of Practice, although operators of retirement villages can voluntarily adopt the provisions of the Code prior to the enforcement date. The Code of Practice will strengthen the protective provisions in the Act, provide minimum compliance requirements for operators, and extend the role of statutory supervisors.

The Retirement Commission in 2006 undertook a benchmark survey prior to the implementation of the Act, to gauge residents' views on a variety of matters from understanding what they had bought into, to knowing their rights and entitlements. A follow-up survey is to be conducted amongst residents and operators once the Act is fully implemented, to measure its effects in achieving the purpose of the Act. This thesis forms part of the Retirement Commission's information-gathering about retirement village living and residents' experience of this life-style choice, especially in the context of conflict that develops into disputes between residents and operators. The Act provides the statutory oversight of this rapidly growing industry: this thesis includes insights into the dynamics of conflict in retirement village settings, early impressions of the Act's dispute resolution mechanism and an analysis of the linchpin role of statutory supervision under the Act.

I wish to acknowledge the assistance I have received in this undertaking from the University of Waikato, The Retirement Commission, The Retirement Villages Association of New Zealand, residents and aged care organisations in New Zealand, NSW and Queensland who have provided vital information which through reproduction in the context of this thesis, may not always seem favourable to their role. Finally I wish to thank a group of supportive friends and colleagues who have responded to questions and offered forms of assistance that ensured this thesis reached its final form: last and never least Murray, whose multi-tasking over the past year, has been inspirational to many; a male role-model extraordinaire.

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Dispute Resolution and the Retirement Villages Act 2003: A fair process?

1.1 Introduction

Formal processes are prescribed for dispute resolution in the Retirement Villages Act 2003. This thesis evaluates that model and asks if it represents an independent and fair process. Retirement villages are largely privately run. The competing interests of residents and those of capital business interests often lead to tensions; some will demand dispute resolution.

The Act was introduced principally to protect the interests and financial assets of older New Zealanders entering into complex legal contracts. Focussed as it is on dispute resolution, this thesis does not concentrate on resident satisfaction with retirement village living nor necessarily dwell on operators who manage their businesses in a principled, consultative and fair manner, though the existence of such operators is acknowledged, appreciated and respected.

The thesis examines the theory and research informing dispute resolution processes. After referring to a number of dispute resolution models it proposes an ideal model and adaptations to the Act model¹ if the ideal model is not accepted. The Act model is deficient in certain respects. The thesis will show that the unequal position of residents and operators has not been adequately addressed within the Act and is the primary cause of the Act's deficiencies. The model has also received criticism about its independence. Independence impacts on fairness of process which must also be fair in the experience of retirement village residents whose average age is around 83 years. The following question will guide the thesis.

Does the dispute resolution model contained in the Retirement Villages Act 2003 represent a fair and independent process and is it a process that is responsive to the needs of retirement village residents?

¹ The Act model refers to the model contained in the Retirement Villages Act 2003.

This thesis aims to explain what an appropriate process for dispute resolution in a retirement village would look like. It will also evaluate how close to that ideal the model contained in the Retirement Villages Act 2003 (RVA) is. It will conclude that the Act model fails because at both steps in its dispute resolution process, it places one of the parties, the operator, in the position of selecting, ensuring independence and paying for a mediator and a disputes panel. The linchpin role in the Act; the statutory supervisor also has a disputes resolution function. This thesis finds the role of statutory supervisor also lacks independence; selection and payment for the role being placed with the operator. Evidence suggests the role is ‘captured’ by one Trustee Company that does not maintain independence from operators and may not communicate with residents at a level appropriate to the age of the resident population. The average age of retirement village residents in New Zealand is 83 years. It will be shown that mediation is not a suitable process for people in their later years, especially older women when the contested matters surround contractual rights and include on-going fees. Mediation is a confidential, non transparent process where power imbalance and mediator perspective can impact on outcome. Mediators differ in their practice style and philosophy about redressing power imbalance which can leave residents in a seriously disadvantaged position.

This thesis addresses both the ‘complaints facility’ and the ‘disputes panel’ model and includes the experience of the first New Zealand resident to participate in its process. It also considers the issues behind conflict and disputes in retirement villages and how residents respond to living with an overarching structure.

1.2 Thesis structure

Chapter One describes the demographic context of ageing; it also discusses the accommodation choices people will make in their later years. The discussion includes the evolution of retirement communities; a literature review on life-style choices to enter retirement villages; the costs attached; the need for protective legislation and identification of the key stakeholders in retirement villages in New Zealand. This leads to the discussion in Chapter Two on residents’ needs.

Chapter Two discusses the needs of older people who have made retirement village living their life-style choice and governments’ responses to protecting their

interests. Elder abuse is discussed, also the international arena including studies undertaken specifically addressing conflict in retirement villages. Australian sector group and tribunal responses to conflict and disputes in this setting are included.

Chapter Three considers the Retirement Villages Act 2003, its background and disputes process and its perceived flaws. A particular focus of the discussion is the key legislative roles of the statutory supervisor and the Retirement Commissioner. This will be followed by the Retirement Villages Association of New Zealand's (RVANZ) approach to complaints and disputes in the pre and post Act environment.

Chapter Four searches for the key principles that underpin dispute resolution processes; especially those that guide processes involving less powerful groups. It discusses the concepts and ideas propounded by key writers and categorises them along emerging principles. Drawing from that, 'Statements of principle' will be formulated showing what might be evident when the principle is present in a dispute resolution process. The principles will be applied to a range of processes and evaluated with reference to different groups. These principles will be used throughout the thesis.

Chapter Five will cover the application of the principles from Chapter Four to a range of processes that might be suitable for use in retirement village complaints and disputes contexts. A dispute 'process map' will be used to identify processes that might be appropriate for conflict and dispute resolution in retirement villages. These processes will be evaluated using the 'statements of principle' that emerged from Chapter Four. Initial impressions from the first disputes hearing under the Act will be included.

Chapter Six examines statutory and private processes for dispute resolution. It considers how different rules and procedures apply to the two contexts, and whether fundamental principles are affected by the processes. It identifies contexts that include representation and advocacy and examples that could positively influence procedures and practices in retirement villages. It includes the statutory examples of dispute resolution in the employment context; the Accident

Compensation Corporation (ACC) and its company Dispute Resolution Services Limited (DRSL) and the Australian National Native Title Tribunal. It also includes the broader role of tribunals in administrative decision-making; the Ombuds/Commissioner role in the health sector, banking and insurance and savings; and the private sector model used by the New Zealand Press Council.

Chapter Seven is about the Queensland and New South Wales experiences of retirement village dispute resolution. It includes the role of the NSW and Queensland state residents' associations. It identifies the key differences between the Australian and New Zealand legislation highlighting factors that could enhance residents' relative power imbalance.

Chapter Eight analyses the dispute resolution processes examined in the thesis. It identifies features that might assist residents of retirement villages. An ideal model will emerge from this analysis.

Chapter Nine draws conclusions and offers possibilities for further research in the context of New Zealand retirement village living.

1.3 Methodological Process

The methodological process undertaken in this study is best represented by the 'mixed method' approach,² meaning it is both qualitative and quantitative. The methodology included theory and a literature review and an examination of the New Zealand and Australian models for dispute resolution in retirement villages. It also included unstructured interviews conducted face to face and by telephone. It was also necessary to gain information by emails. Empirical data was obtained from related studies undertaken in New Zealand, Australia and the U.S.A and through the provision of information from stake holder groups in New Zealand and Australia including document sources. The literature review included a robust examination of principles, systems and methods. On the basis of the information obtained an ideal model for dealing with disputes in retirement villages in New Zealand is proposed.

² Cresswell, J.W *Research Design* (2nd ed) 2003; Patton, M Q *Qualitative Research & Evaluations Methods* (3rd ed) 2002.

The methodology used in this thesis is directed towards unmasking the principles behind dispute resolution (DR)³ and alternative dispute resolution (ADR)⁴; what is known about conflict and disputes in retirement settings; examining processes used in Australia (and other locations) to respond to conflict and disputes and determining the extent to which the processes reflect the principles of *fair and proper process* and *independent adjudication* when compared with the model contained in the Retirement Villages Act 2003.

1.4 Theoretical orientation

1.4.1 The ecology of human development

Dispute resolution is a complex process requiring consideration of issues which interact in a complex system of human and structural influences. Such a process is best understood through an ecological explanation. The ecological school of thinking is best explained by Bronfenbrenner⁵ and others through the concepts from which the theory is founded. The key ideas in this approach are (1) dynamic interaction; (2) a systems approach which considers those things closest to a person and those furthest away; (3) policy impacts (4) embedded in a societal and ideological system. The identifying locations for complex interactions are the micro, meso and macro systems that form the context for human development.

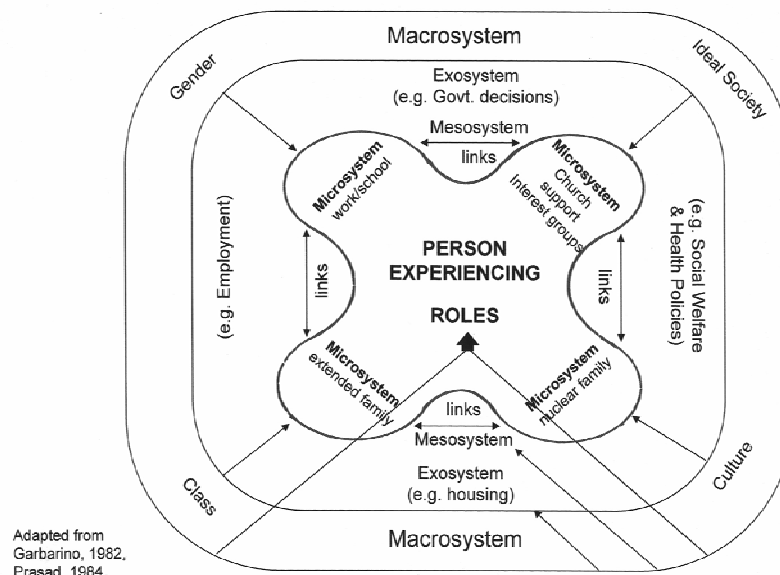
When we think about the transference of a person from one setting (their home) to another (a retirement village) we need a way of thinking about the complex nature of that transference. Dispute resolution is also complex. This study considers the complex phenomena of dispute resolution in retirement villages through the lens of ecological systems theory. Bronfenbrenner writes about complex phenomena using the ecological metaphor. This metaphor draws on an understanding of the layers of influence that impact on human development from birth to death. People are seen as having the potential to develop through the life span depending on the quality of influences from external systems and their sensitivity to the needs of the developing person and that person's supportive network.

³ DR represents the term 'dispute resolution' and covers both consensual and adjudicative processes.

⁴ ADR represents the term 'alternative dispute resolution' and generally means alternative to adjudication.

⁵ Bronfenbrenner, U *The Ecology of Human Development* (1979).

THE ECOLOGY OF HUMAN DEVELOPMENT



This conceptual framework considers life-span development from the outside in. It takes account of subtle changes in the systems external to the developing person as their impact filters through to the developing person in the microsystem setting. Each setting in which the person participates provides opportunities for enhancement (or detriment) of the developing person. "A mesosystem comprises the interrelations among two or more settings in which the developing person participates" and can be seen as the relationship or connections between two settings in which one person is interacting. Bronfenbrenner's multi system conceptualisation describes interconnectedness this way;

The principle of interconnectedness is seen as applying not only within settings but with equal force and consequences to linkages between settings, both those that he may never enter but in which events occur that affect what happens in the person's immediate environment. The former constitute what I shall call mesosystems and the latter exosystems.

Finally, the complex of nested, interconnected systems is viewed as a manifestation of overarching patterns of ideology and organization of the social institutions common to a particular culture or subculture. Such generalized patterns are referred to as *macrosystems*. Thus within a given society or social group, the structure and substance of micro-, meso-, and exosystems tend to be similar, as if they were constructed from the same master model, and the systems function in similar ways. Conversely, between different social groups, the constituent systems may vary markedly...⁶

Bronfenbrenner believes by viewing society in this way, it becomes possible to evaluate these larger social contexts as "environments for human development".

⁶ Ibid, 8.

Through analysis and comparison of the cluster of systems characterizing the different groups or entire societies we can systematically describe and distinguish the properties of the larger social contexts. This is an important claim for it is within the context of the macrosystem ideological realms that *power* is seen to be held and transferred to particular groups through the institutions set up by society.

In most developed societies *power* is held by the dominant class whose dominant discourses monopolise decisions about preferred ways of doing things. The systemic interconnections transfer the dominant discourse to the settings containing the developing person, whether or not there is a compatible fit. Synchronising institutions to fit contexts and settings means developing policy and programmes that will fit with and respond to the needs of people within their microsystem settings. Using an ecological framework to evaluate responsive DR processes means seeking processes inclusive of principles that take account of culture, class, gender and also age, if age is a significant component of power imbalance in a setting.

The ecology of human development incorporates phenomenology and social context allowing us to investigate the pluralistic nature of the development of humans⁷ across and within societies. In the area of public policy it has special significance; it emphasises the power of public policy to affect the well-being and development of human beings by determining the conditions of their lives.⁸ In the case of retirement villages, the Act model can be seen as determining that unrepresented residents will remain in a vulnerable position as a vulnerable ‘class’ because the Act makes no provision for independent representation or advocacy for residents through legal recognition of residents’ committees.

Germane to the question addressed in this thesis is the notion of *power* and *interrelatedness*. These two concepts are key influences in the ecological approach I am taking. The notion of power as it is held by certain groups has been documented by earlier writers. Their analysis of power and how it is transferred in society also needs to be understood theoretically. A discussion on this topic

⁷ The ecology of human development considers humans have the potential to ‘develop’ throughout the life span – birth till death.

⁸ Ibid, xii.

follows. The ideas it presents will be applied implicitly and explicitly throughout the thesis alongside examination of the mechanics of dispute resolution processes.

1.4.2 *The silent determinants: ideology, hegemony and capital.*

Having identified a ‘perspective’ methodology and conceptual framework⁹ I now turn to the ideas of the Italian neo-Marxist Antonio Gramsci and the French sociologist Pierre Bourdieu for theories that help to explain how power is held in a particular ‘class’ to dominate other ‘classes’.

Gramsci’s thesis views power as residing within the ‘private’ non-state levels of the superstructure in the form of *ideology*; that is the ideal representation of the interests of the ruling-class. This *ideology* is universalized through the process of *hegemony* to become integrated into policy, laws and the social and economic conditions that impact on the lives of individuals and groups, without them being conscious of the process. *Hegemony* in this context is the manufacturing of consent. Cultural hegemony is seen as the major dimension of this manipulation. Cultural hegemony involves the production of ways of thinking and seeing and excluding alternative visions and discourses.¹⁰ Gramsci determined that bourgeois hegemony is civil society.¹¹ The role of the state supports this hegemony in the way it operates

...according to a plan, urges, incites, solicits and “punishes”; for, once the conditions are created in which a certain way of life is ‘possible’, then “criminal action or omission” must have a punitive sanction, with moral implications, and not merely be judged generically as “dangerous”.¹²

Simply put, the state becomes the vehicle through which powerful classes gain a dominant position over the less powerful, leaving the state to tackle conflict of interest through force.¹³ A sharp distinction between force, coercion and constraint is made which means people act in unintended ways and when force is

⁹ The ecology of human development provides a conceptual framework through the layering of the systems – macro to micro which assists to assess the impact on individuals of the systems that lay beyond the immediate context of the person.

¹⁰ Scott, J and Marshall G *A Dictionary of Sociology*, 2005.

¹¹ Hoare, O and Nowell-Smith, G (eds) *Selections from the Prison Notebooks of Antonio Gramsci*, GBR: ElecBook, 2001, 506. <<http://site.ebrary.com/lib/waikato/Doc?id=10015105&ppg=505>>

¹² Ibid, 509.

¹³ Hoffman, J *The Gramscian Challenge: Coercion and Consent in Marxist Political Thinking*, 1984; Hoffman, J *Citizenship Beyond the State*, 2004.

used “no activity is possible since the person cannot be said to exercise the power of will at all”.¹⁴ In this tradition the distinctions between state and government are linked. “Government is here defined as the settlement of conflict through arbitration and negotiation”.¹⁵ Yet citizens need to be able to relate to each other about their differences but as members of the state they are subject to its forces of control; these forces have come about through *cultural hegemony* and enshrined in what is accepted as democratic process, making democracy a form of the state.

Horrendous authoritarian policies have been justified in the name of democracy but the problem of this tyranny lies not with democracy but with the state. It is the state that seeks abstract sameness and is threatened by difference, not democracy.¹⁶

The extension of Gramsci’s (neo-Marxist) thesis brings the debates about democracy, citizenship and participation into the realm of retirement village residents and appropriate DR processes through the expansion of *class*. Class exploitation is said to express itself in a culturally specific form whether national, regional, gendered or religious.¹⁷ My intention is to include age in any analysis of class.

Another neo-Marxist Pierre Bourdieu has contributed to my understanding of how individual effectiveness is either maximised or limited, depending on how a person comes to view the world through the inherited knowledge available from the social structures that surround them. Their position or *habitus* in society influences their individual effectiveness. Bourdieu’s theory translates effectiveness into ‘capital’. A person’s social, economic or cultural ‘capital’ within any institutional social ‘field’ determines where they are located in a class system; the class in which individuals are located is in turn determined by prevailing *ideology* via the process of *hegemony*.

Adding sophisticated cultural, lifestyle, and status dimensions to insights from Marxism, Bourdieu argued that the cultural capital of the dominant class gave it an arbitrary advantage over other groups in gaining educational access and credentials.¹⁸ Furthermore Bourdieu’s exploration of the legal world adds

¹⁴ Ibid, 1984, 31.

¹⁵ Ibid.

¹⁶ Ibid, 46.

¹⁷ Ibid, 2004, 175.

¹⁸ Ibid.

additional dimensions to this thesis. He sees “legal culture” as being incomplete but having its own “settled autonomy” through its use of rules of legislation, regulations and judicial precedent and practices that are “strongly patterned by tradition, education, and the daily experience of legal custom and professional usage”.¹⁹ He says unlike other structures and practices in the “social universe”, legal rules and practices have a “life and a profound influence of their own” which he asserts derives from power “to determine in part *what* and *how* the law will decide in any specific instance, case or conflict”. From this perspective the law is seen to occupy a particular *habitus*²⁰ and from this *habitus* those who practice in the field retain *symbolic capital*²¹ thereby being in a position to impose *symbolic violence* on others who have no understanding of their meaning.²²

Considering the topic of this thesis and the application of law to resolve disputes between two classes of people; the ‘vulnerable old’ and the more ‘powerful owners’ leads to the connection with Bourdieu’s concept of *miscognition*. Miscognition refers to induced misunderstanding

... the process by which power relations come to be perceived not for what they objectively are, but in a form which renders them legitimate in the eyes of those subject to the power. This induced misunderstanding is obtained not through conspiratorial, but structural means. It implies the inherent advantage of the holder of power through their capacity to control not only the actions of those they dominate, but also the *language* through which those subjected comprehend their domination. Such miscognition is structurally necessary for the reproduction of the social order, which would become intolerably conflicted without it.²³

For the more ‘powerful owners’ who are generally holders of considerable *economic capital*, the need to understand the language of those who occupy legal *habitus* is irrelevant. They simply pay and the legal (language) experts do their work. However, for the ‘vulnerable old’ who may be without legal advocacy, *miscognition* may be unrecognised or a source of stress which may even cause them to withdraw from a legal dispute.

¹⁹ Terdiman, R Bourdieu translated in “The Force of Law: Toward a Sociology of the Juridical Field” [1987] HLJ, 38, 807.

²⁰ Ibid.

²¹ *Symbolic capital* according to Bourdieu designates the wealth which an individual or group has accumulated through possession of authority, knowledge, prestige, reputation, academic degrees – even debts of gratitude owed by those given favours.

²² *Symbolic violence* refers to the imposition of any symbolic representations such as language, conceptualizations, portrayals, rules on recipients “who have little choice about whether to accept or reject them”. Ibid, 812.

²³ Ibid, 813.

Integrating the ideas of Gramsci and Bourdieu as a means of understanding the relations between residents and operators and residents, operators and the state (through the enactment of legislation) in a retirement village context, provides a lens through which we can explore the relative power position between these actors. It should also assist in determining how accessible a particular dispute resolution process may be for residents of retirement villages.

There are several analytical parts involved in this thesis, all of which allows you to think about the topic in a complex way.

Chapter 1 Ageing and the evolution of retirement villages

Years have been added to life – now we must ensure that life is added to those years. (World Health Organisation, 2002)

1.1 Global ageing demographics

Promoting positive ageing has been the catch cry of global commentators over the last two decades. This has come about due to the known demographic features of global ageing in developed countries which has seen an increase in the numbers of people aged over sixty move from around 10 per cent of the total population in 1998 to a predicted 21 per cent by 2050; that is from around 600 to almost 2000 million people over 65 years of age.²⁴ In less developed countries, figures are expected to quadruple.

New Zealand is no exception with a *positive ageing* strategy published in 2001 containing goals directed at securing adequate income for older people; equitable, timely, affordable and accessible health services; affordable and appropriate housing and transport options. *Ageing in place* strategies also address safety and security; a range of culturally appropriate services for older Maori who generally live in rural areas with less accessibility to support services and less knowledge about income entitlements; emerging issues around the growing number of older Pacific people living with their families and provision of health and social services to meet their needs; emerging issues in diverse ethnic communities and the unique challenges they face as they age; ensuring older people living in rural areas are not disadvantaged when accessing services and creating positive attitudes and images of older people in all government agencies, business sectors and communities including promotion of intergenerational programmes in schools and communities.²⁵

²⁴ Minichiello, V and Coulson, I (eds) *Contemporary Issues in Gerontology* (2005) iii; Atchley R C & Barusch A S, *Social Forces and Aging* (2004) 24-43.

²⁵ Ministry of Social Development, *Positive Ageing in New Zealand: Diversity Participation and Change*, October 2001.

Statistics (2001) indicate the fastest growing group of older New Zealanders is the group 75 years and over with the number 85 years and older reported to be growing at the rate of 5 per cent per year.²⁶ In 2006 it is anticipated the number (over 85 years) will have increased by some 33% to reach 62,000 with a further increase over the next five years to 79,000 in 2011. This figure will by then represent 14% of older New Zealanders. By 2050 it is anticipated the over 65 age group will represent 25 per cent of the total population.²⁷ It is predicted and not difficult to anticipate, this rapidly growing group of older citizens will pose significant challenges at all levels of planning and policy, not the least housing. The Ministry's report informs that in 1996 "almost one in four people over 85 lived in a residential home". It seems from this, the *ageing in place* policy favoured by the Ministry takes on heightened importance in terms of its stated goal of enhancing independence of older people who may choose (or have imposed through lack of adequate capital) to live out their lives in their own homes.²⁸

1.1.1 2006 - Baby boomers turn 60

The *baby boomers* identified in the report as those born between 1946 and 1965 is the group much of the international and national debate and policy formulation has been directed towards. It is believed this group will produce the greatest number and possibly longest living cohort of New Zealand (and international) citizens identified.²⁹ The associated costs in maintaining income support and health and disability services as this cohort ages is predicted to rise substantially with NZ superannuation cost projected to increase from 5.3% of Gross Domestic Product (GDP) in 1996/97 to 10.7% in 2051. Added to this there is a predicted rise from 5.9% to 11% of GDP for health and disability care over the same period³⁰ which raises key policy issues not within the scope of this research but critical to the longer term planning towards positive ageing.

²⁶ Ibid, 8.

²⁷ Grant B, "Retirement Villages: An Alternative Form of Housing on an Ageing Landscape" [2006] NZSPJ, 27, 101.

²⁸ Supra at n 25.

²⁹ Greenbrook S, *Village People: The Changing Role of Retirement Villages in New Zealand's Ageing Society* (2005); Leonard L, *Retirement Villages: Promises of a Lifestyle* (2002); Koopman-Boyden, P G *Ageing Society* (1993); Hoeflinch, M H *Reflections of Elderly Housing* [1996].

³⁰ Dwyer, M and Gray, A "Maintaining Independence in Old Age: Policy Challenges" [1999]. SPJNZ Dec, 83.

One consequence of this increasingly large ‘grey’ body of (generally) politically savvy citizens who grew out of the post-war *youth culture*³¹ during the 50’s and 60’s, will be their collective voting strength. Politicians and age specific business interests (including retirement village operators) should be aware not only of the possibilities associated with the capital gains associated with consumption in such a large ageing cohort, but also the potential of reversal of power relations through sheer strength of numbers and diversity of representation within the group membership. The Minister of Consumer Protection in Western Australia recently described baby boomers and the generation following as “increasingly sophisticated, confident and demanding”.³² This group after all contains the generation that negatively dubbed the early baby boomers (and possibly their parents) as the “greedy generation” and the “lucky generation”³³ because they saw that group as having benefited from previous generations’ acquisition of universal pensions, improved labour conditions and post-war policies resulting in full employment, home ownership and other social benefits accrued from welfarism generally. It was within this developmental context that *retirement* became institutionalised as the “universal condition of later life”.³⁴

The first cohort of capital advantaged *baby boomers* includes a group influential and instrumental in establishing the ‘new right’ policies of the 1980’s. This includes user pay tertiary education which incorporates the highly controversial student loan scheme set up in the early 1990’s.³⁵ It is the cohorts that follow immediately behind the early baby boomers who are seen as having accumulated significant human capital in the form of health and education; enough to provide challenges in the social and political relations between ‘classes’ which could include owners and residents of retirement villages. These cohorts represent the Third Age where the possibility of owning a retirement village and recruiting residents from within their own generational field is not an unlikely prospect. The first graduates of *youth culture* have in turn become the proponents of a range of

³¹ Gilleard, C and Higgs, P *Contexts of Ageing: Class, Cohort and Community*, (2005)74-76.

³² Roberts, M Minister of Consumer Protection, “Opening Address” Retirement Village Association Ltd., WA Regional Conference, August 2006.

³³ Supra, n 31 at 76; Boyack, N “The greedy generation’s way with welfare” Book Review Evening Post 17th May 1991, p5.

³⁴ Supra n 31 at 42.

³⁵ Thomson, D *Selfish Generations: How Welfare States Grow Old* (1996).

products and practices from which has emerged the notion of *lifestyle*; positioned favourably for pursuits of leisure (including health and fitness) and social interaction, this group now occupying a position between work and elderly decline, can be viewed as having reached life's pinnacle - the Third Age.³⁶

1.2 U.S Retirement Villages: origins and a darker side

Age restricted retirement communities began as a large scale social experiment in the US in 1960's. The first and largest purpose built 'active adult' leisure retirement community Sun City was built by the Del Webb Company in the state of Arizona in 1960. Having survived and thrived for more than forty years, Sun City, its concept and residents, have been the subject of much speculation and writing but until 1995 its residents had not been subject to any scholarly research.³⁷ The idea for such a community is said to have derived from two sources, the first being from within the active leisure industry and the second from the notion of the old being idle. One way or the other or through a combination of both, the founders of Sun City spawned a concept which has proliferated and survived stereotypes about older age being a period of rest and decline. Instead, retirement communities (including Sun Cities) have on occasions mobilized and politicized their members to actively oppose community development initiatives taking place within the poorer, working class mostly Latino communities inhabiting precincts outside their 'city' walls.³⁸

One such initiative was a proposed Martin Luther King, Jr Holiday Camp in Arizona. This was to be a state funded concept but through highly organised inter-community publicity and by sheer voting force senior citizens in Phoenix retirement communities voted overwhelmingly against the scheme causing defeat. Another example of senior power operating (negatively) against the exterior community can be found in the school taxes "battles" between 1962 and 2001³⁹ when retirees from two Sun City communities went to extraordinary levels to avoid paying school taxes in spite of the poor state of education and school attendance of children and potential adult learners living in the wider community.

³⁶ Gilleard & Higgs, *supra* at n 31,1. For a less positive view of the Third Age see Blackie, 1999.

³⁷ McHugh, K E and Larson-Keagy "These White Walls: The Dialectic of Retirement Communities" [2005] *Journal of Ageing Studies* [2005] 19, 2, 241-256.

³⁸ *Ibid.*

³⁹ *Ibid.*, 250.

Kausterbaum⁴⁰ argues racist views that are commonly accepted as “naturalized” in segments of society are more to do with pragmatic self-interest than displays of “raw racism”. For example in the school taxes context retirees made personal comments along the lines of *I came here to get away from the rat race*(possibly meaning taxes and issues that don’t concern me)...*people can do and be what they like* (suggesting, *but not here*).

According to McHugh and Larson-Keagy, the notion of *the dialectic of community* can be found in the active leisure, self-interested lives of the retirees in Sun City communities and simultaneously [in these places] of separation and exclusion that speak to the potency of age, social class, ethnicity and lifestyle as social borders. The term *dialectic* in this example refers to the clash of ideas about how people want to live their lives within the community in contrast to how lives are lived outside the community. The Marxist idea of contradictions clashing and producing through sequences a more advanced synthesis out of these clashes depends on the way a community sees itself. In a relatively wealthy community such as Sun City the contradictions between the wealthy and the poor have resulted in separation of communities through the choices of the holders of material wealth against the aspirations of the poorer class outside the city walls.

1.3 What is a N.Z. Retirement Village and why choose to move there?

The New Zealand Retirement Villages Act 2003 defines the term “retirement village” in section 6. The definition covers a broad range of village types and includes a variety of legal forms which allow residents the purchasing right to live in a dwelling; these include a unit title; licence to occupy; or life-time lease or tenancy. All types and ranges of occupation rights will be protected by the Act.

The Act covers any living situation that includes all the following features:

- Multiple units – The village has two or more residential units. A unit might be a villa, an apartment, a studio unit, a kaumatua flat, or even a room in a rest home, among other types of dwelling.

⁴⁰ Kasterbaum in McHugh, *ibid*, 247.

- Accommodation and service/facilities – The village provides residential accommodation, together with services or shared facilities, or both.
- For retirement – The village is mainly for people in their retirement (including their spouses or partners).
- Capital sum – The residents pay a capital sum in return for their right to live there. As well as a lump sum, a “capital sum” can also mean periodical payments, if they are substantially more than would be paid to cover rent and such services or facilities.⁴¹

The literature on why people move, and what categories of people move from their own homes to retirement villages will now be reviewed. New Zealand adds another chapter to what is already known about these questions.

To many older New Zealanders including prospective retirement village dwellers, the prospect of worrying about appropriate housing in their later years is not something they might see themselves overly concerned about. The combination of economic trends, almost universal home ownership and generational savings patterns that they were part of, should mean they will not have to rely on government assistance with housing. The fact that many have a considerable capital investment in owning their homes (which also equates to a form of security in New Zealand society) allows them more options about where they will reside should their circumstances change. To many in this category, elderly housing problems are problems faced by the elderly poor rather than the middle class. The rapid growth of the retirement village sector in New Zealand with two hundred built since the 1980's⁴² suggests this form of retirement living might be as attractive to private business entrepreneurs as it is to prospective residents. This would seem to be borne out by the New Zealand studies undertaken in retirement village settings over the past five years and more than a perception that;

In New Zealand, age-segregated communities which were once the domain of the not-for-profit sector are now a serious business venture for entrepreneurs trying to capture a niche market and make a profit from the turnover of the aged⁴³.

⁴¹ Guide to the Act, Retirement Commission, May 2007 <www.retirement.org.nz>.

⁴² Mansvelt, J *Geographies of Consumption* (2005) 87.

⁴³ Blaikie, 1999 in Grant, B “A New Sense of Self and a New Lease of Life: Leisure in a Retirement Village” [2004] *Annals of Leisure Research* 7, 3-4.

Leonard's 2002 study investigated retirement villages as a housing choice for older New Zealanders. Her key findings surrounded incentives identified by her research participants as reasons for their move from their homes to a retirement village. These were; failing health and feelings of insecurity prompted by government welfare reforms and privatisation of the health system. The concept of *ageing in place* and promotion of a *life care package* in the marketing of retirement villages was influential in her subjects' decisions to make the move to retirement villages.⁴⁴ Their choice range and self-perception of where they fit into the New Zealand social order are well illustrated in the backgrounds and comments of a selection of participants in the Leonard study;

Lillian – It's my decision.

Lillian moved into the village when she became less mobile and was unable to take care of her property to the extent she had previously. She had made good capital gain on her house when selling due to the timing of when she had bought and sold. Lillian had no desire to live in a rest home and saw independent units as being a way to having her independence with someone available if necessary. She was prepared to make the decision to purchase a unit even though she knew little about the legal set up...⁴⁵

Joan: I feel sorry for anyone who has just paid rent all their lives...You need more than just the price of your house, especially if it's an older house. I had to pay considerably more than I got for the flat but I never lived in a brand new house before...⁴⁶

Joe and Hilda married for more than 60 yrs, 5 yrs in retirement village: We've got our independence but we're not independent...

They both suffer from some form of ill health and have found they can remain together longer by using the care facilities, both state supported, such as home help and those for which they pay especially the cooked mid-day meals. Their home has a very private outlook onto a well maintained garden and lawn and has a spatial feel much like that of a suburban garden.⁴⁷

Marie – I didn't rush into it

Nancy – I've never asked my family for anything

Patti – I've got my own little corner and I love it

Rita – People are leaving it too long.⁴⁸

The comments of these retirement village residents capture an overall sense of appreciation for the independence (albeit supported independence in some cases) that financial security affords as well as a sense of pride in being able to take personal responsibility for their later life living arrangements. The fact that these participants are mainly older women is consistent with New Zealand data: women outlive their male counterparts by approximately six years on average and the

⁴⁴ Leonard, L I *Retirement Villages: Promises of a Lifestyle*, Thesis (2002) 83.

⁴⁵ Ibid, 10.

⁴⁶ Ibid, 79.

⁴⁷ Ibid, 9.

⁴⁸ Ibid, 10.

gender composition of New Zealand retirement villages has indicated “almost three quarters of residents are women”.⁴⁹

A further New Zealand study by Bowen of forty residents from six villages in four geographical locations drew similar conclusions. Bowen’s data collection included 40 self-administered questionnaires of which two-thirds were women and just over one third were men. Their ages ranged from 60 to over 85. Just under half had never married or were widowed and the remainder stated they were married. One man stated he was European and his wife Maori. There were no Pacific Island respondents and the author stated she did not observe or hear of any Pacific Island people living the villages she studied.⁵⁰ She was aware however of one Indian and two Chinese women in a village she visited though these women had not become part of her study.

According to Bowen, older people with health and security concerns are more likely to want to move house and consider retirement villages a positive and appealing choice. Her findings reveal the appeal is based around support services, facilities and amenities provided, maintenance-free accommodation, meeting and socialising with like-minded others. However her subjects seemed aware that retirement village living is restricted by socio-economic status and physical ability to live independently with minimal support.⁵¹

In terms of *problems* with village living 82.5% of her subjects claimed not to have experienced any *problems* and those who had, reported theft by staff, management increasing charges and poor emergency responses by staff as *problems*. None mentioned whether the problems had been dealt with through a village complaints mechanism. The possibility that residents do not want to be considered ‘moaners and complainers’ and therefore avoid conflict, has been posed in earlier research.⁵²

⁴⁹ Retirement Commission, *Retirement Villages Survey*, ACNielsen, December 2006.

⁵⁰ Bowen, E *Retirement Villages: A Lifestyle Choice for Older New Zealanders*, Thesis 2003, 94.

⁵¹ Ibid, ii.

⁵² Age Concern, 2000 in Bowen, *ibid*, 113; Streib G F and Metsch, L R “Conflict in Retirement Communities: Applying an Analytical Framework” [2002] *Research on Aging*, 24,1, 67-86 ; Streib G F, Folts, W E and La Greca, A J, “Autonomy, Power and Decisions Making in Thirty–six Retirement Communities” [1985] *The Gerontologist*, 25,4.

A study by Graham and Tuffin looked at the discourses of *companionship*, *privacy* and *security* in retirement villages.⁵³ The composition of the participants in the study appears consistent with the makeup of the previous studies;

The participants included eight residents who lived alone (six women and two men) and two couples. Participants were Pakeha (non-Maori), middle class and ranged in age from 70 to 88 years.

The New Zealand retirement village context does not seem to fit the cultural values (or perhaps the socio-economic realities) of our indigenous and Pacific population. Only one of the New Zealand studies reviewed⁵⁴ identified Maori or Pacific people in the cultural or ethnic composition of their participant villages. Consistent with this situation, the international literature indicates that retirement living in village or community-like settings, draws from a mainly homogenous cohort with respect to age, class, race and ethnic background; the majority of residents being from more affluent social classes representing usually the white majority.⁵⁵ A study just released in New Zealand showed 99% of the 173 residents from 52 participating villages described themselves as European, confirming ethnic and cultural composition in previous New Zealand studies.⁵⁶

Nowhere in the reviewed New Zealand studies or any available local publications has the sexual identity of residents been touched on, yet gay and lesbian retirement housing options are an emerging issue for retirement housing in the US and some European countries.⁵⁷ Perhaps in New Zealand, this is a retirement housing reality that's time has not yet come.

1.3.1 *What are the financial costs of moving into a retirement village?*

⁵³ Graham, V and Tuffin, K [2004] *Retirement Villages: Companionship, Privacy and Security* [2004].

⁵⁴ Bowen, supra n 50.

⁵⁵ Atchley & Barusch, *Social Forces and Aging: An Introductory to Social Gerontology* (2004); Bridge & Kendrig in Minichiello & Coulson *Housing and Older People: Environments Professionals and Positive Aging* (2004); Gilleard, C and Higgs, P *Contexts of Ageing: Class, Cohort and Community* (2005); McHugh, K E and Larson-Keagy, E M *These White Walls: The Dialectic of Retirement Communities* [2005].

⁵⁶ Retirement Commission, supra, n 49.

⁵⁷ See for example Journal of Homosexuality, Vol 49(2), 2005 and Lucco, A.J, "Planned Retirement Housing Preferences of Older Homosexuals", *Journal of Homosexuality* [1987].

The research of Greenbrook⁵⁸ was undertaken in the Auckland, Waikato and Bay of Plenty regions during 2005. In relation to the cost of moving into many New Zealand retirement villages, the following observation about a high priced Orakei village still under construction (unit prices ranged from \$350,000 up to the penthouse from 1 million to 1.4 million) was made;

Even with property prices rising as they are, very few older people would be able to afford a retirement village unit worth up to one million. Perhaps it is because of the cost of retirement village living that most of the residents interviewed for this research were fairly well educated and people who appeared to have a relatively large amount of discretionary income.⁵⁹

Possibly we can conclude from this that the participants in the Greenwood study occupied a more privileged position in New Zealand society than participants in the other studies undertaken during the past four years.

The most recent study shows the two most common price ranges in the 52 villages surveyed as: \$270,000-\$300,000 and \$120,001-\$150,000. The most expensive purchase price in the survey was \$600,000 and the least expensive \$47,500.⁶⁰ Prices have increased in the last three years; residents who have been in their homes for three years or less tended to pay more for their homes.⁶¹ These figures indicate that many villages are built with an eye to accommodating those older people who sell their average priced homes to buy into a retirement village often at a lower price, leaving some savings to live on; albeit small in some cases. The income data in this study show 24% rely solely on NZ Superannuation; 37% rely mostly on NZ Superannuation; 33% have other money and 6% have NZ Superannuation and other money equally.⁶² The study gives the average age of entry to retirement villages as around 78 years⁶³ with 70% being women, of whom 84% live alone.⁶⁴ The resident population is 99% European.⁶⁵ The survey covered retirement villages from Whangarei to Invercargill⁶⁶ with prices reflecting market values in those locations. The not-for-profit category included

⁵⁸ Greenbrook, S *Village People: The changing role or retirement village in New Zealand's ageing society*, Thesis, 2005.

⁵⁹ Ibid, 99-100.

⁶⁰ Retirement Commission, *supra* n 49.

⁶¹ Ibid, 62.

⁶² Ibid, 35.

⁶³ Ibid, 3.

⁶⁴ Ibid, 3.

⁶⁵ Ibid, 33.

⁶⁶ Ibid, 19.

33% of the villages⁶⁷; 89% of the villages are licence to occupy.⁶⁸ These statistics indicate a significant rise in the age of entry to villages and a greater population of older women living alone, possibly more accommodated in the not-for-profit sector.

Fees in the surveyed villages ranged from \$60 to \$1,250 per month;

over half of the villages (57%) do not return any capital gain to residents on or after departure. A few (8%) return all capital gain to residents, and 25% return some but not all. On top of this, there is a range of other charges or deductions (most commonly fixed percentage of the initial purchase price that depends on the length of occupancy (54%), over a third (38%) charge refurbishment costs, and a quarter (26%) charge ongoing fees until the re-sale of the unit).⁶⁹

1.3.2 *The growth of retirement villages in New Zealand*

Although the concept of retirement villages has been on the New Zealand landscape for some thirty years, the past decade has seen considerable growth and interest in this retirement housing choice. Reasons for this interest include business opportunities that have become increasingly evident as our population ages requiring different forms of housing during later years. Of significance, the increase in interest in retirement village living is said to be coming from those in the 80+ age group.⁷⁰ The Retirement Villages Association of New Zealand report a growth rate of 6% annually in village occupancy and estimates around 65,000 to 70,000 people will be living in villages by 2020.⁷¹

A cynical approach to increased interest from an older age group could lead to a conclusion that it makes good business sense to ‘sell’ to someone around 80 years to ensure quicker delivery on capital gain that can only be obtained by developers and owners when units are vacated.⁷² Villages that previously sold to those over 65 years have raised their entry level to 75 years and older.⁷³ A more positive and

⁶⁷ Ibid, 21.

⁶⁸ Ibid, 22.

⁶⁹ Ibid, 3.

⁷⁰ Greenwood, J & Marks, S “Retirement Villages”, New Zealand Law Society Seminar (2004) Feb-Mar, 1.

⁷¹ RVANZ cited in Greenwood & Marks, 2004, 2.

⁷² The National Business Review 25th May 2007 reports “Retirement village operator Ryman Healthcare this week posted a new record net profit of \$41.6 million, up 18% on last year. The result was achieved on higher turnover rather than property revaluations...” This suggests older residents occupy their village units for shorter time spans: units can be on sold sooner.

⁷³ This Information was provided by residents’ groups in NSW and Queensland and has been supported by members of Grey Power. In addition, the Retirement Commission Survey published

humanistic interpretation might favour the view that personal security and options for increased assistance through the provision of different levels of care in many villages, attracts those in the 80+ age group. The lure of sophisticated advertising and a consumer driven suggestion of an ageless life-style, can only go so far in getting people to actually buy in and then move in to a retirement village. Older people are apparently voting with their cheque books and making the move in increasing numbers to homes they see as offering above average surroundings, friendship, activities, support when required and perhaps most importantly, security from the ills and threats of the world outside the village gates.

1.4 Free market vulnerability and statutory protection

Prior to the enactment of the Retirement Villages Act 2003 high levels of caution were expressed about the vulnerability of older citizens and the free market approach to Retirement accommodation. When the Act was still a Bill (2001) and passing through Parliament Aitken expressed the following views in support of the Bill;

The assumption is made that, at least for housing which is one of the most important needs for the elderly, ordinary free market and freedom of contract principles must not predominate alone. The ability to get out of a contract, perhaps merely because of emotional hesitations, recognises the potential for exploitation of the elderly, whether by business, family or professional advisers. A bit like minors' contracts, these contracts by the elderly are treated out of the ordinary.⁷⁴

The Retirement Villages Act 2003 was enacted as a result of a growing concern and lack of legal protection for older people buying into retirement village schemes. New Zealand parliamentary debates during the second reading of the Retirement Villages Bill (July 2003) demonstrate the high level of emotion members of parliament felt at the time. Case upon case of “loss of meagre savings”, deliberate deception by a “minority [of] predators who would rip them off” and huge financial penalties when people wanted to leave after a short time were reported.⁷⁵ Added to this, the earlier work of the Law Commission⁷⁶ warned of the lack of protection of retirement village residents against a variety of

in December 2006 found the average age on entry into retirement villages in New Zealand is now 78 years (Retirement Commission, Retirement Villages Survey 2006, p3).

⁷⁴ Aitken, B “The Elderly, the Law and Accommodation Arrangements: Some Reflections from New Zealand” [2003] Elder Law Review, First Reading Retirement Villages Bill 21 July 2003, NZPD 7019-7034;

⁷⁴ Law Commission Report 57,10.

⁷⁵ First Reading Retirement Villages Bill 21 July 2003, NZPD 7031:11.

⁷⁶ Law Commission Report 57, 1999, *Retirement Villages*.

contractual risks, including prudential risk caused by developers undercapitalising at construction stage; risk of entering into contracts containing unfair terms; and risk associated with what may appear as fair contract terms being compromised by operators skimping on contractual obligations.

The Law Commission report acknowledged the reality “that risk is inseparable from human affairs” In noting the age of participants in a New Zealand retirement village survey (68-88 yrs) the Commission’s statement makes a compelling point;

The complexity of such contracts is probably unmatched by that of any other contract that a consumer may be called upon to adhere to. A consumer will in his or her lifetime rarely enter into more than one contract, so there is no real possibility of learning from experience. The degree of prudential risk and the fairness of such provisions as those providing for rear-end loading and other exit costs is difficult for an unqualified person to assess, and indeed requires specialist knowledge confined to relatively few lawyers, accountants and financial advisers...⁷⁷

The new Act has come about largely because of concerns about the vulnerability of older people and the risks they face when entering complex legal transactions with operators and developers of retirement villages. In addition, the lack of an existing independent dispute resolution process for residents has resulted in a significant part of the new Act addressing these concerns.⁷⁸

The Retirement Commission and the Retirement Villages Association (RVANZ) both have watchdog roles in the sector; the Commission’s focus is residents’ rights and providing information about the Act while monitoring its processes and RVANZ keeps watch on its members and their legal and regulatory obligations. Age Concern and Grey Power represent the concerns of residents. These three roles are explained.

1.4.1 *The Retirement Commission*

The website of the Retirement Commission states the Commission “is an autonomous crown entity that helps New Zealanders prepare financially for their retirement”.⁷⁹ In terms of financial planning the Commission has a range of responsibilities directed at education surrounding planning for retirement, collecting research on retirement planning behaviour and assisting the development of national policies impacting on retirement. The Commissioner has

⁷⁷ Law Commission Report 57,7.

⁷⁸ The Retirement Villages Act 2003, Part 4 Dispute Resolution, enforcement and penalties.

⁷⁹ < www.retirement.org.nz > is the website for the Retirement Commission.

specific functions under the Retirement Villages Act 2003. These surround education and information, a monitoring role concerning the effects of the Act, regulations and code of practice under the Act. The Commissioner plays a significant role in the setting up of Disputes Panels and appointing appropriately trained and experienced panellists. This role will be discussed in chapter 3. The *independent* status of the Commissioner is considered to be a critical factor in the approval of panel members for the statutory disputes panel.

The Retirement Commission website provides comprehensive information about the Act and residents' rights.⁸⁰ It is written from a lay perspective and covers every aspect of resident rights and what to do in situations of concern to residents. It also gives contact details for organisations with an interest in the well-being of older New Zealanders; Age Concern being one of these. The Retirement Villages Act and its relationship to complaints and disputes is well covered with information and dates provided to inform readers when the regulations and code of practice come into force during 2007. The Commission also plans to produce brochures for residents of Retirement Villages covering the same information available of the website. This is seen as an urgent requirement as many residents and potential residents do not have computers or use internet facilities.

A letter from the Retirement Commissioner to the Minister for Building Issues dated 18th May 2006, reports on complaints regarding retirement villages. Couching the problems that have been brought to the attention of her office by residents in a considered manner, the Commissioner acknowledges she mainly sees only the problems and understands many residents are "very satisfied with their life in villages". She goes on to say "nevertheless, the list makes sorry reading".⁸¹

1.4.2 Retirement Villages Association of New Zealand (RVANZ)

The retirement village industry in New Zealand (and Australia) evolved out of the aged care sector. The Retirement Villages Association of New Zealand was set up in 1989 as a professional body to self-regulate the industry and manage what it

⁸⁰ <www.retirement.org.nz>

⁸¹ Diana Crossan, Retirement Commissioner, 18th May 2006. A copy of this letter was supplied by the Retirement Commission.

saw as emerging issues within the new industry. Its intention has always been to set professional standards and maintain a credible and professional front for the industry. Like its Australian equivalents, the Association has set up a website where it explains its functions and provides information for operators and residents or potential residents. It advises would-be residents on a number of matters including why they should choose an RVA member village. The reasons given are that RVA members provide quality services within their villages; they have to comply with the compulsory RVA accreditation programme which they believe demonstrates “that accredited villages are responsible and committed to meeting resident’s needs”. The Association describes itself as a “national body that works to represent, protect and promote the interests of its members and their associated services”.

The principle aim of RVA is to represent villages with a shared vision for providing quality services. In order to achieve this aim, the association has for some time had a member’s Code of Practice requiring RVA members to operate their villages in a professional manner and with the highest level of commercial integrity. The Code of Practice is externally audited by PricewaterhouseCoopers and provides assurances to members that village management is meeting minimum operating standards.⁸²

The RVANZ’s commitment to the highest professional standards is as it should be in a situation where older people and large amounts of money are concerned. The operator professional Associations in New Zealand and Australia however, represent the industry not the residents. As stated in the introduction, this research is focussed on the conflict and dispute context between residents and operators.

1.4.3 Grey Power and Age Concern

Grey Power and Age Concern are both independent not-for-profit national organisations focussed on the well-being of all older New Zealanders. The web site of Grey Power describes the organisation as a “lobby organisation promoting the welfare and well-being of all those citizens in the 50 plus age group”.⁸³ Age Concern on its website states

Age Concern is an independent, charitable, not-for-profit organisation with the mission of working for the rights and well-being of older people, koroua and kuia. Age Concern New Zealand is a federation of local Age Care Councils,

⁸² This information was obtained from the website of RVANZ <www.retirementvillages.org.nz> 22nd November 2006.

⁸³ Grey Power’s website <www.greypower.co.nz> was accessed on the 1st October 2006.

which each provide information and services in cities and most major provincial towns around the country.⁸⁴

Both groups have contributed to this study and both have been involved in consultation with government agencies prior to and during the drafting of the new Act. In some instances these organisations have acted as advocates for residents and have alarming stories to tell about the experiences of residents at the hands of unprofessional and intimidating operators. They also acknowledge the work done by the Retirement Villages Association of New Zealand for its efforts in establishing sector provided dispute resolution processes in the absence of statutory provisions.⁸⁵

However, the advent of an independent disputes process via Part 4 of the Act is welcomed by the two groups. They believe the Act has been too slow to be implemented but welcome the package which includes; a universal code of practice and regulations (General Fees and Disputes Panel Regulations); a code of residents' rights; a consistent and specified role for statutory supervisors and compulsory registration for all retirement villages in New Zealand. Concerns remain that the Act will not be fully operational until late 2007 because of the time allowed for village operators to meet compliance requirements in preparing for the statutory Code of Practice and the General and Fees Regulations.

1.5 Summary

In this chapter I have established the context and actors in the retirement village sector in New Zealand. I have considered ageing demographics and identified the huge swell of age cohorts known as 'the baby boomers' who will, over the next decade begin to join the ranks of 'superannuates'; those over 65 eligible for universal superannuation payments. I have highlighted the "darker side" of retirement village living in the USA and demonstrated that retirement village living in New Zealand is attractive and accessible to financially independent pakeha New Zealanders; that many single women live in retirement villages; and why people choose this life-style.

⁸⁴ <www.agedconcern.org.nz> accessed 1st October 2006. Koroua is the Maori term for a male elder and Kuia is a female elder; both are imbued with cultural recognition and respect for knowledge and age.

⁸⁵ Information was obtained from personal communications with office holders in both organisations during October and November 2006.

I have ascertained the growth rate of retirement villages in New Zealand and the average age of residents; an older group than advertising would suggest and explained how the risks involved in the free market led to statutory protection in the form of the Retirement Villages Act 2003. I have explained the education and monitoring role of the Retirement Commissioner; the role of the Retirement Villages Association of New Zealand (RVANZ) as the principal sector group adviser; and also Age Concern's and Grey Power's role as advocacy groups for older New Zealanders.

The following chapter will focus on issues in, and surrounding retirement village residents and how these can impact negatively on their well-being.

Chapter 2 Retirement village issues: power, attitudes and resident needs.

2.1 Introduction

This chapter considers retirement villages as a housing option. Here I will explore the needs of people who choose retirement villages as an accommodation and lifestyle choice for their later years. The safeguards that have been put in place by governments and sector groups to protect the interests of older citizens through legislation and good business practice will be included.

I will review international studies to provide insights into problems in retirement communities in the U.S.A, Australia and New Zealand. These studies relate to management and resident issues and identify causes of conflict, including the role of power and control in village dynamics. Two approaches to retirement village management are included to demonstrate differences in approach to the ‘business’ side of retirement village living. Also included is the voice of a state residents’ association.

Examples of disputes that have reached the Queensland Commercial and Consumer Tribunal are presented to illuminate the issues involved in retirement village disputes. These include abuse of power and intimidation of residents by operators.⁸⁶ I include a study covering most of the retirement village court cases and approximately half the tribunal determinations in Australia which provides valuable information about where the major problems lie; this concerns both operators and residents in some instances. I have included features of the New Zealand Act and the first New Zealand disputes hearing. Finally I will provide a summary of the issues contained in this chapter that identifies the needs of retirement village residents.

⁸⁶ Power and control issues are present in many of the disputes that can be found on the websites of tribunals dealing with retirement village disputes in NSW and Queensland. The cases cited are some of the most recent on the website of the Queensland Commercial and Consumer Tribunal. NSW disputes involve the same or similar issues.

2.2 Retirement villages: an alternative housing option and peace ever lasting?

Many older New Zealanders who remain in their own homes are fascinated by the issues coming to light within the fast growing retirement village industry; especially those involving residents' rights, costs and fees, and the hotly contested area of refurbishment costs. These are common discussion topics at family events and within neighbourhoods.⁸⁷ These older New Zealanders would not consider swapping their "Huntly brick" homes; their 1930's bungalows; or their renovated beach houses for a villa in a retirement village. However, increasing numbers of older New Zealanders are choosing this housing option for reasons identified in chapter one. Currently, approximately 5% of people over the age of 65 years are choosing to live in retirement villages in New Zealand; this is around 23,500 people.⁸⁸ It seems the majority are not attracted to the idea of placing their financial capital into a retirement village knowing they would in the majority of cases be relinquishing capital gain upon leaving.⁸⁹ They may be less attracted following a recent New Zealand Consumer magazine article including headings "Charging like a wounded bull", "Refurbishment rorts" and "Caught both ways".⁹⁰

⁸⁷ The beach and nearby farming community where I live has seen the move and return of local people 'trying' retirement village living only to find it is not what they expected. These people have been fortunate to have the financial resources to relocate. Others have reportedly regretted their move but had to remain in their chosen village because of the financial loss they would suffer upon leaving. The Retirement Villages Act 2003 s28(1) allows for a cooling off period of 15 working days after the signing of the occupation right agreement so a purchaser can have a change of heart without penalty. Once occupied however, a change of heart could be very costly or simply cost prohibitive.

⁸⁸ Grant, B "Retirement Villages: An Alternative Form of Housing on an Ageing Landscape" [2006] N.Z. *Social Policy Journal*, 7, 3-4.

⁸⁹ The loss of capital gain would depend on the type of entry contract between the resident and operator. The Retirement Commission Survey, 2006 showed 45% of residents in the survey did not expect to get any capital gain on leaving or death; 10% expect to get around 50%; 12% expect to get all their capital gain and 31% did not know. For operators the pattern was similar although a surprising 13% did not know what capital gain they would be able to return to residents/estates. (p67-68) The summarised data for both residents and operators suggests that under new contracts, residents may be less likely to get any capital gain returned to them. (p69) "In addition to the initial purchase price and ongoing fees most Villages charge capital deductions and other costs when Residents leave. The most common is a fixed percentage of the initial purchase price that depends on the length of occupancy (54%). Over a third (38%) charge refurbishment costs, and a quarter (26%) charge ongoing fees until the re-sale of the unit. One in ten (11%) deduct a fixed percentage of the re-sale price. Of this group, half pass on 100% of the capital gain to Residents, but the rest either keep all the capital gain, or pass on 50%. For those who do not pass on any capital gain, this means the more the property is worth on re-sale, the less the Resident gets back. Only 8% are not charged any further deductions (these villages either charge very high fees and/or keep all the capital gain)" (p69).

⁹⁰ *Consumer*, March [2007] 467, 36-39.

Home ownership in New Zealand means different things to different people, but generally it means a chosen place to live which provides a personal haven, a sense of belonging and identity and a face to the community.⁹¹ The majority of older New Zealanders (65+) want to live in their own home and the government's 'ageing in place' strategy supports this preference.

The value of older people to their communities cannot be underestimated. Many older people are involved in unpaid activities, either inside or outside of the home, and older people comprise a significant proportion of the volunteer workforce. Around 15% of all unpaid work is done by older people...This proportion was highest (21%) among 65-74 year olds.⁹²

However older people alone in their own homes can be affected by isolation and loneliness as mobility lessens and friends and neighbours die or move away. A decision to move from home ownership to a retirement village is, as has been ascertained, not a step taken lightly by many residents interviewed in the studies examined.⁹³ Their moves are based on sound reasoning including confronting the realities of aging and inevitable decrease in ability to manage a larger property. The biggest area of growth in the next two decades is for those over 85 yrs.⁹⁴ In Queensland the cohort that requires the highest levels of care (those 85+) is expected to increase eight-fold over the next forty five years.⁹⁵ This huge increase in the number of 'old' older citizens in both New Zealand and Australia incorporates the huge bulge that will come through as younger baby-boomers age.

For those who have chosen retirement village living, the evidence suggests the large majority are very satisfied with their choice and are often pleasantly surprised at the caring and friendship they have become part of in their village communities.⁹⁶ In addition, residents are free to engage with friends, family and their communities outside the village and many continue to do this, remaining

⁹¹ Office of Senior Citizens, "Taking a Positive Approach to Ageing" 2005, 22.

⁹² Ibid, 24.

⁹³ Leonard, L "Retirement Villages: Promises of a Lifestyle", Thesis, 2002; Bowen, B "Retirement Villages: A Lifestyle Choice for Older New Zealanders", Thesis, 2003; Grant, B "A New Sense of Self and a New Lease of Life: Leisure in a Retirement Village" [2004] *Annals of Leisure Research*, 7; Grant, B "Retirement Villages: An Alternative Form of Housing on an Ageing Landscape" [2006] *N.Z. Social Policy Journal*; Graham, V and Tuffin, K "Retirement Villages: Companionship, Privacy and Security"[2004] *Australasian Journal of Ageing*; Greenbrook, S "Village People: The changing role of retirement villages in New Zealand's ageing society", Thesis, 2005; Retirement Commission, ACNielsen, Retirement Village Survey, 2006.

⁹⁴ Office of Senior Citizens, *supra* n 91.

⁹⁵ Aged Care Queensland, "Action Points for an Ageing Population" (2006) Policy Paper.

⁹⁶ Stimson, R McRea, R and Star, L "What Retirees Look for in a Retirement Village" in Stimson R (ed) *The Retirement Village Industry in Australia: evolution, prospects, challenges* 2002, 80; Retirement Commission, *Retirement Villages Survey*, ACNielsen, 2006.

active on committees and within church and sporting organisations: some continue to undertake paid work.⁹⁷ In other words, they treat their retirement village residence just as they did their own home but having removed the responsibility of home and ground maintenance, they are free to use their time as they wish.

Other than inability to care for themselves or death, unhappiness and dissatisfaction are assumed (in the absence of any relevant studies) to be the reason residents move out of retirement villages. Anecdotal reports suggest this has occurred from time to time in New Zealand. In any event, such a decision would incur serious financial disadvantage to the resident.⁹⁸ Under the new Act this remains the case but the decision to sign a contract and move in will be based on informed consent and legal oversight. The Minister for Building Issues explains the new code of practice all retirement village operators will have to comply with as “protecting the best interests of older New Zealanders entering complex contractual arrangements”.⁹⁹

As a means of informing and educating prospective residents, the Retirement Commission has established a well advertised website *sorted.co.nz*. Under the heading *retirement* examples are provided of typical retirement village financial structures including calculations and Kiwi stories. Under these structures it is considered “residents have really made a decision for life”.¹⁰⁰ If the decision is for ‘life’ however long that might be, then residents and potential residents need to know if problems arise there will be easily accessible mechanisms available to deal with them.

The Retirement Villages Association (RVANZ) the peak sector group has taken this responsibility seriously and has incorporated on its website, its processes for dispute resolution under the new Act. However, approximately 45% of retirement villages in New Zealand do not belong to RVANZ and even those that do may not

⁹⁷ Personal communication Vision Senior Living Co. Auckland 2nd November 2006

⁹⁸ The Retirement Commission survey 2006 suggests a 30% deduction from the initial price paid regardless of length of occupancy; 30% was the most commonly mentioned deduction in the survey. (p70)

⁹⁹ Clayton Cosgrove, press release NZ Government 27th September 2006. www.beehive.govt.nz accessed 15th November, 2006.

¹⁰⁰ Retirement Village Adviser, Retirement Commission, personal communication, 1st November 2006.

necessarily comply with RVANZ guidelines.¹⁰¹ This is another compelling reason for the Act.

2.3 What do we know about problems in retirement villages and attitudes of those in positions of power within the villages?

A review of the limited empirical literature has drawn a variety of situations that give rise to conflict in retirement villages. In Australia, these can be broadly categorised under two headings. The first and most dominant theme concerns the nature of contracts between residents and operators/owners involving issues surrounding money; residents' disinclination to pay extra charges or increases in charges when accounting procedures are not transparent and proper processes have not been followed. These contractual disputes account for approximately 80-90% of disputes between residents and operators.¹⁰² The second area causing problems in Australia is the nature of agreements amongst parties establishing retirement villages 10-20%. These parties are owners, operators, financiers and builders.¹⁰³

While no official figures are available in New Zealand it seems from the literature examined and personal communications from stake-holder groups, financial matters dominate in disputes between residents and operators. Grey Power and Age Concern endeavour to be informed about trends and changes in the areas and both organisations were involved in consultation with appropriate government agencies at the time of drafting the Act and regulations. Their websites also provide useful information about retirement village issues. However, due to the relatively small percentage of those over 65 (5%)¹⁰⁴ living in Retirement Villages, it is unlikely these organisations will develop a specialised advocacy focus.

¹⁰¹ Chapter 6 includes a summary of the process undergone by the resident who issued the first disputes notice under the Retirement Villages Act 2003. The first disputes hearing under the Act took place in Paraparaumu on the 26th February 2007.

¹⁰² Keogh, J & Bradley, P "The Potential for contractual disputes in retirement village living: an examination of recent litigation arising from resident contract disputes in NSW retirement villages" paper presented at *Pacific Rim Real Estate Society 8th Annual Conference*, Jan 2002.

¹⁰³ Ibid, 7.

¹⁰⁴ Turner, P cited in Grant, B "Retirement villages: An alternative form of housing on an ageing, landscape", *Social Policy Journal of New Zealand* (2006), 27, 100-113.

The Retirement Commission does not have an advocacy role and none was intended when the office was first established in 1995 although a “retirement village adviser” is a position that has been held in the office. It is to this adviser that most resident issues have been directed, either by residents or their family members. The Retirement Commissioner, in a letter to the Minister of Building Issues in May 2006 included a summary of issues raised about retirement villages received for the six months to May 2006. As a background, the Commission explains it does not receive complaints from operators about residents; residents involved are often in their eighties; many are about licence to occupy villages and others unit title villages; complaints involve Retirement Village Association members, including its governing Executive’s villages as well as non-member villages.¹⁰⁵ Complaints on the list fall under the following headings;

- Buying off plans
- Not knowing what they were buying into
- Financial
- Information and involvement
- Development of village
- Village rules
- Health and safety
- Repairs and maintenance
- Leaving the village
- Statutory supervisors
- Complaints process

A category headed “Complaints process” lists the following issues and goes some way in cementing the new Act’s comprehensive disputes resolution section.

- The village not having a complaints process at all, or residents not being made aware of it.
- Villages not following their own or required industry complaints processes.
- The Retirement Villages Association placing limits on the type of complaint/dispute or the amount of money member villages Disputes Committees and its Review Authority can address, despite its role in

¹⁰⁵ “Summary of complaints about retirement villages received by the Retirement Commission for the six months to May 2006”. Copy supplied by the Retirement Commission.

determining complaints and disputes under current Securities Act regime.

- Complainants not receiving a prompt acknowledgement, clear details about how their complaint will be dealt with and resolved, and copies of relevant documentation (including RVANZ processes).
- Complainants being given the ‘run around’ and experiencing long delays in having their complaint dealt with.
- Heavy involvement of lawyers by some villages.
- Residents being abused by management when they make complaints or feeling they are being adversely treated because they’ve made a complaint.
- When residents make a complaint, receiving complaints about them by management in return.

This summary makes up a small part of the “sorry reading” noted in the Retirement Commissioner’s letter.

Having established that money, power imbalance, attitudes and inadequate complaints facilities are catalysts for resident discontent and disputes in Australia and New Zealand, an examination of empirical studies undertaken to explore what is behind conflict in retirement communities follows.

2.3.1 *Autonomy in the U.S.A.*

An early study conducted in the United States of America looked at autonomy, power and decision-making in thirty-six retirement communities. The study’s focus was the exercise of decision-making power in the immediate living environment. In order to assess *autonomy* empirically, the researchers divided the concept into two dimensions; ‘external’ and ‘internal’. External related to state and county regulations, surrounding communities, occasionally the Federal government, land zoning and related matters. Internal factors surrounded matters within the control of management and residents and referred to the “operations, programs, and activities carried on within the community itself”.¹⁰⁶

¹⁰⁶ Streib, G, Folts, W and La Greca, A “Autonomy, Power and Decision Making in Thirty-six Retirement Communities”, *The Gerontologist* [1985], 25, 4.

The findings especially relevant to this study include;

It is not surprising to find men – almost exclusively and retired corporate executives in the “power” positions in many communities.

This research shows that retirement communities are amalgam social units, combining characteristics of a community and a formal organisation. A retirement community has a range of needs interests and activities and yet because of its organizational structure, operations, and type of residents, it has an explicit focus similar to a formal organization.

Most residents of retirement communities are seeking stability – a continuation of the conditions they thought were present when they moved in. Autonomy often means maintaining the status quo.

...For a few persons, power and decision-making represent a continuation of earlier roles and the use of the skills and competencies honed and utilized during the working years. For these persons politics becomes an engrossing activity. As in other political situations a few people are seen as being more instigators of discord than harmony...yet other active residents with executive skills, technical knowledge, and expertise in group dynamics give valuable and selfless community service and have an important effect on the decision-making process and the quality of life within the community...

It is our observation that communities whose residents have higher educational and economic resources are characterized by higher autonomy.¹⁰⁷

A later study by the same author Streib and colleagues was undertaken the US during 2001 using case studies as examples of how conflict and change manifest themselves in leisure-oriented retirement communities. Their findings include

...the presence of various democratic and participatory committees provides an ongoing means to solve some of the problematic situations that are inevitable in organized group life...Since many of the conflicts are trivial and actually touch the lives of only a minority of the residents, conflict is often viewed as a waste of time. Most residents conclude that staying disengaged is the prudent, convenient, favourable, and satisfying stance to take on most issues...

...Thus, in most situations, the majority of residents will go to great lengths to preserve a spirit of harmony, cooperation, and tranquillity in retirement environments. *Unless their economic interests or style of life are severely threatened, they will generally attempt to reduce or avoid situations resulting in conflict.* [emphasis added].¹⁰⁸

The authors’ overall findings confirmed disagreements over *economics* and *power* had the potential to become controversial and significant in the communities studied. Their major conclusion relates to the theoretical ideas of social construction. They found that the way in which parties involved in conflict “define the focus and importance of the triggering situation is basic to understanding what happens”. They argued;

...that conflict like all other social phenomena is constructed by individuals and groups. The disagreements over resources and power may be crucial.¹⁰⁹

...some of the active participants in community conflict engage in them as a kind of “recreation”... a way of filling in recreational time, keeping them busy active

¹⁰⁷ Ibid, 408-409.

¹⁰⁸ Streib G F & Metsch, L R “Conflict in Retirement Communities: Applying an Analytical Framework” [2002] *Research on Aging*, Vol 24, 1, 67-86.

¹⁰⁹ Ibid, 84.

and “alive”...some of the recreationalists are also persons who wish to exercise power in the community”...They wish to be in charge and “solve” a problem.¹¹⁰

The authors’ view is that if the residents decide an issue is of high importance, they will become involved and engaged in seeking resolution. The corollary to this may be that some residents prolong conflict out of a need to seek recognition through that engagement. *Constructivists* operate from a position that studies the “multiple realities” constructed by people and the implications of those constructions for their lives and interactions with others”¹¹¹ while

Constructionists commonly assume that humans “do not have direct access to a singular, stable and fully knowable external reality. All of our understandings are contextually embedded, interpersonally forged, and necessarily limited.”¹¹²
[italics added]

Social *constructivism* suggests that each person’s way of making sense of the world is unique and “as valid and worthy of respect as any other, thereby scotching any hint of a critical spirit”.¹¹³ The difference between the two perspectives can be found in the way people in the environment of their micro systems, relate and carry out roles in the linking meso-systems. For example *constructivists* might see residents’ rights to ‘participate’ as reason enough to become engaged in a village conflict whereas *constructionists* might see the right as being limited to those who are *affected* by the conflict; if cost increases are proposed, then it is likely more residents will become involved in the conflict. From an operator’s point of view, “troublemakers” in the resident population would be viewed from a *constructionist* perspective and possibly labelled ‘agitators’; constructivism on the other hand would place the role of the resident in a legitimate ‘activist’ framework.

The framework used by the authors to carry out their study, involved four possible situations in which conflict could arise, these being;

1. resident v resident;
2. resident v owner or developer;
3. resident v outsiders (individuals, groups or organized bodies);
4. residents v owner or developer v outsiders (triangular).

Their framework suggests three broad questions regarding outcomes of conflict which include;

¹¹⁰ Ibid, 83.

¹¹¹ Patton, M Q *Qualitative Research and Evaluation Methods* (2002), 96.

¹¹² Neimeyer, R A 1993 cited in Patton, 2002, 96.

¹¹³ Crotty, M 1998 cited in Patton, 2002, 97.

...whether the outcome results in solidarity or hostility; whether people leave or threaten to leave, and whether the conflict leads to additional or continuing conflict.¹¹⁴

The authors' preliminary assessment found that "conflict in retirement communities has both positive and negative outcomes" and concluded "disagreements over economics and power could become controversial and significant".¹¹⁵ It can be concluded from this that economic and power issues possibly provide the greatest likelihood of prolonged conflict and also the greatest likelihood of resident participation in a retirement village.

In terms of retirement village fees and costs, we can anticipate from the Streib and Metsch study, there will be significantly more likelihood of residents engaging in conflict for longer periods, when situations arise that require them to pay more to live in a retirement community.

The two studies conducted by Streib and his colleagues revealed interesting data suggesting male residents seek power through becoming "engrossed" in village politics rather like a recreational activity. In the earlier study Streib placed this behaviour in a broader political context acknowledging "as in any other political situation a few people are seen as being more instigators of discord than harmony". This acknowledgement gives balance to the dyadic resident-operator relationship. A retirement community like any other community represents a 'sample' of society, that is, all dimensions of human nature and political leaning will be represented in both the resident and operator/management populations. There are several issues however that may cause imbalance within this dyad; the first is the relative age difference between operator and resident; second is gender; third, the disparate power relations between the two; fourth, residents are generally living out the final years of their lives in their villages and have committed their financial capital to that choice: operators and managers may come and go, but most are in the business to benefit financially.

A recent New Zealand study looked at the concept of 'participation' by residents in retirement villages and adds another dimension to the 'power' and 'conflict' domain which, according to some, is a contested area; one seeing residents as the

¹¹⁴ Streib & Metsch, *supra* n at 108.

¹¹⁵ *Ibid.*

problem¹¹⁶ while the other views operators as the rogues.¹¹⁷ The New Zealand study approaches the ‘power’ issue from another angle.

2.3.2 *Participation or domination: a New Zealand study*

The New Zealand study considered participation and control in retirement villages and forms part of a doctoral thesis examining marketisation, participation and communication within New Zealand Retirement Villages. The study “aims to extend retirement village research by focusing on communication within the employee-resident domain”.¹¹⁸ The example used illuminates the covert and overt methods utilized by a female staff member who uses (in the author’s view) “hidden power” to gain female residents’ co-operation to use the village community centre rather than their own homes for socializing and interpersonal exchanges.

Utilizing the work of Lukes and the combined use of critical discourse analysis (CDA) and rhetorical criticism (RC) to consider how a three-dimensional model of power is useful for examining “hidden or unobserved aspects of power”, Simpson makes a significant point. This point is consistent with theories underpinning the Duluth model for domestic violence. It is “that power cannot be resisted until it is recognised”.¹¹⁹ This is the reason many ‘stopping violence’ groups include partner groups because it is recognised that a certain conditioning of the partner occurs within the relationship or has already occurred (for the partner) prior to the relationship’s existence. The ‘victim’ partner either is not consciously aware of the power and control being exercised over them, or they believe whatever is happening, is justified. They also may fear consequences if they resist.

Simpson’s example occurred in a retirement village promoted as a village where residents would experience “resort style” living and “participate”. The two hour interview with the activities co-ordinator took place in the village community

¹¹⁶ CEO Aged Care Queensland comments above “most disputes are resident v resident”.

¹¹⁷ The Association of the Residents of Queensland Retirement Villages reports; “To try to bring a degree of balance into the equation is the reason [the Association] was formed...on the advice of the then Minister of Consumer Affairs...”. Email communication 25th November 2006.

¹¹⁸ Simpson, M “Participation and control in retirement villages: Implications for customer service”, 10th Annual Waikato Management Student Research Conference, University of Waikato, 20th October 2006.

¹¹⁹ Lukes S, 1974, *Power: A Radical View* cited in Simpson 2006, 12.

centre where residents came and went while the interview was being conducted. The residents involved the staff member in conversation and the interview was stopped at that point and re-continued later. The excerpt chosen by Simpson to demonstrate types of power follows.

...we don't encourage cups of teas in each other's homes, that's something I frown on and they know it, they know I don't want cliquey little groups, like I talk about it all the time and I say 'oh I hate to see that happen in our village because that's where trouble starts'. So what we do is we have endless cups of teas here – they come here [community centre] and have a cup of tea. There's always a cake, there's always a cup of tea, there's always whatever they want because that's - this is the community, not each other's home because you start that crap and before you know it you've got problems and so and so is whispering about so and so.... so we don't have that. If they want cups of tea they come here and what I say to people is if you want privacy shut your door and no one will bother you, but I will if I don't see you, that's the standing rule before they come in, but they sit on their front porch and before you know it, or they'll sit on those seats out there and they're like birds, come, go, come, go, people, different ones all the time, or if someone comes in here someone else will always come over to see what's going in.... someone else will come over for something and there will be another little flurry and that's what its like, they want to know what's going on so they all come and [go]....but it's not their home – so it's not this 'so and so's been going in there because' – ain't going to have that happen in my village. I'll probably lose control eventually (laughs) but at the moment it ain't going to happen in my shift.

From a conflict management perspective the staff member implies she is avoiding “problems”. Whether she would have known she was controlling an activity termed ‘gossip’ which other researchers have found is an important social interaction in older persons’ residential schemes or that she was attempting to prevent meetings at a popular meeting spot (the resident’s porch), is unknown.¹²⁰ What is known is that she was fully aware she was in ‘control’ and it is clear she was not considering the rights of residents to ‘participate’ *and* use their homes as they wished.

We can see from the studies examined that conflict and disputes in retirement village settings arise out of complex relationship dynamics involving power and control and that issues concerning money are more likely to develop into prolonged disputes. It is also apparent that many residents avoid conflict because they do not want to disturb the stability they were seeking when choosing the ‘community’ lifestyle; silence is therefore one way of maintaining the status quo. Retirement communities can be seen to replicate the same dynamics as any other

¹²⁰ Percival, J “Self Esteem and Social Motivation in Age-segregated Settings [2001] *Housing Studies* 16, 6 836, 839. This study found ‘gossip’ and spaces such as balconies for informal meetings between residents was conducive to enhancing positive social interaction amongst residents.

community; age,¹²¹ gender and permanency having unique impact in the retirement community setting: residents generally want to stay for their remaining life-time.

Another perspective on conflict in retirement villages is approached from a management and sector group business point of view. Two examples will be covered; the first from the USA and the second from Queensland. This will lead to an examination of actual disputes that have gone before the Queensland Commercial and Consumer Tribunal during the past two years and identify the types of issues that have been unable to be resolved “in-house” or through mediation.

2.3.3 *International management and marketing perspectives on conflict in retirement villages*

A point of view obtained from an American operations management and senior living communities guide portrays conflict and complaining by residents as positive aspects to opening communication lines, dispelling rumours and building resident satisfaction and referrals. Pearce, the author says “encourage your residents to complain”, providing the reasons for this philosophy;

- For every resident who bothers to complain, there are 24 silent unhappy residents. Yet if residents do complain and the complaint is resolved quickly 90 percent will recommend you to their friends.
- The average “wronged” resident will tell 8 to 16 people, each of whom may tell 5 others. In a tight social circle such as a senior community, word can spread fast.
- On average it can cost as much as five times more to attract a new resident as it takes to keep an old one happy.¹²²

¹²¹ The US studies of Streib et al indicate a younger and more affluent age group entering US retirement villages in the 1980's and 1990's (Streib & Metsch 2002, 69). Their descriptions of male residents exercising power and control in a kind of recreational sense would not necessarily equate with the current New Zealand retirement village resident population; that is, 80+ years and predominately female, with incomes usually dependent on superannuation and small personal savings.

¹²² Pearce, B W *Senior Living Communities: A Complete Guide*, (Maryland: The John Hopkins University Press, 1998).

Pearce's insight into the older generation currently occupying retirement communities is demonstrated through his knowledge of the times they were born into and the historical events that have shaped their lives.

Today's residents may have grown up during the Depression and may have become conditioned to austerity. When first introduced to a modern senior living community, many react negatively to a lifestyle that they may personally consider "lavish". It is the dream of many to pass on their life savings to their heirs, and many find it very difficult to spend this money on themselves. Therefore they may be concerned about how their hard-earned money is being used by management to deliver resident services and may feel that they do not deserve the lifestyle. For most, at the very least, it is a significant departure from the frugal lifestyle they may have been living in their own home or apartment.¹²³

His philosophy is evident in his promotion of "constructive complaints"; he quotes a prominent retailer;

Those who complain teach me how I may please others so that more will come. Only those hurt me who are displeased but do not complain. They refuse me permission to correct my errors and improve my service.¹²⁴

The findings of Streib and Metsch and the ideas of Pearce are compatible; they both relate to the theory of social construction and the theorem "when people define situations as real they are real in their consequences".¹²⁵ The world views of social scientists in the case of Streib and Metsch and Pearce, a business oriented management and marketing consultant,¹²⁶ appear complementary in the examples cited. The business experience and personal philosophy of one can potentially be enhanced by the additional knowledge from the social sciences (and vice-versa).

2.3.4 *The Association of Residents of Queensland Retirement Villages*

The growth of retirement villages in Australia has consequently brought about consumer awareness and keen interest in legal contracts and issues surrounding

¹²³ Ibid, 79.

¹²⁴ Field, M cited in Pearce, ibid, 81.

¹²⁵ "Thomas Theorem" cited *A Dictionary of Sociology* Scott J and Marshall G, Oxford University Press 2005. University of Waikato 12th November 2006. <www.oxfordreference.com>

¹²⁶ Pearce is a former retirement community manager whose experiences of older relatives and friends in his early life lead to a life-long interest in the welfare and wellbeing of seniors. His book "A Complete Guide to Senior Living Communities" reveals his deep concern and knowledge about subjects such as the grief process of ageing and the realities of operating a retirement community. "Residents can be a challenge. Not only are we financially dependent on them, but for many senior living professionals they the source of both anxiety and job satisfaction...a complaint is not always a criticism, and indeed it is not always a simple matter to identify the real problem behind a complaint. Residents may be experiencing difficulty adjusting..." (p79).

payment of fees and charges to residents. The Queensland Residents' Association explains why it is needed.

...A balance has to be struck between commercial interests and the well-being of village residents which, almost inevitably, do not always coincide. Those whose interests in retirement villages are as a commercial enterprise are very well resourced and have influential lobby groups and law firms acting on their behalf. To try to bring a degree of balance into the equation is the reason that the Association of Residents of Queensland Retirement Villages was formed. It came into being in 1992, on the advice of the then Minister of Consumer Affairs with the purpose of representing the interests of Village residents in negotiations with the industry and all levels of Government. This refers both to Leasehold Retirement Villages and to Freehold Retirement Villages.

There needed to be an organisation with an informed knowledge of the legislation pertaining to Retirement Villages and an understanding of the structure and function of the Retirement Villages industry...¹²⁷

A communication from the Queensland Residents' Association (ARQRV) confirms there are more widows than widowers (more women alone) living in Queensland retirement villages which would emphasise any relative imbalance in the negotiating positions of female residents and the over-all power disparity between the females residents and operators who are predominately male. The Association reports:

...The most exploited group in retirement villages are those whom scheme operators find easiest to intimidate. Women are the majority and are less inclined to participate in any dispute or take up cudgels against intimidation or overcharging etc. Women are more vulnerable and demographically there are more widows than widowers. Many widows say that 'my husband would have dealt with that'. There are cases where the village manager has called in elderly women to his office and given them a serious 'telling off' in front of his desk as if they were schoolgirls in front of the headmaster...

...We have helped many residents committees in many villages and often with many thousands of dollars in legal costs. All too often the scheme operators capitulate before the hearing date having caused the maximum costs and delays with bluff and bluster...

...operators adopt a strikingly similar attitude in their tactics. First they try to get residents to focus on trivial matters as opposed to their statutory function. Then they seek to tell residents that the few who complain are 'troublemakers', malcontents etc. They never want to focus on the matters in dispute or at issue and of course we think that is because they know their actions have been improper and cannot set out a rational, legal position to justify it. Invariably the operator says he is acting in the best interests of the residents.¹²⁸

The Queensland state residents' group formed in 1992 has promoted itself as a "consumer protection group" and actively sought membership at ten dollars per year per unit. With a membership of 7,000 it is able to assist residents with legal fees when problems with operators have not been resolved through negotiation. According to the secretary, it was ARQRV that lobbied for the inclusion of

¹²⁷ Background (to The Association of Residents of Queensland Retirement Villages) accessed from website <<http://www.villagers.org.au>> 21st July 2006.

¹²⁸ Email communication from the Secretary, ARQRV 13th November 2006.

consumer protection in the state Act. This occurred in March 2006.¹²⁹ Another important objective of the Act promotes and encourages resident participation in the affairs of retirement villages generally.¹³⁰ This encouragement adds to the powers of residents' committees enabling them legitimate involvement in matters affecting retirement villages in the state.

2.3.5 Aged Care Queensland Incorporated

...Aged Care Queensland is the peak industry body representing providers of 'aged care' in the broadest sense – whether the care and accommodation services are delivered in a home or community setting, in a nursing home, or in a retirement village...Thus Retirement Village ('RV') operations are only one part of the portfolio of activities carried on by our members.¹³¹

Aged Care Queensland (ACQ) represents the industry in the broadest sense. Like RVANZ, ACQ does not represent the residents of its member groups which include retirement villages, though its membership is reportedly "all united in a common concern to provide Queenslanders with aged, community and retirement services of excellence".¹³² ACQ like RVANZ is a peak industry body which maintains the perspective of its membership, just as residents' groups maintain the perspective of residents. It is obvious that protective legislation has developed in both Australia and New Zealand in the past decade to balance the tensions that inevitably exist between those who pay to live in retirement villages and those who profit from that legitimate business activity; the age of the residents being an influencing factor.¹³³

In June 2006 the Queensland Law Society held a conference "Legal Planning for Older Persons Conference". The CEO, of ACQ delivered a presentation covering the entire sector of aged care including retirement villages. The presentation was

¹²⁹ As a result of the lobbying of ARQRV the first stated main objective in the amended Act is now "to promote consumer protection and fair trading practices in operating retirement villages and in supplying services to residents..." Division 2, 3 (1)(a) Retirement Villages Act 1999.

¹³⁰ Division 2, 3 (2) (c) Retirement Villages Act 1999. "Only through ARQRV (Inc) can residents participate across the full span of villages for it is the only association of residents whose membership is open to all residents of Queensland retirement villages. All residents have rights under the Act so all residents have a commonality of interests. The ARQRV (Inc) seeks to make the standards required by the Act the minimum standard and ensure these standards are met in all villages". Accessed from ARQRV website 21st January 2006. <www.villagers.org.au>

¹³¹ Email communication from CEO, Aged Care Queensland, 15th February 2007.

¹³² Ibid.

¹³³ Vinden & Shailer cited in Stimson, (Ed) *The Retirement Village Industry in Australia: Evolution, Prospects, Challenges* 2002, 109; Dugdale, D F "Retirement Villages", The Law Commission, [1999] NZLJ Oct. 357.

set out in dot point style and covered the interests held by ACQ membership. Four categories under the heading “What legal issues currently affect aged care providers” covered; elder abuse, retirement village legislation, planning laws and land tax anomaly. The first two categories are considered relevant in the context of this study and include the following points;

ELDER ABUSE

- ACQ members have practical concerns about implementing the requirement for police checks (eg volunteers/health staff/relatives/contractors).
- Also, with so many authorities potentially having a stake in alleged abuse in residential aged care ‘compulsory reporting’ may be problematic.

RETIREMENT VILLAGES

- Reflecting grievances held by the few rather than the interest of the many?
- 92% of RV residents say expectations have been met or exceeded (UQ study)
- Rigorous industry accreditation system (ARVA – run in Qld by ACQ)
- Often complaints are **not** actually against registered RVs
- Out of 45,000 residents, only 18 disputes before the Tribunal (2004/5)
- Law focuses on resident-v-operator; in fact most disputes are resident-v-resident ¹³⁴

The response on the day to this style of reporting on legislation to protect potentially vulnerable Australian’s is not known but the “speaker notes” give the overall impression of a resistance to burdensome legislation and troublesome residents. An explanation received from the CEO of ACQ clarifies the organisation’s abhorrence of any form of elder abuse and its frustrations with the June 2006 requirements for volunteers and others to lodge a “Form 349C Application for a Police Certificate Name Only”. The procedure at that time was seen as “demanding and time-consuming” for volunteers who wanted to give their

¹³⁴ Speaker Notes, Queensland Law Society, “Legal Planning for Older Persons Conference”, Brisbane, 29th June 2006, CEO Aged Care Queensland Inc. In contrast, the Retirement Commission survey 2006 showed resident complaints against management well exceeded resident-resident complaints and 54% of residents were not satisfied with the complaints process (Retirement Commission, *Retirement Village Survey 2006*, 89-90).

time in the service of the community.¹³⁵ The procedure for Police checks has now changed to electronic lodgement. Also, the presenter's comments were aimed at residential care not retirement villages which are apparently seen in a different light in terms of opportunity for elder abuse. An exploration of this issue follows below.

During the 2004/2005 period 18 disputes went before the Queensland Commercial and Consumer Tribunal (CCT). The fact these disputes did not seem to figure in the CEO's presentation is not surprising given ACQ represents sector interests and 18 disputes amongst an overall population reporting 92% satisfaction may seem relatively insignificant. However among those 18 cases were several in which residents were represented by the President of The Association of Residents of Queensland Retirement Villages (ARQRV) and determinations were made against operators.¹³⁶ Added to this, the wording of the question "reflecting grievances held by the few rather than the interest of the many?" promotes from a reader's perspective, the sense that "grievances held by the few" are not considered important in the larger picture of satisfaction. Taking a case to the CCT is known to cause tensions in relations between residents and operators; in addition it is a stressful process. It would appear that residents taking such action felt so aggrieved they chose to seek Tribunal assistance in spite of negative consequences.

In relation to disputes, the Australian Consumers Association (CHOICE) in 2003 reported on Queensland retirement village disputes:

Since July 2000 a total of 54 applications to the Tribunal have been received of which 45 have been finalised. The majority of the complaints have been related to disputes over budgets and service charges.¹³⁷

These figures added together provide an average of 14.4 disputes referred to the Tribunal every year for five years; 18 over one year is an increase on the average.

Mediation is used either through the Tribunal mediation services or privately by villages, to resolve disputes. The total figures for mediation are unknown but for

¹³⁵ Email communication from CEO, ACQ dated 15th February 2007.

¹³⁶ These Tribunal decisions are listed on the Queensland Commercial and Consumer Tribunal website; <www.tribunals.qld.gov.au>

¹³⁷ Australian Consumers Association Retirement Villages State by State Guide <www.choice.com.au> accessed 9th September 2006.

disputes to reach the Tribunal, parties must have first attempted negotiation within the village (or mediation privately or via the Tribunal mediation services). From a researcher's point of view, the annual increase in Tribunal dispute figures is not insignificant, especially given the addition of the unknown mediated agreements. It is not the outcome that matters so much as the fact that residents', in spite of the obvious negative stressors involved, took action against operator behaviour and charges to an independent entity and frequently won.

The CEO's emphasis on resident-resident disputes¹³⁸ (which would not usually involve issues of on-going payments) has the effect of minimising the situations where power differences are obvious, money is at stake and the majority of residents in retirement villages are older women. The gender situation raises other questions.

1. Are male residents more likely than females to complain and initiate complaint action?
2. Do female residents seek representation by male committee members?
3. Are female residents less likely to complain?

These questions require exploration. Nevertheless, the way sector leaders present information to professional groups such as lawyers has a predictable element. Lawyers have a vested interest in the business of the stakeholders. It seems likely stakeholders would want to present information in such a way as to encourage their interest; booming business and contractual issues being grist for the mill of the legal profession.

One possible explanation for the downplaying of the 18 Tribunal cases by the CEO may be due to the reputation within the industry of the Chairman of the Queensland residents' body. Phil Phillips, the Chairman is not seen in a favourable light by Aged Care Queensland (ACQ) due to his alleged scaremongering and fear-promoting tactics within the residents' groups.¹³⁹ Aged

¹³⁸ A recent survey of New Zealand Retirement Villages found twice as many formal complaints about management than about residents. (Retirement Commission 2006, 90.) The experience of NSW and Queensland state residents' groups are that residents disputes with operators is the most common type of dispute dealt with at local and state level in NSW and Queensland. This information has been provided by the two state groups through email communication.

¹³⁹ This information was provided during an interview conducted with the Project Development Manager (Retirement Living) ACQ, 18th July 2006.

Care Queensland believes Phillips fear-promoting is not valid. The findings of the research conducted by the University of Queensland¹⁴⁰ (92% residents expectations met or exceeded) is evidence to ACQ that the vast majority of Queensland retirement village residents are satisfied with their life-style choice.¹⁴¹

2.3.6 Queensland Commercial and Consumer Tribunal

A check on the decisions of the Queensland Commercial and Consumer Tribunal in early 2007 has revealed several cases that warrant inclusion in this study. They can be seen to represent the types of retirement village issues that are placed before the tribunal. They also go some way towards answering the question about gender representation at Tribunal level disputes.

The first case discussed concerns an application by retirement village owners seeking orders pursuant to a section of the Retirement Villages Act 1999 to have a budget for the village for the 2005/2006 financial year which had been presented to residents of the village, but not passed by them, approved by the tribunal. Two male residents acting as co-spokespersons for the village residents sought to have the application dismissed on the basis that it was in contravention of the Act. The application by the owners was dismissed in a determination dated 11th December 2006. The tribunal members commented;

...15. The applicant has demonstrated lack of care and responsibility in constructing the budget. Mr Garven appears to have adopted the attitude that it was the responsibility of the residents to advise the applicants if the budget was in contravention of the Act, rather than the applicant accepting its clear obligation to prepare a budget which complied with the Act. Mr Garven has made an implied threat that retribution may be exacted on the residents of the village for their refusal to pass the budget. He has said that as a result of the

¹⁴⁰ Stimson, supra n 133 at 80.

¹⁴¹ The December 2006 Retirement Commission survey found 99% overall resident satisfaction. The New Zealand research objective was to provide a benchmark measure before the Retirement Villages Act 2003 and its associated regulations and codes of practice came into force. Dispute resolution forms a significant part of the New Zealand Act, therefore questions surrounding resident knowledge of complaints procedures were included, resulting in a significant level of dissatisfaction among those who have made complaints; also gaps in knowledge about how to make a complaint. Paradoxically this dissatisfaction features within the overall 99% satisfaction found in the NZ survey. The Australian 'Stimson' study looked at what retirees looked for in a retirement village e.g. services and facilities and asked questions about residents' reasons for citing particular reasons for satisfaction. Complaints processes did not feature in this study which was a collaborative project between the University of Queensland and the sector group RVAA. The Australian project was entitled *Potential Roles for the Retirement Village Industry in Providing Appropriate Affordable Housing Alternatives in an Aging Australian Society*. Each study had a different focus, yet both returned high levels of satisfaction. The Australian study however did not ask questions about complaint processes; the NZ one did yet achieved a higher level of satisfaction.

residents' action the management company may have to be wound up. We are concerned about the potential for detriment to residents at the hands of the applicant as a result of their action in rejecting the budget and defending this application. The applicant must address the legitimate concerns raised by the residents. The delay in having the 2005/2006 budget passed is in no way the fault of the residents, but is the result of the applicant's unacceptable conduct in preparing a budget which does not comply with the Act...¹⁴²

Another judgement, 30th October 2006, concerned a determination resolving costs. Both parties sought costs for the proceedings and agreed the determination should be "made on papers". The applicants (the residents) whose spokesperson was female, submitted they had been "wholly" successful in the proceedings and further submitted;

...that the respondent's conduct before the proceedings in seeking to obstruct the efforts of the applicants to call and have recognised their residents committee should be taken into account in making a costs order in favour of the applicants.¹⁴³

The respondent *Jodaway* submitted;

...it should not be required to pay the applicants' costs because it did not oppose the formation of the residents committee but merely required the committee to be established in accordance with the Act...further submits that the applicants filed lengthy and prolix documents which contained irrelevant material and breached directions...¹⁴⁴

The Consumer and Commercial Tribunal Members Mr P Toohey and Mrs M Green commented;

8. With respect to the conduct of the respondent before the proceedings, the Tribunal made a finding that the removal from the village notice board of the applicants' notice of meeting on the 14 and 15 February 2005 by Mr Fleming, the general manager of the village was heavy handed. The Tribunal also found that Mr Issakidis, who was a director of the respondent at the relevant time had issued to the residents of the village an intimidating notice on 16th February 2005 stating that residents were under no obligation to attend the meeting called by the applicants for 17 February 2005.

9. We consider that this unacceptable conduct on the part of representatives of the respondent is an important consideration weighing in favour of an award of costs to the applicants...

11. We do not accept the respondent's contentions that the applicants filed unnecessarily lengthy and prolix statements containing irrelevant material...

12. We consider that the nature of the proceedings was such as to warrant the legal representation which both parties availed themselves of.

13. In the circumstances we consider that the interests of justice require that the respondent should pay the costs of the applicants, and having regard to the

¹⁴² *Milstern Retirement Services Pty Ltd v Sheppard & Royce* as Co-Spokespersons for the residents of Urimbirra Retirement Village [2006] CCT VHO12-05; this judgement was delivered on the 11th December 2006.

¹⁴³ *June Gilbert v Jodaway Management Pty Ltd* [2006] CCT V007-05.

¹⁴⁴ *Ibid*, 5.

complexity of the proceedings, we consider that the scale of costs is the District Court scale applicable to claims less than \$50,000, and will order accordingly.¹⁴⁵

Another case involving *Jodaway* determined by the Tribunal in May 2006 awarded costs to the applicant residents in August 2006. The determination included the following comments...

4. The applicants were entirely successful in these proceedings, but section 71(5) provides that a party to a proceeding is not entitled to costs merely because the party was the beneficiary of an order of the Tribunal. Or that a party was legally represented at the hearing.

5. ...With respect to the conduct of the respondent before the proceedings, the Tribunal made a finding that the general manager of the village, Mr Fleming, screamed obscenities, including a racial slur at Mrs Lafaele, a resident of the village, and acted in a generally threatening manner towards her. The respondent must bear some responsibility, in our view, for appointing a general manager who acts in such an unacceptable manner towards a resident.¹⁴⁶

Two further cases, one in January 2005 determined the operator/owner must refund to the residents \$22,165.63 for excess water charges¹⁴⁷ and another on 21st August 2006 involved repayment of \$250.00, \$67.10 and \$54 for various overcharges.¹⁴⁸ These two cases involved a male and a female resident taking a case against operators.

Returning to the questions posed earlier, it appears that women are becoming involved in taking retirement village dispute action in Queensland. A perusal of the Brisbane Commercial and Consumer Tribunal website for retirement village decisions leads to a sense that female residents sometimes seek representation by males. Female residents may be less likely to complain: however determinations over the past 18 months suggest this situation may be changing.

Another matter that should be (but may not be) widely known within retirement village communities is mentioned on the CHOICE website. Under Retirement Villages Queensland the following statement is included;

In case of intimidation of residents an application can be made to the Retirement Villages Tribunal. If a resident is incapable of taking this action, they may need

¹⁴⁵ Ibid. The order is dated 30th October 2006. The case was first filed by the applicants Gilbert (et al) on the 2nd August 2005. Orders were finally made to resolve the dispute on the 8th August 2006; one year after lodgement. Orders for costs were made on the 30th October 2006. In total a time frame of 14mths. Proponents of the New Zealand Act expressed a desire for the disputes model to deal with disputes in a 'timely' manner. This was in part due to concern about relational issues and personal stress for both parties in the context of a communal living arrangement.

¹⁴⁶ Eugene & Kylie Mackay v Jodaway Management Pty Ltd. [2006] CCT V006-05.

¹⁴⁷ James Stanley Wales v Laurel Springs Management Services Pty Ltd, Application .CCT V002-04, 11 January 2005.

¹⁴⁸ Sylvia Holt v Edenlea Retirement Village Pty Ltd. CCT VH004-06, 21st August 2006.

to seek the assistance of the services of the Office of the Adult Guardian (telephone: (07) 3234 0870). The Act provides a dispute resolution process that enables residents to seek a fair hearing without incurring significant costs.¹⁴⁹

The broader business oriented views of Aged Care Queensland CEO represent the model, and possibly philosophy, of the organisation. The Queensland Commercial and Consumer ‘decisions’ website provides a reality check of the actual circumstances some Queensland retirement village residents experience in their dealings with operators.

The Aged Care Queensland CEO stated that there were “only 18 disputes” out of 45,000 residents in 2004/5. The 2005/6 figures show a statistically significant increase from 18 to 27 which translates into a 50% increase in retirement village applications in one year. Added to this, the Office of Fair Trading report that within the 20 applications made in 2005/2006, 7-8 involve allegations of verbal abuse, physical violence and bullying and intimidation by staff.¹⁵⁰ In the first half of the 2006/2007 year, the Queensland Tribunal reports 20 applications¹⁵¹ showing a possible 100% increase in applications with several months still to run.

The New Zealand Law Commission Report *Delivering Justice for All*, confirms the vast majority of disputes settle on the Court steps; a situation likely to be replicated in Australia.¹⁵² We do not know how many retirement village ‘settlements’ are achieved in this way or at mediation. This suggests the figure of 18 applications in 2004/5 and 20 in the first half of 2006/2007 may not represent the reality. The Queensland residents’ group obviously has a different perspective to that of Aged Care Queensland; the CCT statistics provide a reality check.

2.3.7 Elder Abuse and retirement village settings

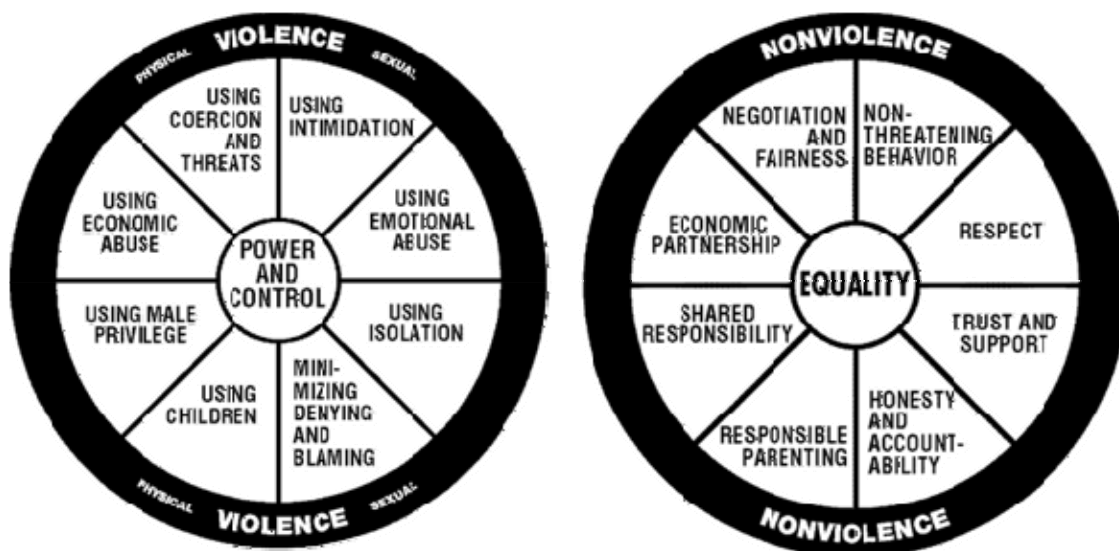
¹⁴⁹ <www.choice.com.au> *Retirement villages state-by-state guide* (archived), p4. Accessed 9th September 2006.

¹⁵⁰ Office of Fair Trading, Retirement Villages Industry, Stakeholder Report 2006, obtained from OFT website <www.fairtrading.qld.gov.au> accessed 16th February 2007.

¹⁵¹ Email communication 27th February 2007 from the Executive Officer, Queensland Commercial and Consumer Tribunal.

¹⁵² Law Commission, Report 85 *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*. Wellington, March 2004.

The issue of elder abuse has become a significant concern of age concern organisations in most Western countries including New Zealand and Australia.¹⁵³ The Duluth model used throughout Australasia by Stopping Violence groups is as applicable to elder abuse in any context as it is to domestic violence. Based on the inappropriate use of power and control, the model covers a continuum of abuses including intimidation, coercion, threats and economic abuse.¹⁵⁴



Implicit in the Duluth model is the notion ‘the personal is political’ which takes its meaning from the ideas of feminist writers during the 1970’s and 1980’s. The subordination of women in order to privilege the rights of men is interpreted as a political act having implication for systemic abuse starting with the socialisation of females within the family and extending to issues such as promotional disadvantage in the workplace, pay equity and other broader societal discrimination.

The goal of the Duluth model is to shift individuals from using power and control to dominate others, to relating in an equitable, safe and respectful manner. Facilitators of programmes using this model came to realise that women who had

¹⁵³ World Elder Abuse Awareness Day fell on Friday 15th June 2007. National and Community radio and the print media covered this event with alarming stories about the forms of abuse perpetrated on elders by those whom they should be able to trust. In this sense many older people are as vulnerable as children.

¹⁵⁴ The Duluth model arose out of concern at the extent of domestic assault occurring in the City of Duluth, USA during the 1960’s. A key component of this initiative was to establish effective intervention which required changes to Police and Court responses to domestic assault. According to the Duluth response, the most important aspect of changing the judicial systems response to battering was “the coordination of its many actors to secure a consistent and uniform response”. There is no reason to believe a similar coordination of responses especially via education on elder abuse could not be undertaken in the Retirement Village/ Aged Care sectors.

been subjected to abuse as children (psychological or physical) were also at risk of becoming abusers themselves; usually the abuse is directed towards (more) vulnerable others (eg children and older people) and sometimes a ‘weaker’ male partner.¹⁵⁵

It is suggested that the potential for abuse using power and control in its various forms, is as likely to occur in a retirement village as it is in any other setting. In addition, residents themselves who have during their lives held positions of authority over others may be as likely as management to assert power and control over others they see as inhibiting their goals. Two possible contexts for this type of dominance (and abuse) are (1) where staff or residents are in positions to influence use of facilities and (2) within Residents’ Committees where domination by strong characters may silence others’. There is some evidence to support this suggestion.¹⁵⁶

The overall situation of disputes in retirement villages in Australia has been examined in a ‘first time’ study published in 2002 and has formed a background to the areas covered in this chapter.

2.4 Australian retirement village disputes – an empirical study; realities and attitudes

The Australian study conducted by Keogh and Bradley involved a review of court and some tribunal hearings in Australia. Under a heading “contracting for a peaceful retirement” the authors noted;

Since 1996 a number of significant retirement village disputes have come before NSW Courts and Tribunals for determination. Collectively the cases have stripped away the rose-tinted notion that retirement living in a retirement village

¹⁵⁵ The writer has been active in the Stopping Violence field for many years both as a facilitator and trainer using the Duluth model for men and (adapted) for women. There is evidence that fewer men than women report abuse by partners due to a reported sense of shame that they are unable to defend themselves. However it remains the view of those working in the stopping violence field in NZ and within the New Zealand Police that men perpetrate significantly more violence towards their female partners and men kill women and children in domestic violence contexts every week in New Zealand. This level of violence is rare for women. Researchers in the US have also negated the myth of sexual symmetry in family violence. See Dobash, R P, Dobash, R E, Wilson M, Daly, M “The Myth of Sexual Symmetry in Marital Violence” [1992] 39, 1, *Social Problems* 71-91.

¹⁵⁶ Streib, G, Folts, W & La Greca, A “Autonomy, Power in Decision Making in Thirty-six Retirement Communities”, *The Gerontologist* [1985] 25, 4.; Office of Fair Trading, NSW “Review of the Retirement Villages Act 1999”, November 2006, 14. A copy was obtained from the website <www.fairtrading.nsw.gov.au> 23rd November 2006.

will guarantee a perpetually peaceful lifestyle and re-enforced the timeless adage of eternal vigilance as the price one must ultimately pay to achieve a satisfactory level of comfort with retirement village living.¹⁵⁷

...the primary source of litigation, and hence conflict, in the retirement village industry is the contents of the contract signed by residents on entering the villages...

Comparisons between matters that end up in the court and those at the coalface indicate that some major points of conflict include the relative lack of case law currently available in this area, the wide variety in contract and tenure structures, resident interface issues and unconscionable conduct on the part of the owners and developers of villages.¹⁵⁸

Both authors are from NSW which has the highest population of retirement village residents in Australia. These retirement villages are subject to the scrutiny of a Government well aware of the contractual pitfalls in the sector. Consequently the NSW Government is seen to be leading legislative reform.¹⁵⁹

The authors acknowledge communication problems between operators and residents as a “root cause” of problems suggesting this is more likely to occur when “contracts establishing relationships are being formed or re-negotiated” and both sides fail to reveal their expectations.¹⁶⁰ They cite examples where Judges have criticised representatives of residents’ committees and operators for failing to learn from their “many forays into litigation” and operators for not observing the Industry Code of Practices Regulation which is directed at good behaviour and good management rather than legal rights enforceable in courts.¹⁶¹

Bradley is the General Manager of property for Anglican Retirement Villages Diocese of Sydney which has 4500 residents and 1600 staff across 30 locations in NSW. He reports his organisation is one of Australia’s largest aged care providers. He and the organisation, live (and manage) by a Christian philosophy and a strong belief in the principle “do unto others...” which he maintains works well if followed within the industry. He sees active residents’ committees as an important component in the context of managing conflict.

Active resident committees do definitely reduce aggravation levels in villages, and consequently do achieve earlier resolution of problems in a village context. I am unable to provide statistics on this but prior to establishing a far better

¹⁵⁷ Keogh, J and Bradley, P “The Potential for Contractual Disputes in Retirement Village Living” Pacific Rim Real Estate Society 8th Annual Conference, January 21-24, 2002, Christchurch, New Zealand.

¹⁵⁸ Ibid, Abstract, Cover Page.

¹⁵⁹ Ibid, 13.

¹⁶⁰ Ibid, 2.

¹⁶¹ Ibid, 2-3.

consultation approach with our residents we had several matters heard in the tribunal and since then have had a significant reduction.

The important fact is to put a process in place and give people an outlet for their grievances where they feel they have been heard. Being approachable, understanding and willing to change, but also being firm about what can and cannot be done, so the village doesn't descend into negative cynicism, can be a balance, but it is really about doing unto others as you would have them do to you.....And it works!¹⁶²

Nevertheless, the Keogh and Bradley study (which includes “most of the recent court cases but only 50% of recent tribunal cases”) and a search of decisions made by state legislated Tribunals operating under consumer and fair trading legislation over the past two years, shows disputes that reach Tribunals in the vast majority of cases surround costs, fees and charges.¹⁶³ The numbers of disputes that actually get to a tribunal or a Court may not be considered high compared with the total number of retirement villages and village residents across Australia: the fact that the external mechanisms for dispute resolution are used on a regular basis demonstrates an ongoing need for independent determination of retirement village disputes.

The writers make an important point regarding residents' groups and operators;

Sometimes resident groups demonstrate an inability to effectively articulate their concerns to the operator or to achieve consensus in decision making within timeframes expected by the operator.¹⁶⁴

In the case of The Heritage Retirement Village, it is clear that neither the administering authority nor the residents have abided by the precepts for appropriate conduct which the Code has laid down.¹⁶⁵

Clearly there can be problems on both sides.

2.5 The New Zealand way

The New Zealand parliament passed the Retirement Villages Act in 2003 as a response to concerns about the lack of regulation within the industry and examples of severe financial loss suffered by some older New Zealanders. The

¹⁶² Email communication from Paul Bradley 6th November 2006.

¹⁶³ State by state residential Tribunal decisions (including retirement villages) are accessible through Consumer Affairs and Fair Trading websites or in the case of Northern Territory via the Northern Territory Government, Department of Justice website <www.nt.gov.au/justice> The NT Government appoints a Commissioner of Consumer Affairs who is empowered to institute or defend proceedings before the Court on behalf of a resident of a retirement village (RVA, s8) and provide an annual report to the Minister (s11(1)(2)(3)).

¹⁶⁴ Keogh & Bradley, *supra* n 157 at 2.

¹⁶⁵ *Ibid*, 4.

problems arose when residents and potential residents, in the context of an unregulated market, entered into contracts with operators and developers often without the benefit of independent legal advice.

The Retirement Commissioner in a report to the Minister of Building Issues in May 2006 noted;

The biggest single area of complaint is people not knowing how to make a complaint and operators and even statutory supervisors fobbing them off – which means concerns and complaints can become entrenched disputes. The second biggest area is residents (or their families) not knowing what they are buying into. They often see this as exploitation by the industry of a vulnerable group.¹⁶⁶

This situation has not changed. The recent Retirement Commission Retirement Villages Survey found a 99% satisfaction rate among retirement village residents and also found 54% of a 13% group that had made a complaint in the past year, were not satisfied with the complaints process.¹⁶⁷ There were more formal complaints about management than about residents; 29% of residents said they did not know whether there was an efficient and effective process for resolving complaints.¹⁶⁸

RVANZ has an established disputes resolution system in place and this is accessible from its website or contacting the organisation by phone. Having a disputes resolution system on a website does not necessarily mean that one is operating or that members understand and use its processes. Another concern is that over forty five percent of New Zealand retirement villages do not belong to RVANZ. By November 2007 the entire sector which is made up of some 400 villages will be fully regulated. Much criticism has been levelled at Government for slowness to implement the 2003 Act and the wait now for all regulations and codes to be in force, further aggravates the situation in New Zealand.

2.6 Summary

In this chapter I have discussed the stress for older people associated with making life-changing decisions and how these changes have been beneficial and rewarding for many. I have identified potential sites of conflict and inappropriate use of power and control in retirement villages and described the educative and

¹⁶⁶ Retirement Commissioner's report to Minister of Building Issues, May 2006.

¹⁶⁷ Retirement Commission, Retirement Villages Survey 2006, ACNeilsen, 89.

¹⁶⁸ Ibid, 88.

advocacy work done by state residents groups in Australia. Using American studies I have illuminated the sources of conflict and harmony in retirement communities and shown the way in which conflict is perceived and responded to by those in positions of power in these communities.

I have established that communication problems between operators and residents are a primary source of conflict at interpersonal and collective levels and that abuse of power and control, intolerance and prejudicial attitudes in the context of village life and dispute forums are potentially damaging to those to whom they are directed and the offenders themselves. Much of the evidence suggests that the reason for conflict is a desire to exploit.

I have indicated a growing interest by women residents in Australia to become involved in dispute actions that concern paying extra and illegal charges. I have proposed that elder abuse may be as likely to occur in a retirement village as in any other context. Areas where residents' needs are not being met have been emphasised in this chapter.

The next chapter covers the Retirement Villages Act 2003 prior to and following its implementation.

Chapter 3 *The Retirement Villages Act 2003*

3.1 *Introduction*

I will begin this chapter with an explanation of the environment prior to the Retirement Villages Act 2003 and include an account of the background to the Act during early stages of drafting. Second I will cover the role of conflict and consider conflict as a phenomenon in retirement villages. The third area covered is the Law Society's perspective on the Act and fourth, issues will be raised about the monopoly the Act affords operators in selection and payment for key roles in dispute contexts. Fifth, I will discuss the process of dispute resolution in retirement villages and include criticisms the Act has received leading up to its implementation. Sixth, I will cover key legislative roles and the operator compliance elements surrounding disputes along with the Act's disputes flow-chart.

3.2 *The pre-Act New Zealand Retirement Village dispute environment*

3.2.1 *The way we were*

Retirement village disputes have previously been seen as a “private” matter between residents and operators. The court system and Disputes Tribunal dealt with unsettled disputes between residents and operators when villages were not part of the Retirement Villages Association. Prior to October 2006 when the disputes process in the Act became effective, the Retirement Villages Association (RVANZ) had a statutory role to determine complaints and disputes under the Securities Act 1978. However, the Retirement Commission reports that since its role came into force on 1st February 2004, it has continued to receive complaints; half the complaints reported have come from residents or family members of residents in RVANZ member villages; the other half are believed to “simply represent the market share”.¹⁶⁹ During this period RVANZ has advertised its dispute resolution process on its website, giving the impression the system was

¹⁶⁹ Retirement Village Adviser, Retirement Commission, December 4th 2006.

operating and member villages would know the process to follow when resident complaints become known.

The experience of the Commission has not matched the website impression; residents from member villages have contacted the Commission claiming confusion about the process to follow or reporting no process to follow. This situation has raised questions with the Commission about the effectiveness of the Association's procedures.¹⁷⁰ For residents in non-member villages, the methods for dealing with resident complaints are not generally known. Some non-member operators have received high profile publicity when their actions have reached the media and Courts including the Court of Appeal and Privy Council in the case of *Culverden*¹⁷¹.

In a recent case also involving the Culverden Group, fines of \$30,000 followed the successful prosecution for un-consented work which put at risk the lives of residents living in the Culverden retirement complex, Mangere East. The un-consented work included the removal of sprinkler system parts. The Manukau City Council took the case against the Group. The Manukau City Council became aware of the issues through residents and concerned others.¹⁷² Residents from other villages have used the Court process to challenge management decisions with mixed results.¹⁷³

3.2.2 Background to the Act

The Ministry of Social Development reports that its involvement in the early stages of the Act's drafting was focussed on the problems that were being experienced by residents. Many of the complaints were considered "low level" and of a kind with the potential to be resolved through an effective complaints

¹⁷⁰ The dispute resolution flowchart of RVANZ can be found at page 83.

¹⁷¹ *Culverden Retirement Village Ltd v Registrar of Companies* [1997] 2 WLR 291 reported in NZLJ [1997] 92 March.

¹⁷² This information was provided by G. Smith, Manukau City Council in a personal communication 24th November 2006.

¹⁷³ *Fenton & Ors v Pakuranga Park Village Trust & Ors* HC Auckland, Dec 23, 1996; *Pakuranga Park Village Trust & Ors v Fenton & Ors* CA Nov 18, 1997. This case went to the High Court and then the Court of Appeal. Residents opposed the sale of land that housed the village bowling club and facilities to BP for a service station. The owner Trust wanted to relocate the bowling club to another site on the property. The residents sought and gained an injunction in the High Court to halt the sale to BP. This was overturned in the Court of Appeal almost a year later. The residents alleged an infringement by the (owner) Trust of their licence to occupy. When buying into the village they had not anticipated living close to a BP service station that could operate 24 hrs.

process. The Ministry was aware that few villages had a complaints process and while the RVANZ has a disputes process it was felt by the Ministry that it was oriented towards the interests of village owners. The tendency at the time was for those villages having a statutory supervisor¹⁷⁴ to use that person as the “de facto complaints process”. The challenge for the Ministry, knowing the issues consistently raised by residents, became one of how to design a process

- a) that enabled complaints to be addressed at the appropriate level by the village management with significant or unresolved complaints flowing through to a disputes resolution process
- b) that ensured that principles of natural justice were upheld – i.e. responses were timely, complaints advised etc.
- c) in which dispute resolution was neutrally controlled, accessible and could be provided at reasonable cost
- d) that provided incentives for early and appropriate resolution and disincentives (e.g. the application of penalties) for village owners to exploit residents
- e) that recognised that some disputes about the slow on-sale of units (the most complained about issue) needed to take account of market considerations and therefore needed to be separately constituted
- f) that allowed matters of law to be taken to the Courts
- g) that slotted into the government administration somewhere¹⁷⁵

It was from this background, that the Act and specifically the dispute resolution provisions of the Act were born. At the time of undertaking this study the Act is finally emerging from its new-born state and has embarked on its first steps into the real world of older New Zealanders who have placed their finances and their trust in owners and operators of the places most will consider ‘home’ for the remainder of their lives.

3.2.3 Views of the New Zealand Law Society

The Law Society in a 2004 seminar paper “Retirement Villages” noted the “constant complaints” from residents about the absence of statutory support for a facility for “fast tracking” and dealing with resident complaints. The Society

¹⁷⁴ Statutory supervisors have been appointed under the Securities Act 1978, s47. The Retirement Villages Act 2003, s 37 covers statutory supervisors from the 1st May 2007.

¹⁷⁵ Office for Senior Citizens’, Ministry of Social Development, 6th June 2006.

acknowledged RVANZ's code of practice saying it adequately covered off dispute resolution for its member villages and went on to state "What has been absent is the rigour of independence and underpinning dispute procedure with the force of statute".¹⁷⁶

The Law Society views the 28 comprehensive sections in the Act relating to dispute resolution as having been adopted in part using existing statutory models. These models include Part 6 of the Injury Prevention Rehabilitation and Compensation Act 2001 and the Weathertight Homes Resolution Services Act 2002; specifically the mediation and adjudication procedure that provides a two tier approach which the Act replicates.¹⁷⁷ The Act however does not specify mediation but the "complaints facility" may incorporate mediation prior to issue of a disputes notice.¹⁷⁸

The Law Society has produced a second seminar booklet "Retirement Villages – the full impact of the Act". The authors state on the opening page

One would have thought that an easy pathway now exists in explaining and understanding the impact of the Retirement Villages Act 2003 (*the Act*) and the Retirement Villages (*General*) Regulations 2006 (*the General Regulations*). Fox hunting in the United Kingdom however may prove a more profitable task...¹⁷⁹

The Retirement Villages Act 2003 will assist in protecting the rights of residents and sets out a legal framework within which operators must run villages. This new legal framework places responsibilities on operators for disclosure of information to residents and potential residents. It introduces independent oversight of villages through statutory supervisors and contains a dispute resolution process involving independent and experienced panellists approved by the Retirement Commissioner. This is in accordance with what the Retirement Commissioner agreed was to be a "low level" of involvement in the disputes process.¹⁸⁰ The new process is deemed to be less expensive and less formal than a District or High Court hearing and is able to make orders and provide binding decisions though appeal rights remain.

¹⁷⁶ Greenwood, J and Marks S "Retirement Villages" New Zealand Law Society Seminar, February – March 2004.

¹⁷⁷ Ibid, 33.

¹⁷⁸ Retirement Villages Act 2003, s51.

¹⁷⁹ Greenwood, J and Burke, M "Retirement Villages – the full impact of the Act" New Zealand Law Society March, 2007, 1.

¹⁸⁰ This "low level" involvement was confirmed by Diana Crossan, Retirement Commissioner, 7th December 2006.

3.2.4 *Disputes processes: early days and perceived flaws*

The subject of dispute resolution in the context of retirement villages and this thesis involves principally, the relationships between residents and operators. This includes financial arrangements that have been struck in order for residents to take up occupancy in a retirement village and receive continuing services. Section 52 of the Retirement Villages Act 2003 specifies “a resident” (or former resident) or “the operator” as the parties who may require dispute resolution through a disputes panel process.

The Retirement Villages (Disputes Panel) Regulations came into effect on the 1st October 2006.¹⁸¹ The Disputes Panel Regulations provide the supporting structure and detail for the operation of the disputes panel. They give direction to the disputes panel to consult parties on matters relating to the hearing and conducting of the hearing and disposal of the dispute which may include a refusal on the part of the panel to hear or continue to hear a dispute in specific circumstances. The awarding of costs and expenses, advising of the decision to parties, the operator and the Retirement Commissioner on the relevant forms and the records of disputes are covered in the regulations. Of importance to this chapter, regulation 20 (2) of the Disputes Panel Regulations states;

A disputes panel must determine the dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case.

And regulation 20 (3)

Subject to section 67 (4) of the Act and these regulations, every party to a dispute is entitled to call evidence, and to examine, cross-examine, and re-examine witnesses.

The disputes panel process must be considered a very important feature of the new Act. It is a response to the lack of a process, other than the courts or RVANZ’s internal processes to deal with disputes in all retirement villages in New Zealand. Most significantly it is intended to be an *independent* alternative to litigation and the sector group’s internal system which for residents, may not be perceived as being as independent as RVANZ would hope.

¹⁸¹ Retirement Villages (Disputes Panel) Regulations 2006.

The processes contained in the Act have come about following extensive consultation followed by lengthy delays in producing regulations and a code of practice for operators. Prior to these delays, the responsibility for administration of the Act shifted from the Ministry of Social Development and the Ministry of Economic Development¹⁸² in 2003 to the Department of Building and Housing (DBH) in July 2005. The DBH was “responsible for completing all regulations and the Code of Practice, which was completed by the end of July 2006 for the dispute panel regulations, and 25th September for all the others”.¹⁸³ The General and Fees Regulations and Code of Practice came into force 1st May 2007. The Retirement Commission fielded a list of criticisms. The criticisms concern;

- the disputes panel model
- implementation delays
- borrowed provisions/patchwork legislation with flaws
- not requiring operators to share capital gain and not requiring operators to ‘buy back’ units, especially when departed residents have to wait until re-sale and continue to be charged fees etc and delays (especially for licence to occupy when residents don’t actually own the unit)¹⁸⁴
- compliance costs especially for smaller, non profit and owner-occupied unit title villages – because of all the documentation required and the requirement to have a statutory supervisor
- too much documentation/information required to be given to intending/residents without prescribed templates for e.g. the disclosure statement – to help compliance costs plus to give intending residents the ability to compare ‘apples with apples’
- not having any advice/advocacy role for residents.
- the industry belief that it is too prescriptive and older people’s belief that it is not prescriptive/protective enough¹⁸⁵

The fact that mediation was not included in the Act has also been criticised. The list is comprehensive enough to indicate significant concern about the model for DR encompassed in the Act.

¹⁸² The Ministry of Social Development was always regarded as the lead agency. Retirement Village Adviser, Retirement Commission, 6th March 2007.

¹⁸³ Retirement Commission Adviser, 6th March 2007.

¹⁸⁴ These concerns came from Grey Power, Age Concern, Residents and families.

¹⁸⁵ Retirement Commission Adviser, 25th January 2007.

3.2.5 2008 Review

In 2008 the Department of Building and Housing will undertake a review of the dispute resolution provisions of the Act.¹⁸⁶ In the meantime some aspects of the Act model attract attention. The issue of power imbalance between residents and operators and the selection and payment of three key DR roles by operators is questioned. The key DR roles are mediators, disputes panel and statutory supervisor. Representation of residents is also an issue which will be covered later. The perceived lack of independence of the panel appointments is exacerbated further because the panel has no autonomy to decide for itself which members will adjudicate particular disputes. With no connection to an ‘arms length’ body and no principal adjudicator, the disputes panel has little flexibility.¹⁸⁷ Autonomy and flexibility within the role could have avoided suggestion of panellists being ‘connected’ to particular villages or companies owning villages.

Currently RVANZ has a pool of mediators who conduct mediation for member villages and the same conditions apply; the operator chooses and pays the mediator. If mediation is used more often than the disputes panel, operators will become familiar with the style of particular mediators and possibly what outcomes have been delivered by certain mediators. This could include how particular outcomes transpired during the mediation process; what compromises were achieved; and sometimes who has gained the most benefit from an outcome facilitated by a particular mediator. If operators have been a party previously, they will have learned from this. This does not exemplify a *fair and proper process* and in a different context, it is a situation that has not been tolerated by the courts.

The Court of Appeal in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* held that “the lawyers could not act in a confidential mediation for one client, then act for the other clients in parallel litigations against the same defendant”.¹⁸⁸

¹⁸⁶ This information is published under Retirement Village’s Sector Group Meeting 14th March 2007 on the Retirement Commission website <www.retirement.org.nz>. Accessed May 2007.

¹⁸⁷ Eight panellists have been approved by the Retirement Commissioner; one resigned in April 2007.

¹⁸⁸ *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2003] 3 NZLR 343. See the discussion of this case by David Williams QC, Arbitration and Dispute Resolution [2002] NZLR, 76-78. Also David Carden, *Confidentiality in Mediation*, AMINZ 2005 Annual Conference, Queenstown, New Zealand.

Confidentiality was at stake in this example. In the context of retirement village disputes, it may not be confidentiality that is compromised, but *independence* along with *conflict of interest*. The operator (party) in a retirement village context is involved in selection of mediators and dispute panels. The rules surrounding *conflict of interest* and possibly *confidentiality* would disqualify a mediator¹⁸⁹ and counsel from a similar situation, yet retirement village operators are apparently seen in a different light within the Act model.

Mediators who practise in statutory contexts¹⁹⁰ report tensions between the goals of their contracting organisation such as limitations on fees, time constraints and the needs of the parties. In this organisational context, the organisations are not parties yet the tensions are acknowledged and apparently taken into account by mediators. No one seems to be aware of how or whether this impacts on outcomes.¹⁹¹ There is a suggestion that when the Act is reviewed in 2008, the disputes panel may move to the jurisdiction of the tenancy tribunal raising different issues about the special needs of older New Zealanders in dispute with those who have considerable control over their living environment and financial interests. This may become the topic of another study but for now, the misfit between *independence* and *fairness of process* within the *complaints facility* and *disputes panel* mechanisms in the Act remain, highlighted for ongoing attention in this study.

¹⁸⁹ AMINZ Code of Ethics states at 2 “A member should disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias”. From August 2005 David Carden, an approved Disputes Panel member under the Retirement Villages Act 2003 and AMINZ member has promoted model standards of conduct for mediators. In March 2006 these model standards were considered at a Mediator Duties Workshop held in Auckland. These being the standards of the American Bar Association, American Arbitration Association and Association for Conflict Resolution which take the issues of *conflict of interest* and *impartiality* to higher levels of application than sometimes experienced in New Zealand. For example, Standard III A. states “A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after mediation. A conflict of interest can arise from involvement of a mediator with the subject matter of a dispute or from any relationship between a mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality”. In addition Standard III E qualifies this further by placing the duty to withdraw with the mediator; “If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary”. In this context, mediators who have acted previously in that capacity for a particular village with the same operator as a party, should not act again as a mediator for that village. It is unlikely however that aged residents would grasp the significance of the repeated role of the mediator and even if they did, evidence suggests they would be unlikely to complain. Questions of fairness and integrity of process naturally follow.

¹⁹⁰ For example, housing/tenancy, employment and the Family Court.

¹⁹¹ Conversations about these and similar issues take place regularly at meetings of the Waikato and BOP branches of AMINZ.

3.3 The Act's key legislative roles and compliance elements: actors, factors, and contradictions.

The key roles of the four government agencies are;

- The Department of Building and Housing is responsible for administration of the Act from July 2005
- The Registrar of Companies (Ministry of Economic Development) is also the Registrar of Retirement Villages
- The Retirement Commissioner is responsible for managing the disputes panel process¹⁹²
- The Registrar-General of Lands is responsible for noting relevant details on the land titles of the village¹⁹³

The key compliance elements of the Act are;

- s10: the operator of a retirement village must ensure that it is registered under the Act
- s10 (2) (c) the operator must appoint a statutory supervisor (*unless exempted*)
- s12: if a retirement village has one or more residents at the commencement of this particular section (to be specified in regulations), an application for registration must be lodged within six months from the 1st May 2007
- s13: an operator must deliver for registration an annual return for the village. Upon s10 registration, the Registrar of Retirement Villages will allocate a month to that retirement village for the purposes of the annual return
- s21: upon registration, the registrar must notify the Registrar-General of Land. The Registrar-General must note a memorial against the title to the village land. Under s22, that memorial restricts the rights of a security holder to enforce its security in certain regards

¹⁹² The Retirement Commissioner has a *management* role in the Disputes Panel Regulations; cl 7, Operator to give Retirement Commissioner documents; cl 26, Retirement Commissioner to hold records of disputes but the Act, Part 3, s36 (1) states clearly "The functions of the Retirement Commissioner in relations to this Act are as follows: (a) to *monitor* the effects of this Act and the regulations and code of practice made under this Act:..." [emphasis added]

¹⁹³ NZ Companies Office <www.companies.govt.nz> accessed from website 17th November 2006.

- s27: the occupation licence agreement itself must contain at least the information prescribed in the Act. The intending resident must receive independent legal advice
- s30: before an occupation right agreement may be entered into, the intending resident must receive a disclosure statement which sets out the prescribed information concerning the village, the residents' code of rights and the village code of practice
- s32: Villages must have a code of residents' rights. The minimum rights conferred upon a resident are set out in Schedule 4 of the Act.
- s50: in any retirement village there are to be two forms of dispute procedure: a complaints facility and dispute resolution.
- s89: each village must comply with the code of practice governing the management and operation of retirement villages. The code was approved by the Minister responsible for the administration of the Act on the 25th September 2006; the code will apply to all villages¹⁹⁴ from 25th September 2007 (*unless exempted*).

Announcing the approval of the regulations which will, by the end of 2007, bring the Act fully into force, the Minister for Building Issues stated;

For the first time, all residents will have a mechanism for resolving their disputes with village owners and managers, and a clear voice...Often residents' only option has been court action, which can be out of reach for those on fixed incomes...

...This will ensure accessible and fair hearings in a sector where disputes tend to involve substantial issues, both in property and emotional terms...

...This is about informed consent and protecting the best interests of older New Zealanders entering complex contractual arrangements...the Government was not prepared to let the safety and security of residents rely on goodwill... The Act will for the first time, require all villages to be registered and to meet required standards...¹⁹⁵

It is curious that a Minister speaks of “accessible and fair hearings”; “substantial issues both property and money” and “protecting the best interests of older New Zealanders”, when the parties with whom these older New Zealanders are in dispute are given the control of so many facets of the dispute resolution processes. Whether the writers of this law had an informed knowledge about the principles of

¹⁹⁴ A Segedin, NZLJ [2004] April; bracketed comments updated, emphasis added for clarification .

¹⁹⁵ Hon Clayton Cosgrove, 27th September 2006, accessed from < <http://www.behive.govt.nz> > 6th November 2006:102-104.

independence and fair and proper process is questioned. Nevertheless, the existing law remains, to be reviewed in 2008.

The Act is supported by the Retirement Villages (General) Regulations 2006; the Retirement Villages (Disputes Panel) Regulations 2006; the Retirement Villages (Fees) Regulations 2006 and the Retirement Villages Code of Practice 2006. The regulations surrounding dispute resolution are currently in force. The general regulations came into force on the 1st May 2007 but the code of practice is not effective until the 25th September 2007 unless an operator agrees to be bound earlier. Previously the Securities Act 1978 applied to the majority of retirement villages and some with unit title.

The resident or the operator is entitled under the Act to seek dispute resolution through the Disputes Panel unless the dispute relates to health or disability services, or any facilities that would fall under the Health and Disability Services Commissioner Act 1994. This includes matters contained in the Code of Health and Disability Services Consumers' Rights.¹⁹⁶

3.3.1 Residents

The Act provides a very broad coverage for residents including five sub-sections covering contravention of an occupation right agreement by an operator making an occupation right agreement voidable under the Act.¹⁹⁷ An occupation right agreement means any written agreement or other document or combination of documents that;

- (a) confers on any person the right to occupy a residential unit within a retirement village; and
- (b) specifies any terms or conditions to which that right is subject.¹⁹⁸

Other types of disputes for which residents may give dispute notice cover breach of the resident's occupation right including access to services or facilities; charges for outgoings or services or facilities; charges or deductions imposed as a result of the resident's occupation right coming to an end; a breach of a right referred to in the resident's code of rights or the code of practice; a breach of the resident's rights or the code of practice in disposing of a residential unit in a retirement village formerly occupied by the resident. A resident may also give a dispute

¹⁹⁶ RVA s 53 (2).

¹⁹⁷ s 31(1) (2) (3) (4) (5).

¹⁹⁸ Part 1, 5 Preliminary Provisions, RVA 2003.

notice when another resident or a person in another resident's unit with permission, affects the resident's occupation right.¹⁹⁹

3.3.2 Operators

An operator may give a dispute notice under the same sections of the Act concerning occupation rights; access to services or facilities; charges for outgoings or access to services and facilities imposed under the resident's occupation right agreement or relating to charges or deductions imposed as a result of the resident's occupation right coming to and end for any reason; or relating to money due to the resident under the resident's occupation right agreement following termination or avoidance under section 31 of the resident's occupation right agreement.²⁰⁰ The operator may also give a dispute notice in certain circumstance where suspension of registration of the village is concerned²⁰¹ and offers of occupation have been suspended.²⁰² Other sections of the Act concerning voiding of occupation rights,²⁰³ withdrawing all advertising and not entering occupation rights agreements,²⁰⁴ and contraventions of occupation right agreements²⁰⁵ allow dispute notices to be given by operators.

¹⁹⁹ s 53 (1) (3) (4).

²⁰⁰ s53 (1) (a) to (c).

²⁰¹ s18(3).

²⁰² s25(1).

²⁰³ s31(1).

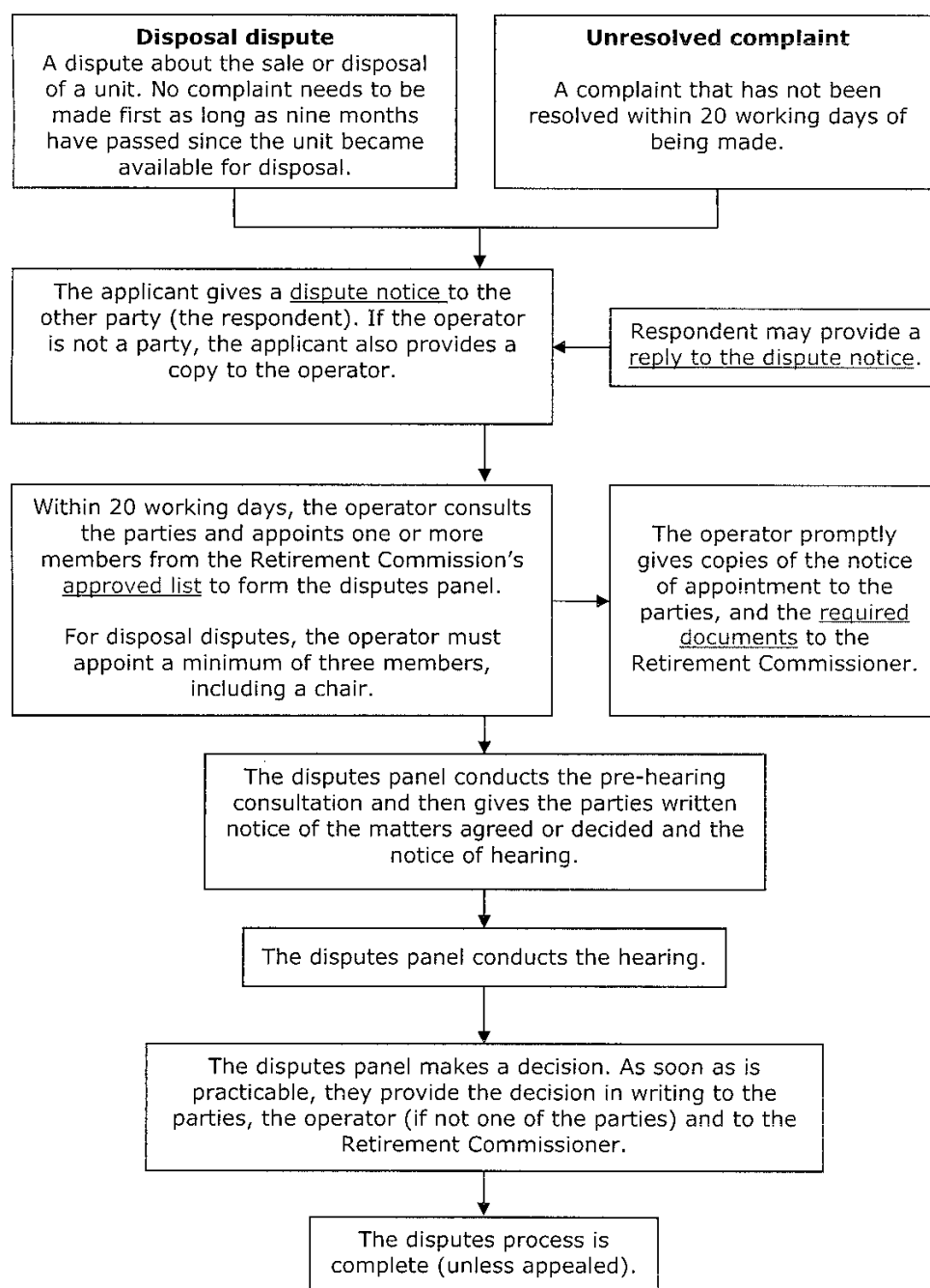
²⁰⁴ s18(3).

²⁰⁵ s31(1).

3.3.3 Disputes process

The disputes flowchart available through the Retirement Commission website is set out below.

Disputes flowchart



3.3.4 Role of Statutory Supervisor

Under the Act, the role of the statutory supervisor will be focussed on the collective interests of residents and the financial viability of the retirement village. In certain circumstances the operator must notify the statutory supervisor of disputes as soon as practicable after a dispute notice has been given.²⁰⁶ This includes situations where the operator considers the outcome of the dispute may affect a significant number of residents; the general operation of the village and the operator's rights and obligations under the deed of supervision. In addition there is the situation when a resident has issued a dispute notice concerning the operator's breach of the resident's occupation right (or code of practice) in disposing of a residential unit in a retirement village formerly occupied by the resident.

The operator must also immediately inform the parties to the dispute that notification of the dispute has been made to the statutory supervisor. Residents too can inform the statutory supervisor of a dispute they are a party to and have the right to make a complaint about the breach of their rights to the statutory supervisor.²⁰⁷ They can also involve the statutory supervisor in a dispute once a dispute notice "may" be given. This indicates residents can involve the statutory supervisor in a dispute prior to the dispute notice being given.²⁰⁸ In addition, statutory supervisors have duties and powers under sections 42 and 43 of the Act which could mean a resident may not know of actions taken by the statutory supervisor but nevertheless, any matters of concern on the part of the residents would fall into the category of *complaints*. The Act states;

42 Duties of statutory supervisor

A statutory supervisor must –

- (a) provide a stake holder facility (for example, under section 29(1)) for intending residents pay deposits or progress payments in respect of occupation right agreements or uncompleted residential units or facilities at the retirement village; and
- (b) monitor the financial position of the retirement village; and

²⁰⁶ s55. The extent to which a statutory supervisor becomes involved in a complaints facility for a village will depend on the terms of their deed of supervision with the village operators. Some operators will have detailed requirements requiring statutory supervisors to take an active role in complaints. This information was provided by John Greenwood, personal communication 27th February 2007.

²⁰⁷ Schedule 4, 8, Code of Residents' Rights.

²⁰⁸ s55 (3).

- (c) report annually to the Registrar and residents on the performance of its duties and the exercise of its powers; and
- (d) perform any other duties that are imposed by this Act or any other Act, any regulations made under this Act, and any documents of appointment.

43 Powers of statutory supervisor

- (1) If a statutory supervisor believes the financial position of the retirement village, the security of the interests of the residents or the management of the retirement village is inadequate, the statutory supervisor may –
 - (a) direct the operator to supply all residents (or their nominated representatives) with the information that the statutory supervisor may specify; or
 - (b) direct the operator to operate the retirement village in a specified manner; or
 - (c) apply to the Court under section 49 of the Securities Act 1978 which applies with all necessary modifications.
- (2) The statutory supervisor may direct that an advertisement that the statutory supervisor considers is inconsistent with this Act or regulations made under this Act, or the disclosure statement, occupation right agreement, or code of practice, not be published or distributed.

These duties and powers are broad, far more encompassing and imposing than those invoked under the Securities Act 1978 under which a statutory supervisor previously operated. Since the General Regulations came into force on the 1st May 2007, the powers of statutory supervisors can be extended through provisions of a ‘deed of supervision’ that potentially places the statutory supervisor in the role of resident advocate.²⁰⁹ In the context of this study, the *independence* and *perceived independence* of this role is critical because of the responsibility attached to over seeing the interests of residents.²¹⁰

²⁰⁹ Retirement Village (General) Regulations, 2006. For example cl 47 (1) (b) in accordance with section 33 (2) (b) of the Act (resident entitled to bring an allegation of breach of a right referred to in the code of residents’ rights to the attention of the statutory supervisor); cl 53(1) relates to provisions in deeds of supervision such as the operator having to provide the statutory supervisor with any communications a resident is entitled to receive; (c) permits the statutory supervisor to attend meetings of the residents and be heard in any discussion at the meeting concerning the statutory supervisor or the residents; to call a meeting of the residents; (d) to attend a meeting of the residents called by at least 10% of the residents (iii) “for the purpose of the residents giving the statutory supervisor their opinions or directions relating to the exercise of the statutory supervisor’s powers; “(e) require a meeting of the residents of the village called by the statutory supervisor to be chaired by a person appointed by - (i) the statutory supervisor; or (ii) if the statutory supervisor does not appoint a chair, the majority of the residents of the village who are at the meeting”. These are selected parts of the regulations that implicate the statutory supervisor in an advocacy role.

²¹⁰ One trustee company advertises on its website that it provides “statutory supervision and advocacy for retirement villages throughout New Zealand” (accessed 25th June 2007). It sees *independence* as its paramount ethical responsibility; acting for residents only and focussing on dispute avoidance through close involvement with residents. Associate membership of RVANZ is seen by the Trustee Director as a way of giving that organisation the benefit of some of its experiences (Trustee Director, 5th July 2007).

It has been acknowledged that statutory supervisors have already been involved to an extent in dispute resolution and this will expand under s55 (3) of the Act²¹¹ however, their role is perceived as being more connected to operators than residents.²¹² This being so, what do we know about resident knowledge of this important role? The Retirement Commission survey showed levels of confusion about the role which may indicate policy changes are required. For example;

over half of Residents can say whether or not their village has a Statutory Supervisor (56%) and the majority of those do have one. Almost half (44%) do not know.²¹³

Causing confusion regarding residents' knowledge about statutory supervisors is the finding relating to "Overall Satisfaction with Statutory Supervisor";

Almost half (46%) of Residents who say they have a Statutory Supervisor say they have had any contact. Regardless of whether they have had contact or not, all Residents with Statutory Supervisors were asked how satisfied they were overall with their Statutory Supervisor. Three quarters (74%) state they were satisfied with their Statutory Supervisor. Only 6% say they are dissatisfied.

This indicates residents who had no contact with the statutory supervisor (54%) were in the majority "satisfied" with their statutory supervisor; only 6% being dissatisfied.

²¹¹ Greenwood, J and Marks, S *Retirement Villages*, New Zealand Law Society (2004) 38.

²¹² Retirement Commission Retirement Villages Adviser, 4th December 2006. A personal experience of a visit to a retirement village late last year provided feedback that came in the form of a comment made by a manager. The manager was talking about village audits and spoke of [their] statutory supervisor being like an adviser and friend of the village. This indicated a level of closeness which the role would understandably involve but also raised questions about professional boundaries and expectations of managers of the role vis-à-vis the legal definition of the role and what that should involve concerning *independence* of the role. Recently the secretary of a Waikato Residents' Committee reported concerns (to the Retirement Commission and to me) about lack of support and perception of lack of independence of the Village's statutory supervisor. Problems in this village development are being taken up by the local MP who does not want to publicise the issues for fear of bad publicity impacting on sales in the village. The village received its first residents two years ago. At this time, the death of a resident and the sale of their apartment is hampered by the soggy, unfinished construction site around the uncompleted complex. The family members of the deceased occupant have to continue to pay ongoing charges because the Code of Practice limiting this does not come into effect until the 25th September 2007. Sales are not occurring due to the unfinished state of the complex. In the meantime it appears there is a lack of goodwill on the part of the developer to complete the project and lack of commitment by the statutory supervisor to heed the existing situation in this uncompleted village. Villagers are experiencing difficulties including finding level ground to walk on or push walking frames and they have no permanent manager to see essential tasks are carried out. The secretary of the residents' committee is unable to move to another village in the region because of the adverse financial impact on her limited funds; this was a solution put to her by the developer at a recent meeting at the village. (Communication with Village Residents' Committee Secretary, 4th July 2007).

²¹³ Retirement Commission, Retirement Villages Survey, ACNeilsen (2006) 84.

One conclusion that could be drawn is that operators do a very adequate job informing residents about the role of the statutory supervisor. In contrast, the study also found 44% did not know about the role of the statutory supervisor suggesting possibly some older people do not like to record their dissatisfaction.²¹⁴ This may be particularly so when the residents for the Retirement Commission survey involved those whom the operator had given permission to be interviewed. Of these, 9 refused to be interviewed and 15 screened themselves out because they were aware there was to be a survey.²¹⁵ Residents who had left the surveyed villages were not interviewed.²¹⁶ This situation raises further questions, unable to be addressed here but it is worthwhile to point out, the pre-Act role of the statutory supervisor was much narrower and the survey was conducted prior to the Act's implementation. The role now has a much wider focus including complaints, making it of greater significance to residents.

3.3.4.1. Independence of role

The recent Law Society Seminar on retirement villages takes the view that while statutory supervisors are an independent party, they can "look at a dispute from a fresh perspective rather than being an advocate for a resident".²¹⁷ The role appears confused and conflicted. However it is anticipated as residents' become better informed about the Act and the Code of Practice which comes into effect on the 25th September 2007, residents will begin to ask questions about what value the statutory supervisors are providing.²¹⁸ There is some evidence this has already occurred.²¹⁹

²¹⁴ Refer also to the studies previously quoted by Streib, Folts and La Greca, 1988; Streib and Metsch, 2002 and Simpson, 2006.

²¹⁵ This information was provided by the Commission's Retirement Villages Adviser.

²¹⁶ Retirement Commission, Retirement Village Adviser's presentation to Sector Group meeting 13th December 2006.

²¹⁷ Greenwood, J and Burke, M *Retirement Villages – the full impact of the Act*, New Zealand Law Society Seminar, March 2007, 30.

²¹⁸ Snr Policy Advisor, Department of Building and Housing, 4th July 2007. It was explained the Code of Practice will require operators to provide itemized invoices. When residents see where their money is going (which may include payment to statutory supervisors) this will be noted by residents and they will want to be sure there is value to them from this payment.

²¹⁹ I have become aware of one large South Island Retirement Village where residents heard of a sale in the village falling over in early May 2007, reportedly due to comments made by the statutory supervisor favouring 'licence to occupy' tenure: resident's believed this would seriously impact on the values of their units and therefore saleability of units. A special meeting called by

Clause 49(g) of the General Regulations imposes duties on an operator including “to accept the statutory supervisor as a representative of the interests of the residents of the village in any matter relating to the village”. In addition, the Retirement Villages Code of Practice 2006 makes special provision for access to the statutory supervisor;

3. The operator must have a process for residents to contact the statutory supervisor (if there is one) about an alleged breach of a right, or to make a complaint. The operator must inform residents about any change to this process.
4. The operator must inform residents in writing of the name of the statutory supervisor (if there is one) and how to contact them. *Code of residents’ rights in Schedule 4.*²²⁰

This being the case, the *independence* and *perceived independence* of statutory supervisors should be an imperative in appointments to this position under the Act. The Law Society in an earlier seminar highlighted the ‘*independence*’ of statutory supervisors.

...Operators still have the prime role in appointing statutory supervisors. The Justice and Electoral Committee, in their wisdom, considered that the fact that statutory supervisors are appointed and paid for by the operator will have no bearing on the *independence* of statutory supervisors...²²¹

Currently the existing statutory supervisors are associate members of RVANZ and two companies specialise in retirement village supervision.²²² How *independence*; suggestions of conflict of interest; and the performance of statutory is to be monitored under the new regime is not specified. Again operators both appoint and pay for a key role affecting residents’ interests; the perception of compromised *independence* naturally follows.

the residents to address what they saw as a breach of their right to be consulted and informed was held; around 200 attended. Later, the residents conveyed (via management) a statement to the statutory supervisor expressing their disappointment about the ‘licence to occupy’ comments and strongly criticising the statutory supervisor’s style and length of presentation as unsuitable for the age and understanding of the audience (Residents’ representative 4th July 2007).

²²⁰ Retirement Villages Code of Practice 2006, 30, 3 & 4, p27.

²²¹ Greenwood, J and Marks, S *Retirement Villages* (2004) 38.

²²² While existing statutory supervisors are associates of RVANZ, they have differing ideas about how their relationship with RVANZ is managed. One sees its connection with the sector as limited to informing the sector about its experiences as a residents’ advocate (reported 5th July 2007). Another has a moving advertisement on the ‘home page’ of RVANZ’s website and a profile informs that this trustee regularly features as a speaker at RVANZ conferences.

Statutory supervisors have oversight over residents' villages and the issues and interests of residents. Under the Act, statutory supervisors must be approved by the Securities Commission Registrar. Once approved, appointment is indefinite, whereas prior to the Act the appointment was for up to five years. In addition there is no requirement to seek independence for this role. The existing statutory supervisors are to continue in the role²²³ and already have established relationships with village operators; a situation I believe can be strengthened through affiliation with RVANZ.

The notion of 'biting the hand that feeds' is an ever present tension in this type of context, and is one that is currently at the forefront of Grey Power and residents' committee thinking towards the role of statutory supervisor. For example, there is currently a move underway by the sector group RVANZ to vary clause 49.1(e) of the Retirement Villages Code of Practice which covers "Refurbishment costs and process". Recent and past publicity²²⁴ including reports from the Retirement Commissioner to the Minister of Building Issues over several years, have raised concerns about refurbishment costs to residents upon vacation of units. The code of practice to come into effect on the 25th September contains a new refurbishment clause welcomed by residents, Grey Power and Age Concern. The clause relates to the occupation right agreement and requires the agreement to;

- e. State that the residential unit is to be refurbished to no more than the condition of the unit when the resident entered it, less fair wear and tear.

It appears the move to vary this clause will have mixed impact, but is generally seen as a detrimental step for the majority of residents. The move to vary the clause is supported by one Trustee Company, which describes itself as "the major provider of statutory supervision"²²⁵ and some legal commentators with an interest in the sector. The move to vary the clause has angered residents and groups such as Grey Power.²²⁶ The Trustee Company believes the issues

²²³ Section 37 (2) RVA 2003.

²²⁴ For example *The Press*, 25th May 2004, Ed 2, 5; *Consumer* 467, March 2007, 36-39; The New Zealand Herald 14th April 2007, Part C Business Section; Retirement Commission, Retirement Villages Survey 2006, and reports to the Minister from the Retirement Commissioner.

²²⁵ This is the same company that raised concerns in the South Island village. Its website states – "We are New Zealand's leading provider of statutory supervision services to the retirement village industry...we have around 50% of the market..." (accessed 25th June 2007).

²²⁶ The Chairman of the Grey Power Retirement Villages portfolio reports the Trustee Company made its support for the variation of C1 49.1(e), known to residents of his village recently. The

surrounding refurbishment have been “overstated”²²⁷ and provides two examples to demonstrate a wider issue. The examples appear to hold legitimate issues and should be considered in the context of universal refurbishment requirements, yet there is also widespread concern surrounding excessive refurbishment requirements and the fairness of this.²²⁸ There appears to have been no consultation with the wider resident network other than perhaps those in the two examples used by the Trustee Company, but knowledge and support of operator interests can be gleaned from its submission.²²⁹

Like the dispute panel members, statutory supervisors first must be approved. Unlike the disputes panel members, their tenure is indefinite. The role of statutory supervisor requires a level of *independence* at least equivalent with that expected of disputes panel members. In addition, monitoring each statutory supervisor’s performance including resident feedback should involve assessment of whether they have the capability to manage their role as trustees for vulnerable investors; the more clients they have, the murkier the waters in terms of realistic oversight and case management. For the residents in the examples provided, not only is there a perception that one trustee company is not *independent*, but residents

residents find it difficult to accept the role of statutory supervisor, intended by the Act to represent the interests of residents and intending residents, supports a variation they believe will discriminate against the majority of residents; most have not been consulted. If an operator is genuinely in trouble financially and can prove it cannot comply with the Act or the Code of Practice, section 93 of the Act contains exemption provisions. The Chairman estimates it is unlikely more than two villages would genuinely qualify for this exemption. The likelihood for statutory supervisors to be to be biased towards “those who reward them” is reinforced in the eyes of residents through the Company’s justification to seek a variation to the Code of Practice without consultation and his position that refurbishment problems have been “overstated” (Grey Power Retirement Village portfolio chairman, June 2007). It is accepted that people will have different perspectives on this issue depending on whose perspective they are representing. All submissions on this code variation will be available once the Minister has decided how to proceed. At that time, a document analysis can be undertaken which will illuminate the perspectives of the submitters. For those who have made their submissions available publicly, it can be ascertained whose perspective they are supporting. In the meantime, the Retirement Commission reports having received “numbers” of submissions covering a range of perspectives on the proposed variation to the Code.

²²⁷ This comment is contained in the Trustee Company’s submission to the Retirement Commissioner 3rd May 2007 to vary Clause 49, 1 (e) of the Code of Practice. The letter suggests the dispute resolution processes in the Act will provide “a significant deterrent to abuses of these provisions”.

²²⁸ A former Parliamentary Ombudsman and Banking Ombudsman Nadja Tollemache spoke of fairness in this way “Fairness is a constantly developing concept...there is no such things as a free lunch and in the private sector, measures that may be fair to one person may increase costs of a service to such an extent that it will disadvantage and so be potentially unfair to many others”. Tollemache, N “Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand” [1996] VUWLR 26, 233-245.

²²⁹ The website of this company demonstrates its close alignment with the industry, identifying its clients as owners of retirement villages and solicitors: there is no mention of residents as clients.

regard the Trustee's actions in making a statement about their views on Unit Titles without having consulted them, as clearly aligned with management and the sector group RVANZ. They feel equal concern about the Company's support to vary the refurbishment clause in the Code of Practice.

The Trustee Company in question is obviously experienced in the role of statutory supervision and no doubt has excellent marketing skills, having a firm hold on the role of statutory supervisor for retirement villages in New Zealand.²³⁰ It is possible these attributes will combine to reveal the Achilles' heel of its business.

The statutory supervisor role is seen as the linchpin of the Act, requiring a high level of *independence*²³¹ and personal ethics. Retirement Village residents deserve and require faithful advocacy; they cannot afford to have their interests in the hands of trustees who demonstrate ambivalence towards the *independence* expected of the role.

3.3.5 *Role of the Retirement Commissioner*

The Act sets out the role and responsibilities of the Retirement Commissioner in relation to the disputes panel, the main features being the requirement for the Commissioner to approve dispute panel members and publish the names on a list.²³² The appointments are for a term of not longer than 5 years providing the person does not fall within a range of situations that would require the Commissioner to remove the person's name from the list. In certain circumstances the Commissioner has the power to restore a person to the list.²³³ The Retirement Commissioner's role is described as "limited",²³⁴ although the Retirement Commissioner sees the functions outlined as having oversight of the disputes

²³⁰ See footnote 225.

²³¹ The Retirement Commission and the Ministry of Economic Development recognise the very important role of statutory supervisor which has been described as "the linchpin" of the Act.

²³² s58.

²³³ s58(4).

²³⁴ Greenwood, J and Marks, S *Retirement Villages*, New Zealand Law Society (2004) 35.

panel.²³⁵ Section 36 sets out the monitoring responsibilities of the Commissioner. These are

1. (a) to monitor the effects of the Act and the Code of Practice made under this Act;
- (b) to advise on issues relating to retirement villages when requested to do so by the Minister or required by this Act;
- (c) to promote education about retirement village issues and to publish information about such issues;
- (d) to collect and publish information relating to any of the functions referred to in this section;
- (e) to perform any other function conferred by this Act or regulations made under this Act.

A monitoring role by definition suggests investigation at some level. Every operator of a retirement village is required to answer “any questions” and supply “any information” at the request of the Retirement Commissioner and must do so within 20 days of the request unless the Commissioner permits an extension.²³⁶ The Commissioner has no involvement in the approval of statutory supervisors, only the approval of disputes panel members²³⁷ and no direct advocacy role for residents other than through offering advice to the Minister. The Commission’s Statement of Intent however states “The Retirement Commission has a broad guardianship role in protecting the interests of residents of retirement villages”.²³⁸

The role of the Health and Disability Commissioner arose out of the enactment of a Code of Patients’ Rights²³⁹ set out in the Health and Disability Commissioner Act 1994. The banking ombudsman arose from a Code of Banking Practice which sets out customer rights.²⁴⁰ There is now a Code of Residents’ Rights incorporated in the Retirement Villages Act 2003²⁴¹ which makes clear resident entitlements

²³⁵ Retirement Commissioner, personal communication 6th December 2006.

²³⁶ s36(3).

²³⁷ The New Zealand Law Society seminar “Retirement Villages” raises the matter of the continuing involvement and extent of any continuing involvement of the Retirement Commissioner in the retirement village industry in future. The writers make the point that government funding of the “Commissioner’s functions will dictate to a large extent what monitoring and educative role is adopted”. They also anticipate the need for the Commissioner to balance the dual roles under both the Retirement Income Act 1993 and the Retirement Villages Act 2006. What the writers appear to be addressing in terms of the “dual role”, is the possible tension between ensuring retirement financial planning for all New Zealand citizens remains a key government focus juxtaposed to ensuring older New Zealanders have an informed, government appointed figure, involved in their welfare and financial well-being once they become residents of a retirement village.

²³⁸ See Retirement Commission website <www.retirement.org.nz>.

²³⁹ Paterson, R “The Patients’ Complaints System in New Zealand [2002] Health Affairs, Vol 21, 3, 70-79.

²⁴⁰ Tollemache, N “Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand” VUWLR [1996] 26, 240.

²⁴¹ Schedule 4, Code of Residents’ Rights, RVA 2003.

and minimum requirements to be included in any occupation right agreement. We have an existing Retirement Commissioner with an established statutory administrative base, with a “broad guardianship role” yet retirement village residents can be seen as disadvantaged in the advocacy stakes because of an apparent definitional and policy preference in the Commission’s interpretation of the term ‘guardianship’.

3.4 Retirement Villages Association of New Zealand approach to complaints and disputes

3.4.1 What the Act and code of practice prescribes set against what RVANZ promotes

Section 51 of the Act places the responsibility on the operators of every retirement village to operate and make known to residents, the existence in the village “of a facility for dealing with complaints by the residents”. In addition the Retirement Villages Code of Practice 2006, clause 31 refers to “Procedure for making and acknowledging complaints by residents” and clause 31.1 states;

The operator must have a written procedure for dealing with complaints about the operator or other residents of the retirement village. *Section 51*

The Act and the regulations specify the *complaints facility* is for dealing with complaints made by residents against operators and residents against residents.

In contrast, the Complaints Policy page on the RVANZ website provides the following information;

The RVA Complaints Process enables both complainants and operators the opportunity to access the most appropriate process for resolution of their complaint...²⁴²

Under a heading “What is the Retirement Villages Association” the Association states;

The RVA is a national body that works to represent, protect and promote the interests of its members and their associated services.²⁴³

The Association’s updated Constitution provides specific objectives in relation to promoting standards within the industry.²⁴⁴ These include; promoting the interests

²⁴² Complaints Policy, RVANZ, accessed 28th November 2006 and 24th May 2007.

²⁴³ <www.retirementvillages.org.nz>

²⁴⁴ <www.retirementvillages.org.nz> (complaints)

²⁴⁴ Clause 3.1.1 RVANZ Constitution August 16th 2006.

and good reputation of members;²⁴⁵ improving conditions of the industry in a “proper and lawful manner”;²⁴⁶ and in terms of dispute resolution, providing and maintaining;

...dispute resolution processes and procedures dealing with residents’ complaints or issues in relation to their occupation of a Retirement Village and/or complaints or issues of Operators.²⁴⁷

In addition, the Constitution clause 3.1.9 states;

To petition Parliament or any authority on any matter for the general benefit of the Industry including the suggestion of amendments to laws affecting Members’ interests and to promote and/or oppose any current or proposed legislation, regulation or requirement that in any way affects the interests of Members and to take such steps for this purpose as the Executive determines.

These selected statements concerning standards taken from the official publications of the RVANZ promote the Association’s commitment to member interests. This is understandable given the Association’s membership is made up of owners and operators; not residents.

A section on Village Operation covers “management consultation with residents” and “extent of (resident) participation”. The document determines resident participation “to protect their residency, lifestyle or investment” with a rider to this participation being subject to management’s requirement for “reasonable management autonomy”.²⁴⁸ It is assumed that management can veto residents’ participation based on their interpretation of “reasonable management needs”.

The recent Retirement Commission survey found under half (37%) of operators work together with their residents in a “consultative” way. A further 47% “consult” and 17% “inform” or have “little communication”. Residents are provided with the opportunity to “contribute to the formation of the committee for resolution of disputes referred to in clause 7.2 and this is specified in the actual clause; 7.2 Disputes Committee “The Disputes Committee shall comprise three persons as follows: (a) a person appointed by the residents...”²⁴⁹

²⁴⁵ Clause 3.1.4.

²⁴⁶ Clause 3.1.6.

²⁴⁷ Clause 3.1.17.

²⁴⁸ RVANZ Code of Practice, 6.1.

²⁴⁹ RVANZ Code of Practice 6.1 (e).

Whether resident contribution to the formation of the complaints committee has been given effect, is not known. What is known is the new statutory regulations support the establishment of a residents' committee in every village allowing residents to agree to their own rules for running the committee.²⁵⁰ The Retirement Commission survey found that in spite of the legislated Code of Practice not taking effect until 25th September 2007, 84% of residents in the survey stated there was a Residents' Committee or other grouping of residents in their village. Only 68% of operators were aware such a group existed. The surveys found "...there are more Residents' groups or committees functioning in villages than Operators are aware of and which they are not meeting with".²⁵¹ This finding can possibly be linked to Age Concern's view indicating some residents hold meetings in spite of opposition or lack of encouragement from management.²⁵² It may also indicate the possibility of lack of operator interest in residents' committees.

RVANZ has a process for dealing with dispute resolution including an internal adjudicative process; the RVA Review Authority.

²⁵⁰ Retirement Villages Code of Practice 2006, 29.

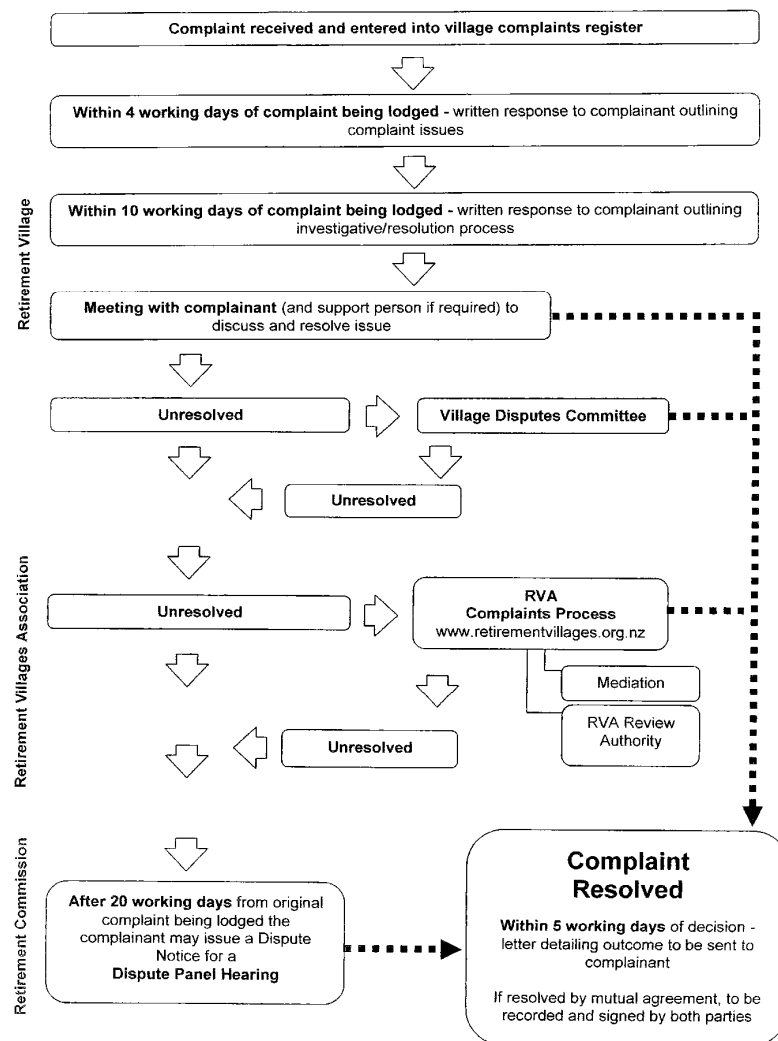
²⁵¹ Retirement Commission, Retirement Villages Survey, ACNeilsen, 2006, 78.

²⁵² This information was provided in a personal communication November 2006, with an Age Concern member endeavouring to set up a national residents' group.

Sample Complaint Facility

Village Contact Person:

Contact Details:



C:\Documents and Settings\Margaret\Local Settings\Temporary Internet Files\OLK226\1a RVA complaints flowchart.doc

Clause 13.2 and 13.3 of the reviewed Constitution outlines the Review Authority position *within the climate of the new Act*.²⁵³ [emphasis added]

- 13.2 The Review Authority shall consist of three persons appointed from time to time by the Executive from a pool of persons approved by the Executive and the Association. Appointment to the Review Authority shall be on such terms and conditions as may be decided from time to time by the Executive in its sole discretion but two individuals from the same corporate entity or Retirement Village may not be appointed to the Review Authority at the same time. At least one person appointed to the Review Authority shall be independent of the industry.
- 13.3 The Review Authority may conduct its affairs entirely as it sees fit and may elect one of its members to be its convenor.

²⁵³ Reviewed Constitution received from RVANZ Head Office 5th September 2006.

The Association's Review Authority unlike other dispute resolution mechanisms does not specify its processes or make clear the way it operates raising a number of critical questions;

- (1) Why it is the methods of the Review Authority are not transparent?
- (2) Is there a time frame in which certain matters must take place?
- (3) Is there a hearing and if so do people have a right to be heard?
- (4) What information is given to participants?
- (5) Where can a Review Panel hearing be held - i.e. does it meet at the resident's location or do residents have to travel?

A quorum under the Association's new regime is two members of the Authority; one being independent of the industry; decisions are by majority. Numerous other clauses pertaining to the operation of the Authority are listed. One of particular interest relates to payment to Review Authority members and is described as "appropriate remuneration as determined by the Executive". Prior to the Act's Disputes Panel being approved, it was not known what the cost would be to RVANZ operators using the Disputes Panel.

There is confusion in the terminology used by the RVANZ resulting in its processes appearing contradictory and at odds with the Act model. It is also a complicated model requiring residents (and their complaints) to go through a number of processes. Most significantly it shows a choice of two models; the Act model or the Association's, yet the Act is specific: part 4, s50 states "In any retirement village there are 2 forms of dispute procedure: a complaints facility and dispute resolution". Section 51 states "The operator must operate and make known to the residents of a retirement village a facility for dealing with complaints by the resident". Section 52 (1) addresses dispute resolution and a dispute notice. This terminology is in keeping with accepted dispute resolution language; complaints are usually internal matters and disputes usually involve external independent dispute resolution mechanisms.²⁵⁴ Simply stated, complaints systems usually underpin disputes systems. The RVANZ model is complicated and confusing in this regard.

²⁵⁴ Sourdin, T *Alternative Dispute Resolution* (2nd Ed) 2005, 10.100, Chap 10.

Documentation pertaining to the first disputes hearing conducted near Wellington in February 2006 provides evidence of the confusion caused by inaccurate terminology and several processes operating; under statute; within RVANZ and individual villages. The panellist had difficulty sorting out exactly what documents were being referred to in a number of communications. Consistent use of language and application of accepted dispute resolution terms would assist.

3.4.2 *Some critical issues*

The continuation of the Association's Review Authority for unresolved resident complaints following implementation of the Act is a situation that may not have been considered by legislators; anticipated cost of the Disputes Panel being RVANZ's justification. Residents however can, by issuing a dispute notice, avoid the Association's internal process and opt for the Disputes Panel which offers greater protection and finality of a dispute. Whether the legitimate concerns that prompted the Retirement Villages Act are no longer within the sight of the RVANZ is not clear. The Association's decision to allow operators to make complaints about residents along with its continued promotion of its Review Authority, suggests the Association prefers to be in control of issues that may involve costs and expose its members to public scrutiny through the public Disputes Panel process.

The NSW state residents' association is experienced in the issues connecting, legislation, dispute resolution processes (external and internal) and reasons why the sector may prefer issues to stay inside the village walls. Currently the NSW Act is under review: the Retirement Villages Amendment Bill 2006 which has passed through the consultation phase is said to provide greater protection to residents and reduce red tape for operators.²⁵⁵ A report is available on the Office of Fair Trading (OFT) website.²⁵⁶ The government however has not disclosed what recommendations from the report it has included in the Bill which remains under wraps. It has been reported that operators pushed for village based systems

²⁵⁵ The Minister of Fair Trading in a news release on the 22nd November 2006 identified "significant elements of the Bill" including provisions to improve the disclosure of information to incoming residents; improving dispute resolution procedures; limiting the continuation of charges once a resident leaves; reducing red tape for operators by simplifying accounting and budget procedures. This news release was obtained from the Fair Trading website, February 2007.

<www.fairtrading.nsw.gov.au>
²⁵⁶ <www.fairtrading.nsw.gov.au>

at every level unless significant matters of law were involved. NSW state residents' representatives say

...operators would have pushed for that in their submissions. They are required under the Act to indicate in the Disclosure Statement (Schedule 1 to the RV regulation) when there are court or tribunal cases and to reveal the decisions. To get around that which could affect their sales – why wouldn't an operator develop a system in the village?

...The trouble with dealing with OFT officers and Government Members of Parliament and their staff is that none of them have experience of living in a village and thus do not know how an operator can play to the residents who are gullible as well as vulnerable.²⁵⁷

This may also be an issue to consider in the New Zealand context. The nature of operator influence on residents can be seen in a variety of circumstances; it can also impinge on the independence of residents in a number of ways including preventing transparency in dispute resolution processes.

3.4.3 Over-kill?

The Retirement Commission survey covered retirement villages only where the operator gave permission and the “most frail” residents were not interviewed.²⁵⁸ This ‘gate-keeping’ while obviously legitimate and sensible in instances where resident frailty is concerned not only raises the possibility of operators being able to manipulate who takes part in surveys, but also the issue of operators being able to make complaints about residents.

Where power relations are so disparate it is not obvious why an organisation basing its livelihood on providing accommodation and services for the aged would provide a facility for its members to make complaints against the residents. The Association's Constitution and Code of Practice promotes “the interests and good reputation of members and improve the conditions of the Industry in every proper and lawful manner”.²⁵⁹ Perhaps this may be seen as a type of David and Goliath situation with the frail, powerless residents finding themselves at the mercy of the strong and powerful owners who, blinded by their inability to see themselves as others do, blunder on until their strategy is exposed, powerful no more.

²⁵⁷ Secretary NSW Retirement Villages Residents' Association email dated 23rd November 2006.

²⁵⁸ Retirement Villages Survey 2006, Retirement Commission, December 2006, Appendix 11, vi.

²⁵⁹ Clauses 3.1.4 and 3.1.6 Constitution of Retirement Villages Association of New Zealand Incorporated, 16th August 2006; The Code of Practice and Minimum Operating Standards, Retirement Villages Association of New Zealand, February 2002.

The NSW state residents' association has a particular view on surveys undertaken for the purposes of ascertaining whether residents feel their village complies with accreditation requirements. The Office of Fair Trading apparently carries out these surveys and does not ask questions about the financial management of the village. The association describes the NSW accreditation requirements which once accomplished, allow a village to include that accreditation in any advertising.

They [OFT] survey 10% of the residents and while they say it is not a contrived system, nevertheless I have never heard a person who is anti-management ever being asked to reply to the survey. Our main objection to the system is that they never ask whether the staff is good or bad and whether the services are adequate or not, but leave out the one where residents are critical of the fees being charged...²⁶⁰

On the one hand operators want to “protect” frail residents from being involved in surveys and on the other, RVANZ has set up a system allowing operators to take complaints of harassment against residents.²⁶¹ The incongruence with the context is startling. There are other options for professionally competent managers to deal with difficult residents. Operators are in the business of elder accommodation²⁶² which the residents have usually paid for upon entry and will continue to pay for, therefore sector leaders should be looking to educate operators and staff about managing difficult situations. The facility for this type of complaint in an elder living context will have impact when a New Zealand residents' association is formed. Publicity naming villages with facilities for operators to take complaints against residents would have an impact. Chances are, resident recruits might be difficult to attract to those villages.

3.4.4 *Where does this leave residents?*

The Act's disputes panel and the 2006 Disputes Panel Regulations were in the realms of contestation before they were fully implemented and prior to the Code of Practice coming into force. What actually transpires after all components of the Act are operational may depend on the weight of resident opinion and how justice and *fairness of process* is perceived by them and others. It is likely informed residents will perceive the Act model has been rejected by sector leaders in favour

²⁶⁰ Email communication from Secretary NSW Retirement Villages Residents' Association, 23rd November 2006.

²⁶¹ RVANZ confirmed harassment by a resident would be grounds for an operator to make a complaint.

²⁶² Some retirement villages also provide different levels of care to meet the changing needs of residents as they age.

of the less independent in-house disputes process (the Review Authority); a process controlled by the sector and lacking public accountability through published decisions. The consequences of this will be loss of residents' confidence in the process and RVANZ's credibility will be seriously compromised.

3.5 Summary

This chapter has provided an overview of the Retirement Villages Act 2003 and its complexities and contradictions. I have included criticisms fielded by the Retirement Commission and added my own. These are directed primarily at the way provisions in the Act allocate operators' tasks that seriously compromise the fairness and independence of the DR process. I have argued the role of the statutory supervisor cannot be seen as independent or offering assurance to residents that their interests are not compromised by the ambiguity of the role and the lack of accountability for that role. The role lacks tenure of office, a neutral remuneration base and independence from operator interests. I have shown this situation can be linked in part to the broadening of the duties and powers of the role contained in sections 42 and 43 of the Act and the apparent lack of limitation on individuals and companies access to this role: I have highlighted industry 'capture' as a significant concern.

I have considered the role of the Retirement Commission and suggested it is out of kilter with comparative contexts where codes of rights have been implemented to protect sectors of the community and ombuds/commissioners appointed to serve as independent advocates/dispute resolutionists for consumers.

I have examined the complaints and disputes processes of RVANZ and found confusion and lack of understanding of terminology about dispute resolution processes. The continuation of the Association's Review Authority suggests the possibility of a preference to bypass the Act model which consequently may impact on some resident's access to fairness and independence of process. I have highlighted the Association's intention to provide a facility for operators to make complaints about residents, seeing this as a moral and ethical contradiction to the Association's Code of Practice and Constitution.

The following chapter examines the key principles of DR processes and considers how these principles might be experienced by parties involved in disputes.

Chapter 4 *Towards theoretical principles for evaluating dispute resolution models*

4.1 Introduction

The purpose of this chapter is to develop principles to inform DR processes. A particular focus of this review will be the principles that attempt to balance the power relations in less powerful groups such as residents of retirement villages. All DR processes are guided by a number of key principles which explicitly and implicitly guide the process. I understand conflict and disputes as complex phenomena, made up of many different interrelated parts; any change in one part will affect others. This being so, the principles involved in DR processes should be sensitive and synchronised with the context and culture of the participants, including their gender and age.

As a woman, communication and conflict specialist and researcher, the perspective I take on the principles that ought to inform methods and models of DR, should attempt to balance the power relations between participants in such a way that the powerlessness ought to be recognised and reflected in the experiences of the participants.

4.2 Principles involved in determinative and consensual DR processes: a starting point

In the Law Commission Report, *Delivering Justice for All*,²⁶³ the President's opening statement emphasises the preservation of "fundamental and immutable principles" alongside the need for the accommodation of "flexibility and change".²⁶⁴ The report seeks the delivery of responsive and flexible processes incorporating the accepted fundamental principles of

- Equality before the law
- Adherence of the rule of law including principled appeal rights²⁶⁵
- Fair and proper process

²⁶³ *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Law Commission Report 85, 2004.

²⁶⁴ *Ibid*, 8.

²⁶⁵ *Ibid*, 3-4.

- Independent adjudication²⁶⁶ which includes the principle of impartiality
- Accessibility
- Efficiency including timeliness

There is an expectation also that citizens will make efforts to resolve disputes prior to entry into the Court system and alternative forms of dispute resolution can be seen as playing a very significant role in this regard; rules may change due to the lack of transparency and the confidentiality of ADR processes but the basic principles remain for ADR processes, including tribunals.²⁶⁷ This includes parties being treated in an even-handed, fair and impartial manner; processes such as mediation follow accepted rules and procedures; accessibility is covered by the availability of accredited mediators through professional membership of AMINZ or LEADR and facilitators and mediators are responsible for ensuring parties understand the process, the issues and language²⁶⁸ in which they are presented in order to participate fully in the process.

Through my reading, I have identified two concepts that provide additional tools to the array of processes available to manage and resolve disputes. These concepts are;

- Process pluralism
- Advocacy (non-legal)

The concept *process-pluralism* has two requirements; the first is that all those affected by decisions should participate in the decision-making process; the second surrounds the choice of process which must take account of the morality of any outcomes, the legitimacy of the process and the context of both the conflict and the participants. Together these two requirements result in procedural fairness. *Advocacy* requires conflict engagement through effective coaching and educating of parties on how to conduct themselves through the course of conflict.

²⁶⁶ Ibid, 8.

²⁶⁷ Astor, H and Chinkin, H *Dispute Resolution in Australia* (2nd ed, 2002); Spiller, P (Ed) *Dispute Resolution in New Zealand* (1999); Sourdin, T, *Alternative Dispute Resolution* (2nd ed , 2005); Code of Residents' Rights, Schedule 4, Retirement Villages Act 2003 and the Retirement Villages Code of Practice, 2006.

²⁶⁸ Language in this context means style of presentation, understanding the issues involved and the way they have been framed.

This can be achieved only when conflict is exposed and the reasons behind it understood.

I will first discuss the principles *equality before the law*, *adherence to the rule of law*, *fair and proper process* and *independent adjudication* according to the history, law or what key writers have to say on the subject. There is overlap between these principles; for example *adherence to the rule of law* means treating people in an even handed way which also impacts on *fair and proper process*. For a process to be *fair*, *independent adjudication* is required; if processes are not *accessible*, *timely* or *cost effective* then *fairness* is compromised; the interdependence of the principles being essential to the complete concept of procedural justice. Second, I will consider different points of view and determine whether there is any consensus of opinion. Third, I will provide a statement on the principle that incorporates what might be evident when the principle is present in a DR process.

With respect to the two concepts which I consider to be emerging principles, I will discuss each one in relation to the situations to which they apply, and clarify the principle through the final statement.

4.3 *Equality before the law*

Lord Hewart's famous dictum "justice should not only be done but should manifestly and undoubtedly be seen to be done"²⁶⁹ is a principle on which the law relies to promote equality and fairness before the courts and other legal processes. Following from this, the Oaths and Declarations Act 1957, section 18 requires judicial officers to swear to "...do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will" and common law conveys the duty on decisions-makers to apply the principles of natural justice.

This principle guides formal and informal DR processes in New Zealand to some extent though processes such as mediation allow parties to caucus separately with the mediator and the subject of the caucus is not disclosed to the other party.

²⁶⁹ The dictum originated from *R v Sussex Justices, ex parte McCarthy* [1924], 1 KB 256, 259.

Where consensual or informal DR processes are undertaken and swearing allegiance is not required, the principles nevertheless are present²⁷⁰ but to a lesser degree in ethical standards of professional bodies such as AMINZ and LEADR. For example both organisations promote standards through rules and codes of ethics and both have complaints processes to deal with complaints against members.²⁷¹

The New Zealand Bill of Rights Act 1990 incorporates the principle of equality before the law in section 27 *Right to justice*;

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

In addition, sub sections (2) and (3) cover all persons whose rights, obligations and interests are protected or recognised by law, to apply in accordance with law for a judicial review and to bring civil proceedings against or defend civil proceedings brought by the Crown in the same way as civil proceedings against individuals.

The Judicial Commission of New South Wales in 2006 published a book *Equality before the Law Bench Book* which provides NSW judicial officers with information concerning “different values, cultures, lifestyles, socioeconomic

²⁷⁰ In mediation it is the duty of the mediator to be even handed in dealing with the parties and ensure each side is heard uninterrupted while the other side listens. Impartiality is also implicated in equality and fairness of process.

²⁷¹ For example AMINZ Code of Ethics includes (1) A member should uphold the integrity and fairness of the relevant dispute resolution process; (2) A member should disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias; (9) A member should avoid impropriety or the appearance of impropriety; (11) A member should make decisions in a just, independent and considered manner; (12) A member alleged to be in breach of this code shall be subject to the provisions of the Institute's rules dealing with professional misconduct and disciplinary matters. LEADR's *Ethical Standards for Mediators* was developed by the Law Council of Australia and adopted by LEADR (including LEADR NZ) as part of its Accreditation Scheme. The standards cover the definition of mediation (1); impartiality (2), conflicts of interest (3), competence (4), confidentiality (5), quality of process (6), termination of mediation (7), publicity and advertising (8) and fees (9). Rule 2 of LEADR's *Ethical Standards for Mediators* provides a commentary concerning *impartiality*, for example Comment (a) Whatever their own views and standards mediators should not only not be partial or prejudiced but should avoid the appearance of partiality or prejudice by reason of such matters as the parties' personal characteristics, background or conduct at the mediation; (b) Mediators should seek to avoid behaviour which, however innocent, may be interpreted as indicating partiality or prejudice, such as spending more time with one party than another without good reason, socialising with a party and adopting different modes of address; (c) Even if all the disputants agree that they would like the mediator to express an opinion on the merits, there is a substantial risk in giving such an opinion that the mediator may no longer appear to be impartial. As a result the mediator may be obliged to withdraw.

disadvantage” and other disadvantages that might impact on a person’s ability to fully and equitably participate in court proceedings. The book also provides “guidance” only on how judicial officers “might need to take account of this information in court”.²⁷² The explanation surrounding why the information has been provided specifically refers to the oath to administer the law fairly undertaken by all judicial officers and brings together the notion of equality before the law and discrimination. The 1991 determination of McHugh J makes the point that equality does not necessarily mean “same treatment”.

...discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different.²⁷³

Mediation literature has addressed various forms of partiality, bias and the issue of power imbalance in mediation, particularly unequal bargaining power.²⁷⁴ It is not clear whether the demonstration of partiality or non-intervention of mediators in situations where power imbalance is clearly affecting the ability of a party to participate effectively, actually means discriminatory practice. What is clear from the literature is that power, perspectives and their impact on parties and outcome, is now well documented and acknowledged in literature concerning conflict, disputes and their settlement or resolution through both determinative and facilitated processes.²⁷⁵

The consistent message should be that “people must be treated fairly and without discrimination and also *believe* they are being treated fairly and without any form of discrimination...”²⁷⁶ In addition, practitioner self-awareness of bias and prejudice and on-going education about the value systems of people from diverse backgrounds is encouraged and expected of dispute resolution practitioners and

²⁷² “Equality before the Law Bench Book: Providing for community and individual difference in court proceedings” (Judicial Commission of New South Wales, June 2006) obtained from <<http://www.jc.nsw.gov.au/benchbks/equality/>> 10th February 2007.

²⁷³ *Waters v Public Transport Corporation* [1991] 173 CLR 349 at 402 cited in “Equality Before the Law Bench Book”(2006) 1103.

²⁷⁴ Boulle, L Jones, J and Goldblatt, V *Mediation: Principles Process and Practice* (NZ ed) (1998); Mayer, B *The Dynamic of Conflict Resolution* (2000); Sourdin, T *Alternative Dispute Resolution*, (2nd Ed) (2005); Menkel-Meadow, C *Dispute Processing and Conflict Resolution: Practice and Policy* (2003); Spencer, D and Brogan, M *Mediation Law and Practice* (2006).

²⁷⁵ Sourdin, T *Alternative Dispute Resolution*, (2nd ed, 2005); Astor, H and Chinkin, C *Dispute Resolution in Australia* (2nd ed 2002); Bayliss, C and Carroll, R “The Nature and Importance of Mechanisms for Addressing Power Difference in Statutory Mediation” (2002) 14 *Bond LR*; Menkel-Meadow, C *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (2003).

²⁷⁶ Judicial Commission of New South Wales, *Equality before the Law Bench Book*, June 2006, 1104. Obtained from <<http://www.jc.nsw.gov.au/benchbks/equality/>> 10th April 2007.

the judiciary; in NSW there is an expectation that judicial officers must “actively seek to neutralise these”.²⁷⁷ In theory this sounds positive but it is also a response to situations that have shown that all are not equal before the Courts or in ADR processes; strong educative and awareness strategies are therefore being promoted.²⁷⁸

An information sheet that would be provided to users of a court, tribunal or process would contain a statement including the following; “The principle of *equality before the law* incorporates being treated in such a way that your Indigenous status, ethnicity, culture, religion, socio-economic status, disability, age, gender, sexuality or their lack of legal representation will be respected and not cause difficulties in your dealings with a court/tribunal/process. The court/tribunal/process is adaptive and can be responsive to your cultural background and current circumstances and will make every effort to ensure you feel comfortable and able to participate fully in the legal process. If this means you wish to provide information about your cultural background or other information you believe could affect your ability to participate and be understood, this can be arranged. As far as possible, we will ensure you have access to appropriate information, advice and representation and that you understand what happens in the process and why”.

4.4 Adherence to the rule of law

The British Constitution is founded on *the rule of law* (and the supremacy of parliament). Its primary meaning is that everything must be done according to law. Those affected by others’ decisions and actions, especially decisions of the government may always resort to the courts of law; *the rule of law* is essential to fair and proper government. This right is *the principle of legality*.²⁷⁹ The second meaning of the rule of law includes legal and discretionary power which impact on the way governments can conduct their business; “...government should be conducted within a framework of recognised rules and principles which restrict

²⁷⁷ Ibid, 1104.

²⁷⁸ Ibid; the complete document covers many aspects surrounding the provision for community and individual difference in court proceedings.

²⁷⁹ Wade, H and Forsyth, C *Administrative Law* (7th ed, 1994) 24.

discretionary power”.²⁸⁰ *The rule of law* here is directed at prevention of abuse of discretionary power.

The rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedure. The principle is intended to be a safeguard against arbitrary governments.²⁸¹

The third meaning surrounds disputes that question the legality of acts of government. *The rule of law* ensures these disputes are heard by unbiased judges of the courts or judicial officers operating within administrative tribunals which in turn, are subject to control by the court. This process of checking preserves *the rule of law* and also includes the right to appeal decisions to higher courts. The fourth meaning promotes the principle *equality before the law*, determining that the law should be even handed between government and citizen in an administrative dispute, but not privileging or allowing exemptions to government. In New Zealand the Crown Proceedings Act 1950 is the mechanism that sets the limits of actions that can be taken by the Crown and officers of the Crown “and to civil proceedings by and against the Crown”.²⁸² The growth of powers in government intensifies the importance of *the rule of law*. Continuing to have the court of justice as the sole arbiter of lawfulness of officers or departments of central government means the court is the only judge.²⁸³ Extending beyond public administration *the rule of law* also means only those found to have committed legally defined crimes can be punished. Whatever the context “...the rule of law provides certainty as to the law and confidence that it will be properly applied to all”.²⁸⁴

The rule of law appears to have universal acceptance because it preserves the right of all people to the benefit and protection of the law; it enforces minimum standards of fairness, both substantive and procedural and individual liberties depend on it.²⁸⁵

²⁸⁰ Ibid, 24.

²⁸¹ Coxe, H M *Third World Countries and the Rule of Law* The Florida Bar Journal [2007] April, 6.

²⁸² Crown Proceedings Act 1950. Leading statement preceding “ANALYSIS”. 1950, No 54 obtained from <www.legislation.govt.nz> June 10th 2007.

²⁸³ Wade & Forsyth, supra n 281 at 33.

²⁸⁴ Law Commission, *Delivering Justice for All*, Report 85 (2004) 3.

²⁸⁵ Baylis, C “Statutory Mediators and Conciliators: Towards a Principled Approach” [2002] NZULR, 20, 104.

In summary, the rule of law will be present in a dispute resolution process when the participants experience even handed treatment by the judge or judicial officer at the hearing and the resulting decision is based on the correct and proper application of the law and is one that gives full reasons for the decision and states the timeframe and process for appealing the decision. Those with appeal rights will be able to exercise those rights. When the rule of law is applied to ADR processes such as mediation, the rule of natural justice will be present ensuring a procedurally fair process with proper accountability.

4.5 Fair and proper process

The concept of a fair and proper process and the right to a fair process are encapsulated in the Latin phrase *audi alteram partem* ‘hear the other side’, sometimes known as *the adversary principle*; when justice is to be done and seen to be done. This is said to be the more far-reaching of the principles of natural justice because it embraces almost every question of fair procedure (or due process) and has wide and detailed implications.²⁸⁶ Its origin is attributed to Saint Augustine who was born in Algeria in 354. His dictum was based on the broad principle that the exercising of legal power could not be validated unless the person who was going to suffer was first given the opportunity to be heard.²⁸⁷

Some writers believe that fairness in procedure (or procedural justice) for resolving conflicts is an invariable and fundamental kind of fairness, a “constant in human nature” across cultures, places and times.²⁸⁸ Universal fairness might include the ability to make a case and be heard and have impartiality and fairness determine direct decision making processes. It might also include participation in the process by all those affected by any decisions and in any context.²⁸⁹ These ideas relate to the principle of *process pluralism* which encompasses the spectrum of dispute resolution processes; adjudicative and consensual. The idea of ‘universal fairness’ leads the author to believe we have enough consensus to identify processes for making decisions that will allow us to “go forward and

²⁸⁶ Wade & Forsyth, *supra* n 281.

²⁸⁷ *Ibid*, 494.

²⁸⁸ Hampshire, *S Justice is Conflict* (2000) 2.

²⁸⁹ Hampshire in Menkel-Meadow, 2003, xii.

act”.²⁹⁰ It has also been argued that in determining a fair and proper process, the outcomes that derive from particular processes should be considered. The outcomes may be fair from a legal perspective but morally incongruent with the context of the conflict and the parties’ circumstances.²⁹¹

Indigenous DR processes typify those that are considered morally and culturally congruent with the contexts of conflicts and disputes involving Indigenous people.²⁹² It is claimed that dealing with Indigenous people in conventional settings does not provide an appropriate context for resolving disputes or morally or procedurally just methods for determining disputes that involve and impact on Indigenous people.²⁹³ Varied multi-disciplinary fields have joined the study of disputing processes over recent decades and decentred law from its primary position in the DR field. Sociologists, social psychologists, anthropologists, international relations theorists, game theorists, organizational management, labour relations, peace studies and political theorists are some of the disciplines and fields involved in debates about fair and just processes for disputing parties.²⁹⁴ Many writers from these fields promote consensual ADR processes in the belief that mutually arrived at decisions will have greater legitimacy and longevity than a determination reached by a judge or adjudicator.

The issue of true ‘consent’ however is challenged by others who consider power imbalance can seriously impact not only on an agreement to participate but also the negotiations that ensue from any settlement. This has become more of an issue since the introduction of statutory mediation and court directed mediation over the past two decades. Private negotiation or processes such as mediation and arbitration, including those that are court directed can have considerable impact on procedural change, yet there is an assumption at least at a theoretical level, that ADR does not advocate a particular ideology.²⁹⁵

²⁹⁰ Ibid, xiii.

²⁹¹ Menkel-Meadow, C *Dispute Processing and Conflict Resolution*, 2003, xii.

²⁹² Indigenous processes that involve torture would not be considered moral or right.

²⁹³ Behrendt, L *Indigenous Dispute Resolution*, (1995); Bell, C and Kahane, D (Eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (2004); Love M Te W “Te Waitangi Tribunal’s Role in Dispute Resolution of Indigenous (Maori) Treaty Claims” in *Intercultural Dispute Resolution in Aboriginal Contexts*, 2004, chapter 7; Treaty of Waitangi Fisheries Commission, *Dispute Resolution Procedures* (1995).

²⁹⁴ Ibid.

²⁹⁵ Astor, H and Chinkin, C *Dispute Resolution in Australia* (2nd ed, 2002) 29.

Feminist writers have claimed court mandated mediation in the family law area of child custody has concealed substantive change concerning how decisions about children are made. These decisions and ‘settlements’ previously public and contestable, now elude public scrutiny due to the private and confidential nature of mediation. Two simultaneous events influenced this change. The first was the implementation of mandatory mediation and the second change occurred when mediators ideologically committed to shared parenting, influenced custody outcomes within the private and confidential process of court mandated mediation. Accountability in this context is problematic and women feel pressured to settle based on the belief system of the mediators.²⁹⁶ Similar arguments have arisen where historical domestic violence features and parties are coerced to come together to ‘seek agreement’. Studies have shown this practice to be counter to the notion of consensual outcomes and not in the interests of women victims of violence or their children.²⁹⁷

Court directed mediation has both proponents and detractors with some writers believing it is a contradiction in terms,²⁹⁸ others extolling its virtues²⁹⁹ and still others believing that the fundamental value of self-determination is so seriously compromised the notion of parties “actually making their own decisions is purely illusory”.³⁰⁰ Although parties may be compelled to attend mediation, they are not forced to settle but in the Family Court at least, not settling is seen in a negative light both by lawyers acting for parties, and Judges who would prefer parties

²⁹⁶ Fineman, M “Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making” *Harvard Law Review* [1988] 101, 4, 727-774.

²⁹⁷ Elliott, C *In what circumstances should a mediation conference be convened in the Family Court of New Zealand under the Family Proceedings Act 1980 where domestic violence has occurred Inter Parties?* Massey University, 2002; Astor, H “Violence and Family Mediation: Policy” [1994] *Australian Journal of Family Law*, 8.

²⁹⁸ *TheLaw Society Journal*, March 2001, 65. Spigelman, J, who was then Chief Justice of New South Wales made the point that compulsory mediation is a contradiction in terms because a mediation process requires consensus. He had however formed the view the power to order mediation, conferred on the Court by Parliament, was a useful addition “to the armoury of the court to achieve its objectives”. In an article on Mediation and the Judicial Institution Sir Laurence Street AC commented that “ADR - more specifically mediation...is not an exercise in the administration of justice...Natural justice or due process have no more relevance to the mediation of a dispute than they have to the mediating of any commercial deal...(p795)... The warning that I venture to give ...is against the use by the court of a procedure that is in its very substance antithetical to the maintenance of public confidence in the integrity, and inaccessibility to external influence of the court system” (p796). *ALJ* [1997] Vol 71.

²⁹⁹ Venus, P *Court Directed Compulsory Mediation – Attendance or Participation* [2004] 15 *ADRJ* 29-37.

³⁰⁰ Spencer, D and Brogan, M *Mediation, Law and Practice* (2007) 245.

come to their own decisions.³⁰¹ An influential author decrying settlement writes about the critical differences between settlement and judgment; one assumes a rough equality between the parties and is based on bargaining via consent that is often coerced, and the other struggles against those inequalities through its aspiration to “an autonomy from distributional inequalities”³⁰² and a focus on rights and the rules of law. Civil litigation in his view “is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals”.³⁰³

Hearing the other side in a settlement context, can mean the loudest and most persuasive voice will gain the most, whereas hearing the other side in an adjudicative forum, usually means the process itself will balance the voices, leaving the adjudicators to determine disputes in accordance with general principles of law relating to the particular matter and in some instances, the substantial merits and justice of the case.³⁰⁴

Fair and proper process also encapsulates the principles of accessibility, efficiency and timeliness of process. These principles address individual rights contained in various pieces of legislation and their codes.³⁰⁵

In summary the principle of a *fair and proper process* means viewing processes from the perspective of *process pluralism* which would include determinative processes with a neutral adjudicator making a decision in favour of one party through the range of consensual and facilitative processes. All must be procedurally just and consider culture, class, race, sexuality and age of participants, adjusting processes if fairness is likely to be compromised. The processes available and those chosen must as far as possible promote self-determination and be morally and contextually congruent with participants’ life

³⁰¹ This is my personal experience following 14 years working within the Family Court system.

³⁰² Fiss, O “Against Settlement” *The Yale Law Journal* [1984], 93, 1073.

³⁰³ Ibid, 1089.

³⁰⁴ For example the Retirement Villages (Disputes Panel) Regulations 2006 state in Clause 20 (2) “A disputes panel must determine a dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case”.

³⁰⁵ Retirement Villages Act 2003, Schedule 4 Code of Residents’ Rights; New Zealand Bill of Rights Act 1990; Human Rights Act 1993.

situations.³⁰⁶ They should be accessible, timely, cost effective and efficient; responsive to power imbalance and contain principled remedial components that reflect research surrounding gender, age, culture, historical factors such as historical violence and how these can impact on parties' ability to fully participate in processes. In addition, *fairness of process* should be present in the perception and experience of the participants. Participant feedback should be sought, and evaluation and publication of results should follow.

4.6 Independent adjudication

The notion of independent adjudication was originally linked to Aristotle's Politics and later, philosophers Locke and Montesquieu.³⁰⁷ The principle of separation of powers now refers to the separation of legislative, judicial and executive powers of government. Locke's principle³⁰⁸ concerned only the powers of government through the separation of legislative and executive functions and was based on his belief that nobody can transfer to another, more power than he possesses himself. He asserted that the power of legislators be "limited to the public good of society ..." through the vesting of this power to declare laws to maintain peace, quiet and protect property of and for the citizens.³⁰⁹

Montesquieu reformulated Locke's distinction into the classical Westminster system which separates legislative, executive and judicial powers. The basis of this further separation was his understanding of liberty which for him required the separation of judicial power from the legislative and executive. His fear was that without the separation, subjects would be exposed to arbitrary control because the

³⁰⁶ I believe the colloquial term *horses for courses* is an apt alternative title for *process pluralism*. It encapsulates the notion of legitimacy and fit; in this case referring to appropriateness of process to context and outcome. Sometimes the terms "appropriate" or "proportionate" dispute resolution are used.

³⁰⁷ Ryan, K *Judges, Courts and Tribunals*, Paper presented at The Australian Judicial Conference Symposium on Judicial Independence and the Rule of Law at the Turn of the Century (1996) November 2-3.

³⁰⁸ John Locke (1632-1704) was a philosopher of freedom.

³⁰⁹ The year 1690 saw publication of Locke's two principle works *Essay Concerning Human Understanding* and *Two Treatises of Government*. The first established the principles of modern empiricism (we learn through experience) and the second established him as a supporter of revolutions and philosopher of freedom. This was based on the idea that government rests on popular consent and rebellion when government subverts the ends; the protection of life, liberty and property – for which it was established. Article obtained from John Locke (1632-1704), The Philosopher of Freedom at <http://www.blupete.com/literature/biographies/philosophy/locke.htm>. See also Ryan, K *Judges, Courts and Tribunals*, November 1996.

judges would then be the legislators. His concern was for the balance of power between the “three orders of the realm, the King, Lords and Commons”.³¹⁰ The checks and balances were then in place and the fundamental constitution formulated with the two part legislative body checking each other “by the mutual privilege of rejecting”.³¹¹ Both were restrained by the executive power just as the executive is by the legislative.

In 1932 the Donoughmore Report identified two major areas of concern about the extent of ministerial power and ministerial involvement in both legislative and adjudicative functions.³¹² Thirty years later the influential Franks report of 1957³¹³ was concerned with controversies between citizens and government and the administration of impartial justice to determine such disputes. This development and the increase in the use of tribunals followed intensive post Second World War social legislation. Tribunals were seen as a part of the machinery of adjudication, not part of the machinery of administration. Key principles contained in the Franks report were aimed at providing certainty about the independence of administrative tribunals from the department whose decisions they were reviewing. These principles continue to guide the work not only of tribunals but other processes that determine or investigate government or quasi government organisations. Key principles in the Franks report include;

- open, fair and impartial adjudication
- evidential rules should be modified in their application to tribunals
- tribunals must be independent of the department (or entity) concerned
- the procedure should be adversary and not inquisitorial
- Chairmen of Tribunals should normally be legally qualified; always in the case of appellate tribunals but members should comprise a lay majority in keeping with the Council’s guiding principle being the ordinary man’s sense of justice and fair play

³¹⁰ Ryan supra n 309 at 3.

³¹¹ These ideas were produced in *The Spirit of Law*, Book XI “Of the Laws Which Establish Political Liberty, with Regard to the Constitution”, Charles Montesquieu, 1748. Montesquieu cited in Ryan, 1996, 3. from an online edition of *The Spirit of Law* to be found at <<http://www.constitution.org/cm/sol-02.htm>>.

³¹² Craig, P *Administrative Law* (4th ed 1999) 64.

³¹³ The 1957 Report of the Franks Committee on “Administrative Tribunals and Enquiries” (Cmnd.218) led to the establishment of the Council on Tribunals which has itself provided influential reports of the work and administration of tribunals in the UK and Scotland. See also Tribunals their Organisation and Independence (Cm 3744, 1997).

- remuneration should be examined by the Council of Tribunals
- procedure should be orderly with informal atmosphere
- appeal and judicial review should be based on fact, law and merits from a first instance tribunal
- on principle there should not be an appeal from a tribunal to a Minister
- tribunals must provide reasons for their decisions

The independent Council of Tribunals for England and Wales and the Scottish Council were set up as a consequence of the recommendations of the Franks Report. These Councils would oversee the appointment of lay members of tribunals, leaving the chairmen to be appointed by the Lord Chancellor.³¹⁴ The advent of the Councils is seen to have strengthened the original principles contained in the Franks report, especially in regard to *independence*. Additional wording has been added to the independence principle; “the principal hallmark of any tribunal is that it must be independent. Equally importantly, it must be perceived as such”.³¹⁵ Australia and New Zealand now have a Council of Australasian Tribunals (COAT) whose work is making inroads to tribunal independence in New Zealand.³¹⁶

While there has been support for the organisation and work of tribunals over recent years there has also been concern expressed about the ad hoc nature of the growth and housing and resourcing of tribunals by departments directly affected by the decisions of the tribunal; their independence has been examined and questioned as has the quality of their decisions.³¹⁷ There is consensus surrounding the clustering of tribunals into fewer and larger ones. This is thought likely to

³¹⁴ Craig *supra* n 312 at 252.

³¹⁵ Council on Tribunals, *Tribunals their Organisation and Independence* (1997, Cm 3744) 3.

³¹⁶ The Council of Australasian Tribunals was formed in 2002. Its website <<http://www.coat.gov.au>> states its intention “to facilitate liaison and discussion between the heads of tribunals”. It has developed best practice models, model procedural rules, standards of behaviour and conduct for members along with increasing capacity for training and support for members. One of its objects is “to co-operate with institutions of academic learning, and to other persons having an interest in Tribunals and Tribunal practices and procedures”. The NZ branch of COAT is active through its Chairperson in consulting with government agencies about delivering justice in an independent and informed way. (Personal communication with Trish McConnell, Chairperson COAT NZ July 2006).

³¹⁷ Tracey, R *Administrative Tribunals – Some Emerging Issues*, A paper given at the ABA Conference, July 1990, 35; Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, 2004; Letts, P *Natural Justice and Tribunals*, A paper presented at the 9th Annual AIJA Tribunals Conference, Canberra (2006) 6-7 April.

make tribunals better known; be more accessible and more independent and authoritative.³¹⁸ Tribunals, like courts, must both be independent and seen to be independent. And this applies as much to private sector tribunals dealing with disputes between private individuals as those adjudicating between citizen and state. The perception is as important as the reality.³¹⁹ Likewise the independence of mediation and mediators has come under scrutiny as mediators mediating between dissatisfied clients and government departments or Crown entities has increased and statutory and court directed mediation has proliferated in the past two decades. When mediators are influenced by supply of work and ideology or policies of the organisations they are employed by, such as pressure to settle, it is possible outcomes may be affected.³²⁰ This has implication not only for the principle of independence, but also for fairness and integrity of the process.³²¹ This issue is heightened in situations where hybrid processes such as med-arb have been legitimised in legislation.³²²

The Retirement Villages Act 2003 has drawn a range of criticism about its independence in both the complaints process and dispute resolution process. There is a perception of lack of independence of mediation and the disputes panel because the Act places the responsibility for selection, ensuring independence and payment for both processes with the operator who will be in the majority of cases, a party to the dispute.³²³ In this Act and others identified, it seems the principle of independence and the perception of independence has been diluted through; ideology, the consultation process and the desire of the executive to process disputes in as timely, expeditiously and with the least disruption to administrative stability as possible. The Retirement Villages Act has the distinguishing feature of

³¹⁸ Law Commission, *Delivering Justice for All*, Report 85, 2004.

³¹⁹ Council on Tribunals "Tribunals their Organisation and Independence" (1997, Cm 3744, 3); Law Commission Report 85, *Delivering Justice*, 2004, 284. The Council on Tribunals in its report dated November 2002 stated "a) Tribunals should be free to reach decisions according to law without influence (actual or perceived) from the body or person whose decision is being challenged or appealed, or from anyone else" (Framework of Standards for Tribunals, Council of Tribunals, 3). This report was obtained from the website of the Council on Tribunals <www.council-on-tribunals.gov.uk/pubs_guid_framstan.htm> on the 13th September 2006.

³²⁰ Here I am referring to pressure to settle and mediators not using principled approaches to mediation when consumer or client rights are implicated.

³²¹ Baylis, C "Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions" [1999] VUWRL 30; Krivis, J *Preventing the Death of Mediation*, obtained from <www.firstmediation.com> 30th October 2006.

³²² For example the Fire Services Act 1975; Employment Relations Act 2000.

³²³ Grey Power and Age Concern raised this issue during the consultation period prior to implementation of the Act. The Retirement Commission reports receiving many concerns about the refurbishment requirements. Personal Communications August - November 2006.

being a protective mechanism for citizens entering into private living arrangements with business operators providing housing opportunities. for a significant number of senior citizens. Housing for seniors in the next decades will burgeon and governments faced with the 'ageing' problem are likely to want to minimize interference with this process.

In summary an independent adjudicative process is one that is accessible and where the judicial officer would not be subservient to the executive branch of Government or any entity with interests in the dispute. The tenure of office and payment of salary or fees would be standardised and institutional support would be delivered from a neutral administrative base. The selection and payment of adjudicators to hear disputes would be unambiguously neutral. An independent adjudicative process would adopt the rules of natural justice hearing evidence from both sides including the evidence of witnesses and weigh that evidence according to the principles of law relating to the matter. When a matter is not litigated, usually the law and substantial merits and justice of the case would be the criteria for determination. The adjudicator would be flexible and responsive to the context and the parties presenting their case while also ensuring impartiality, demonstrated by listening carefully and seeking information in a thorough and even handed way. The adjudicator would understand the inequities surrounding culture, gender and class including age of participants and be able to adjust the process to accommodate these factors. This would go some way in demonstrating independence from ideological influence about how adjudication should be conducted. The process would be open and reasoned decisions made and the right of appeal and process of appeal clearly explained.

4.7 Emerging principles

4.7.1 Process pluralism: horses for courses

The context of a retirement village and the capabilities of residents should be a determining factor in the choice of a dispute resolution process. To impose a process that may produce an outcome directly influenced by the disadvantaged position of the less powerful party must be considered to lack morality. It also has the potential to jeopardise procedural justice. In addition, to impose a process that is so unfriendly and inequitable towards users they would choose to avoid conflict

and suffer on-going disadvantage, should be seen as immoral in the extreme.³²⁴ Identifying legitimate process for retirement village disputes necessarily means in the first instance, rejecting processes that leave residents unsupported in negotiations and secondly, processes must be principled in terms of openness about how power imbalance would be addressed and residents' rights privileged and non-negotiable.³²⁵

The concept of *process pluralism* has derived from a range of process institutions developed as a response to what Galanter described in 1985 as "the law in action". This was pursued by actors ranging from litigants to mediators pursuing "their visions of advantage and justice".³²⁶

Regulatory enterprise is not an official monopoly. There are multiple arenas of normative innovation and interpretation. Legal pluralism, it turns out, is not just a condition of some less developed societies. Under rubrics like private governments, semi-autonomous social fields, indigenous law etc., we have learned that *pluralism* is very much with us...The official law does not preside over a landscape barren of regulation, but over a thick tangle of rivals and companions...³²⁷ [emphasis added]

The invariability of indirectly attendant and unintended consequences surrounding the pronouncement and implementation of legal norms is recognised as coming also from competition for scarce resources: as overload of courts and costs have skyrocketed in recent decades so too has the proliferation of ADR processes.³²⁸ 'Rival' ways of understanding the legal world have emerged, and processes developed and considered to be more responsive, inquiring and contextually appropriate than traditional legal processes have become institutionalised. Hampshire, who pursued procedural justice from the perspective of a moral philosopher, identified several principles which he considered crucial to an understanding of procedural justice.³²⁹

The first principle relates to the idea that conflict is human, ubiquitous and essential for understanding what is important about ourselves and our civil

³²⁴ This issue is elaborated further in relation to the Australian National Native Titles Tribunal, Chapter Four.

³²⁵ While both parties have rights, Schedule 4 of the RVA sets out a Code of Residents' Rights which includes the right not to be exploited. RVA Schedule 4, 8.

³²⁶ Galanter, M "The Legal Malaise; or Justice Observed" [1985] Law and Society Rev 19, 4, 537-556.

³²⁷ Ibid, 544.

³²⁸ Ibid.

³²⁹ These have been restated by Menkel-Meadow.

government or society. The second relates to procedural fairness and the notion that “we might have some almost universal ideas about procedural fairness...”³³⁰ The third concerns the principle *process pluralism*; that is fair procedures in any context should allow all parties likely to be affected by a decision to participate and be heard. The fourth principle requires that conflict resolution be acknowledged as a multi-dimensional human skill “to be theorized about, taught, learned and practiced”.³³¹

Menkel-Meadow suggests Hampshire has discounted multi-party dispute contexts and focussed only on “the adversary principle or merely hearing the other side”.³³² Menkel-Meadow sees *pluralism* as encompassing not only the game-players but all those affected by the game. Both dual and multi-party disputes fit within the framework of *process-pluralism* and ‘context’ and ‘legitimacy of process’ is applicable for both.

Procedural justice should be viewed within the context of ‘process pluralism’ because particular processes affect outcomes and each produces its own morality.³³³ For example an adversarial process whether litigation or negotiation will “limit the field of possible outcomes to distributive arrangements” including unprincipled compromises; whereas a different process can allow more creative options such as “joint-gain” and “wealth creation”. Critics have suggested that a focus on “participatory processes” can create “false harmony” and could be equally as unjust as the adversarial “conventional institutions”.³³⁴ *Process pluralism* requires that practitioners know what they are doing and why.

In summary, *process pluralism* addresses procedural justice offering a spectrum of dispute resolution processes³³⁵ that can be context specific or adapted to meet the contextual and cultural needs of parties. The principle *pluralism* determines all parties should participate and be heard in decisions affecting them. Therefore conflict specialists involved will be appropriately qualified and skilled to assist

³³⁰ Menkel-Meadow, C *Dispute Processing and Conflict Resolution*, 2003, xiii-xiv.

³³¹ Ibid.

³³² Ibid, xv.

³³³ Ibid, xiv.

³³⁴ Nader, L “Controlling processes in the practice of law: Hierarchy and pacification in the movement to reform dispute ideology”, (1993) cited in Menkel-Meadow (2003) xiv.

³³⁵ This includes determinative processes such as adjudication through the range of consensual processes including negotiation and mediation.

individuals and groups choose the most appropriate process or processes. This will include substantial knowledge about facilitative, advisory and determinative processes and what each process might offer particular circumstances. Parties will be provided with information about the type of outcomes that different processes produce; what types of problems they are supposed to solve; how imbalance of power and individual rights will be dealt with during the process and under what conditions some processes would result in termination of the process. The likely cost and methods of accountability will be provided for each process and contracts to undertake any of the processes available for perusal. This pre-process familiarization for parties will assist in fulfilling the aspiration of democratic participation and provide conflict specialists the opportunity to be involved in expert education about their professional field of choice and allied fields.

4.7.2 *Advocacy – lay and legal*

Non-legal advocacy has been proposed as the way forward for the conflict field. According to Mayer the conflict field has the potential to make a much bigger difference by not avoiding conflict but rather engaging in it constructively.³³⁶ His most recent contribution to the conflict resolution field, *Beyond Neutrality* has pushed the boundaries beyond mediation and facilitation because these processes are not being called upon in contexts that are “crying out” for the assistance of specialist conflict professionals.

There is a perceived crisis in the field which has arisen from of its inability to significantly impact on serious national and international issues, from long standing discriminatory practices to the perpetration of violence and terror on innocent people. Mayer’s answer to the crisis that has evolved after twenty five years is for conflict professionals to change the way they think about themselves and their work; changing self-perceptions will “both reflect the market for ourselves and shape it”.³³⁷

Helping people engage in conflict means not abandoning commitment to conflict resolution or conflict management but instead, putting it in a broader context. Conflict engagement sometimes necessarily means working with people to raise

³³⁶ Mayer, B *Beyond Neutrality* (2004) 181.

³³⁷ Mayer, B *The Dynamics of Conflict Resolution* (2000) 296.

the level of conflict; an often difficult and risky proposition but one he believes is sometimes necessary to settle conflict.

The concept of advocacy placed within the spectrum of process pluralism, will as other processes have done previously, develop the theoretical and conceptual tools, organizational structures and track record to help people engage in conflict and actually resolve it. A goal is to assist people

to find their own voice and respect others, to mobilize their own resources and power...and to appreciate the concerns of those with whom they are in conflict.³³⁸

Helping people to get their conflicts noticed, raising the level of conflict and assisting people to manage conflict and “conduct themselves through the course of a conflict”³³⁹ is seen by Mayer as a necessary prerequisite to effective resolution.

Mayer’s work is consistent, and compatible with the view that conflict is inevitable and functional in a society³⁴⁰ the corollary being, we have limitless opportunity to find ways to deal with it and positively effect systemic change through the process. The narrative therapeutic and mediation ‘stream’³⁴¹ is a branch of counselling and mediation that uses language to separate or externalise problems (from people) so that problems can be examined from an observer’s point of view. The goal of the narrative model is to gain mastery over the problem without attaching blame. The narrative field for the past two decades has promoted ‘public conversations’ as a way of bringing conflict into the open, to share information, dispel myths and endeavour to find common ground and understand others’ positions; likewise, consultative models for public administration, policy formulation and implementation.³⁴² The form of advocacy promoted by Mayer fits within this mould; it seeks to expose the reasons behind conflict and place them in a position where they are able to be examined and debated

³³⁸ Ibid, 296.

³³⁹ Ibid, 181.

³⁴⁰ Coser, L *The Functions of Social Conflict*, 1956; Fuller, L *The Morality of Law*, 1977; Galanter, M “The Legal Malaise or Justice Observed” [1985] *Law and Social Review* 19, 4; Hampshire, S *Justice is Conflict*, 2000.

³⁴¹ Drewery, W and Monk, G “Some Reflections on the Therapeutic Power of Poststructuralism” *International Journal for the Advancement of Counselling* (1994) 17 (4) 303; Winslade, J Monk, G and Cotter, A “A Narrative Approach to the Practice of Mediation” *Negotiation Journal* (1998) 14 (1) 21-41.

³⁴² Blomgren Bingham, L and Nabatchi, R “The New Governance: Practice and Processes for Stakeholders and Citizen Participation in the Work of Government” *Public Administration Review*, [2005] 65, 5.

in a constructive way. Traditional advocacy has three key elements; representation, empowerment and substantive focus which requires experience in the area in which advocates are working.³⁴³

When embracing advocacy as a conflict specialist function, additional skills are required; communication skills such as listening, ability to frame and deliver messages, arguments and proposals “in a way that moves a conflict forward”, and also the ability to raise difficult issues.³⁴⁴ Advocates as conflict specialists also need to be problem solvers, coaches and counsellors and negotiators. These roles require different sets of skills than those contributed by traditional legal advocacy. Advocacy is now being promoted as an additional process to include in the spectrum of ADR processes.

In summary, advocacy would be present in a conflict context when a party could demonstrate through the assistance of an advocate, the multiplicity of levels contributing to a situation and then be able to consider ways to bring the conflict into the open and engage in personal or public debate with those parties with whom they are in conflict. The revelation of issues outside of those stated would indicate that deeper issues were being exposed having more to do with the conflict than those claimed. This disclosure of deeper issues would show that strategizing through *advocacy* had been successful in its impact. To have reached this point would have required the party to understand the nature of conflict as a complex adaptive system and also to understand the development process and associated tasks that need to be accomplished before conflict can be addressed effectively. The tasks include being aware of what we are in conflict about and who we are in conflict with; giving expression in some way to the existence of the conflict in order to achieve self realisation of the conflict; mobilizing resources such as will, determination, clarity, allies, legal arguments, finances to bring the conflict to a level of planned intensity; taking active steps that bring about a response to a further goal – this may raise or lower intensity; finding ways to connect with those whom we are in conflict with through negotiation, public actions, third parties or any other way possible to achieve connection; satisfying some need that has

³⁴³ Mayer, B “Beyond Neutrality: Confronting the Crisis in Conflict Resolution” (2004) 251.

³⁴⁴ Ibid, 255.

resulted from the conflict; releasing energy occupied by the conflict; being involved in the selection of the process to accomplish the tasks required.³⁴⁵

4.8 Summary

This chapter has discussed key principles that should inform DR. Taken together I will utilize them in my discussion. The principles are;

Equality before the law

Adherence to the rule of law

Fair and proper process

Independent adjudication which includes the principle of impartiality and the expectation of expertise in the DR field

Accessibility

Efficiency, including fair and timely process

Process pluralism

Advocacy

From this point I will cross reference to these principles and the ideal model that will emerge in Chapter Eight will be protected by them.

³⁴⁵ Mayer, B *Beyond Neutrality*, 2004, 188-189.

Chapter 5 *How do the processes relevant to retirement village complaints and disputes align with the principles?*

5.1 Introduction

Having established the essential dispute resolution principles I will now approach the principles in the context of retirement village complaints and disputes and the processes that might provide appropriate responses to this conflict. Firstly I will cover the role of conflict and consider conflict as a phenomenon in retirement villages. Next I will utilize Sourdin's 'process map' to evaluate a number of processes that might provide appropriate responses to conflict in the retirement village context; these are the facilitative processes, negotiation, facilitated negotiation, partnering, mediation and the determinative process adjudication. I have included in this evaluation impressions from the first two disputes³⁴⁶ conducted under the Act and applied the statements of principle identified in Chapter Four.

5.2 Conflict, its role and retirement villages

The needs of a specific group were the rationale for the Retirement Village Act 2003. If we take a snap shot of a retirement village from the boundaries of the macrosystem, we will find a 'class' of older citizens living out on average, the final decade of their lives.³⁴⁷ This 'class' of citizen is predominantly female living alone. Their 'capital' and therefore their effectiveness will be reduced because of their inability to claw back the inevitable physical issues of ageing and their decreasing economic capital. Chapter two has identified areas about this 'class' and its relationship to conflict and according to Coser,³⁴⁸ conflict is everywhere, conflict is inevitable and conflict is essential to social cohesion and interaction.

³⁴⁶ See pages 128 and 129 for further analysis of these disputes.

³⁴⁷ The Retirement Commission, Retirement Village Survey, December 2006, (p3) found 70% of residents in the survey live alone, 70% are women and this figure increases with age. Almost ¾ (73%) are aged over 80 years, only 7% are under 70 years and 12% are over 90 years of age.

³⁴⁸ Coser, L 1956 cited in Mayer, B *Beyond Neutrality* (2004) 175.

This cliché (at least in part) coined from Coser's work, is extended through his analysis of conflict. He asserts we have a certain dependence on conflict to bring together otherwise isolated groups, tackle difficult and divisive issues, focus on important issues, include people not usually in our sphere, break down barriers and provide an outlet for pent-up emotion. Individuals, couples, groups, organisations and even governments are seen to have developed a fragile form of unity if they are without conflict. However, for retirement village residents, conflict could impact heavily due to the age and gender of the majority of residents especially if the conflict involves operators or staff. Conflict in retirement villages can be between residents; residents' committees having been identified as a context for domination and power contest.³⁴⁹ The focus here however is on the conflict that develops into disputes between residents and operators when usually matters of money are concerned.³⁵⁰ Conflict in this context may have a catalyst role. If identified and responded to wisely, conflict should ensure communication and consultation between operators and residents. This could avoid issues such as the imposition of arbitrary decisions that can lead to disputes and bad publicity for village operators.

The difference between a complaint and a dispute within the context of the Act is best explained in terms of steps in a process. Complaint systems generally underpin dispute systems and are usually internal to an organisation.³⁵¹ A complaint is an expression of dissatisfaction that a resident makes to an operator of a retirement village about any aspect of village life that concerns the resident. Once a complaint has been made, a process should occur that addresses the issues involved. The focus at this point is on 'resolution' and informal processes (ADR) to achieve this outcome. If the issues remain unresolved then a disputes process can be initiated after 20 days, either by the resident or the operator in certain

³⁴⁹ NSW Office of Fair Trading, Review of Retirement Villages Act 1999, 14 obtained from <www.fairtrading.nsw.gov.au> November 2006 ; Streib, L & Metsch, L "Conflict in Retirement Communities: Applying an Analytical Framework" *Research on Ageing* [2002] 24, 1, 67-86.

³⁵⁰ NSW Minister for Fair Trading, 23 November 2006 press release sent by Secretary NSW Residents' Association Inc. N. Carnegie 23rd November 2006; Keogh, J & Bradley, P "The Potential for contractual disputes in retirement village living: an examination of recent litigation arising from resident contract disputes in NSW retirement villages" paper Jan 2002. Retirement Village Amendment Bill 2006 NSW; Queensland Commercial and Consumer Tribunal Retirement Village decisions available at website <www.tribunals.qld.gov>

³⁵¹ Sourdin, T *Alternative Dispute Resolution* (2005, 2nd ed).

circumstances and this can involve a process where a determination is sought through the appointment of a disputes panel.³⁵²

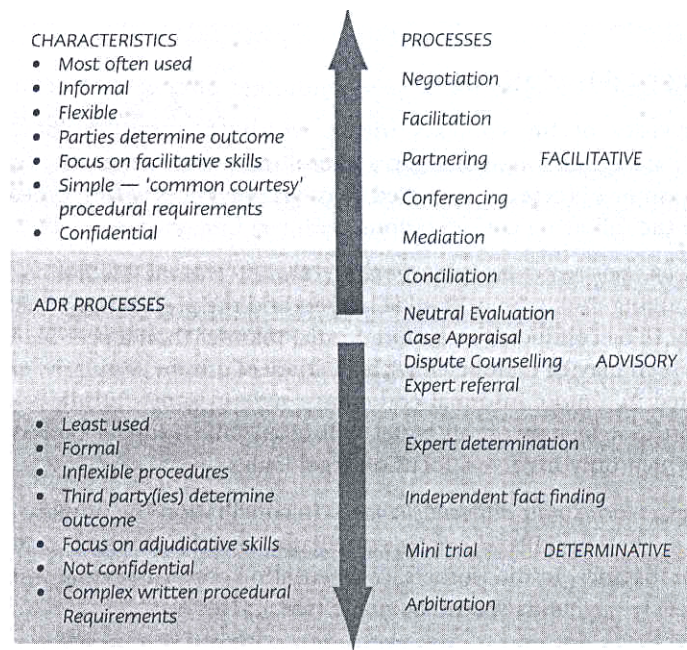
5.3 Retirement village residents' needs: how do the various processes align?

Chapter Four examined principles that should underpin dispute resolution processes involving less powerful groups; in this case retirement village residents who are in the majority, female with an average age of 83 years. Ideally what is required for residents is a process that will not result in disadvantage to the resident due to lack of knowledge about legal processes and does not pit them against more powerful operators in coerced negotiations or incur additional costs and stress, associated with disputes about their living arrangements. A cluster of resident needs emerged from Chapter Two and will also be considered in the process of evaluating suitable DR processes for the retirement village context. These are;

1. Resident representation/advocacy
2. Legal provision for class actions by residents
3. Legal recognition of residents' committees
4. Education about power and control dynamics in residential settings and prevention of elder abuse.

The principles of *process pluralism* and *advocacy* are included. Each process will be evaluated through application of the *statements of principle* set out in Part 1. *Advocacy* is both a principle and a process; as a process it falls within the advisory and facilitative categories and as a principle it may cover the spectrum of DR processes. *Process pluralism* in this study is a principle with two parts. The first is what Menkel-Meadow describes as “the principle of process pluralism” as it relates to fair process: **all** parties should be heard on and participate in, any decisions affecting them. The second incorporates the entire spectrum of DR processes and involves the selection of a process or processes that best fit the context of the participants.

³⁵² Part 4, s (59) Retirement Villages Act 2003.



Sourdin 2005:20

The distinction between litigation and ADR is authoritatively stated by Sir Laurence Street³⁵³ in a foreword to Sourdin's book. He focuses specifically on what ADR does **not** involve.

In the final analysis, adjudicative or determinative processes are not dispute resolution processes. Judges do not *resolve* disputes coming before their courts; they *decide* disputes or *adjudicate* on them. Disputes are *resolved* through consensual interaction between the disputants...

...The important distinction between *deciding* and *resolving* disputes has been masked by the use of the letters ADR and attempts to render them meaningful. I believe that the time has now come when further debate on this topic is profitless. The letters should be seen in their own right as describing an holistic concept of a consensus-oriented approach to dealing with disputes or conflict. The concept encompasses conflict *avoidance*, conflict *management* and conflict *resolution*. The over-arching element of ADR in addressing these three aspects of conflict is the consensus-oriented philosophy that pervades the newly evolving recognition that conflict avoidance, management and resolution are simply three closely related sequential approaches each of which has relevance and application within the broad field of social and personal interaction.³⁵⁴

The reasons people generally enter adversarial processes is said to surround the belief that they are entering an arena in which principles are at stake and that whatever transpires will be partially linked to right and justice.³⁵⁵ The governing principle of the adversarial process is *the rule of law* which provides "a worthy aspiration for any decision-making process"³⁵⁶ and probably one that those using

³⁵³ "Forward to the First Edition" by Sir Laurence Street in Sourdin, T (2nd ed 2005).

³⁵⁴ Ibid..

³⁵⁵ Grillo, T "The Mediation Alternative: Process Dangers for Women" [1991] YLJ 100, 6, 1559.

³⁵⁶ Ibid.

the process place heavy reliance upon. We now have a protective piece of legislation covering retirement village residents making litigation a less likely process in the future; the determinative disputes panel mechanism being the choice. However, before conflict reaches dispute proportions parties are expected to attempt resolution through the *complaints facility*. Through this facility, it is likely mediation will be promoted ahead of the disputes panel. Twenty days after a complaint has been made a disputes notice can be issued; the *complaints facility* therefore has to be accessible and speedy in response.

5.3.1 Mediation

Mediation is the most frequently used of the ‘alternative’ facilitative processes and the most difficult to define or describe due to the way it has evolved and the uses it has been put to over the past two decades. Mediation no longer necessarily falls exclusively within the range of consensual processes. Compulsory mediation is now a regular feature of contractual arrangements in employment and commercial settings and within the court system. In the context of the Retirement Villages Act, following informal negotiation mediation is likely to be the preferred if not compulsory second step *complaints facility* process.³⁵⁷

Generally definitions of mediation have evolved from two approaches; conceptual and descriptive. Boule, Jones and Goldblatt provide examples of both approaches. A conceptualist definition is;

The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues to develop options, consider alternatives, and reach consensual settlement that will accommodate their needs.³⁵⁸

And a descriptive approach;

...a process of dispute resolution in which the disputants meet with the mediator to talk over and attempt to settle their differences.³⁵⁹

Sourdin adds to the conceptual/descriptive approaches with two models of mediation; *evaluative* and *facilitative*; both are seen as empowering for parties and involve compromise. She believes that “where lawyers expect and promote

³⁵⁷ An ideal first step would be an attempt at resolution through informal communication. If this failed it is likely mediation would be advised. Section (2)(a) of the Act states “A resident may not require resolution of a dispute (other than a dispute referred to in section 53 (3) by a disputes panel unless – the dispute has earlier been referred to the complaints facility...”

³⁵⁸ Folberg and Taylor in Boule, L Jones, J and Goldblatt, V *Mediation: Principles, Process, Practice* (NZ ed. 1998) 4.

³⁵⁹ Roberts, M in Boule, Jones & Goldblatt, 5.

evaluative mediation models, the mediator chosen is likely to adopt a more evaluative approach”.³⁶⁰ Sourdin uses a description from NADRAC

Evaluative mediation is a term used to describe processes where a mediator, as well as facilitating negotiations between parties, also evaluates the merits of the dispute and provides suggestions as to its resolution...

and attaches a note:

...evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the definition of mediation provided in [the NADRAC] glossary.³⁶¹

The NADRAC description of mediation states;

A process in which parties 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. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is “a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute”.³⁶²

What is the potential for using these two models of mediation in the context of retirement villages? How do they rate in relation to the *statements of principle*?

- ***Equality before the law***: In the context of retirement village conflicts, mediators represent ‘authority’ and by proxy, the law. The age and gender of the majority of residents will mean a considerable power imbalance between the parties; this comes in the form of both individual and structural power and is likely to result in difficulties for the resident. Mediators therefore are expected to possess knowledge about gender disadvantage in mediation, including the difficulties faced by older people in negotiation with those they see as capital rich and socially advantaged. However, mediator attempts to balance power between unequal parties has been criticised for a number of reasons including the existence of partiality which can mean the activation of prejudices “based on gender, social class, and even desired outcomes”. Also countertransference, a complementary process which refers to the mediator’s response to the party’s superimposed view of the situation,

³⁶⁰ Sourdin, T *Alternative Dispute Resolution* (2nd ed 2005) at 2.252, 28.

³⁶¹ National Alternative Dispute Resolution Advisory Council (NADRAC) fn 2, p 8 cited in Sourdin (2005) 28.

³⁶² Ibid, fn 2, p 9.

projected³⁶³ onto the mediator by the party. This, according to Grillo explains “why mediators’ attempts to redress power imbalances cannot necessarily be relied upon to meet the problem of unequal bargaining power”.³⁶⁴ Others argue that the image that power can be balanced in such as way as to produce some equality of power “fails to account for the dynamics of power and the interactional context within which it must be understood”.³⁶⁵ Writing on the subject of gender and [any] mediation Grillo asserts;

...in a very fundamental way, impartiality is a myth...The concept of impartiality is based on, the notion of an observer without perspective. But any observer inevitably sees from a particular perspective whether that perspective is acknowledged or not. Mediators like other human beings, have biases, values, and points of view. They all have experiences in their lives that influence how they react to others, independent of anything the others might do...A mediator’s attempt to remain neutral is to some extent always doomed to failure, but it is an important effort nonetheless...The most salient feature of a good mediation process is that the failures of neutrality are not denied, but recognized and addressed...³⁶⁶

And on “Mediators and Judges: the importance of form” she adds;

Mediators are not supposed to be judges...It is assumed, however, that mediators as well as judges can and should be impartial. In the context of judging, Judith Resnik has shown how impartiality among judges is an aspiration, not a reality. Rather, a demonstrable “picture of partiality, of prejudgement, of judges ready to translate racial and sexist views into law” emerges. Even among well-intentioned judges who try to be impartial, the twin dangers of unacknowledged perspective and unrecognized partiality are always present. These dangers, serious enough in the context of judging, are exacerbated in mediation. There are numerous restrictions on the way the decision maker ordinarily relates to parties in the adversarial setting that simply do not apply to mediation...At the most mundane level, judges sit apart from the parties...they speak to the parties’ attorneys...they do not ordinarily communicate with one side separately...judges can consider only certain evidence. By contrast, mediators sit close to the parties and speak directly to them. They frequently meet with the parties separately, often without subsequently telling the opposing party what transpired...no attempt is made to limit the sort of material that may be considered in the session on the grounds of privilege or relevancy...In sum, a mediator establishes what may be a risky relationship of informality and apparent intimacy with the parties...³⁶⁷

- Under a heading “Implicit agendas and defining fairness” Grillo speaks of the personal values, recognized and unrecognized of the mediator. These values are derived from multiple sources including professional training and the contexts and communities in which a mediator lives and

³⁶³ Transference also means projection; the client/party transfers/projects a view of a situation or personal world view onto a mediator and the mediator counters this using a response that comes from the mediator’s own past experiences. (Grillo, 1991, 1591)

³⁶⁴ Grillo, T *The Mediation Alternative: Process Dangers for Women* [1991] YLJ 100, 6, 1592.

³⁶⁵ Mayer, B *The Dynamics of Conflict Resolution*, 1990, 50-51.

³⁶⁶ Grillo, supra n 364 at 1587.

³⁶⁷ Ibid, 1588.

works. The reliance on these values whether recognized or not, may not be disclosed to parties. “It may appear to the mediator, as to any of us, that her perception of the world is objectively true”.³⁶⁸

- Mediation for older people, especially women appears to have many disadvantages. To understand what happens in the process of mediation and why, would probably require residents to undergo coaching for mediation prior to attendance. Whether that is a responsible or fair expectation of residents raises a number of issues including whether mediation is a *fair and proper process* for aged residents.
- *Adherence to the rule of law* can have meaning within a mediation context. When a mediator provides a procedurally fair process for dealing with issues and demonstrates even handed treatment of the parties they are adhering to the rule of law in a non-determinative context. Additionally, in the event of lack of settlement parties have the right to proceed to a determinative process and the mediator should make this known to the parties.
- *A fair and proper process* according to the *statement of principle* requires amongst other things that a process must be procedurally just and take account of culture, class, race, sexuality and age of participants. It must also promote self-determination. The absence of lawyers in the majority of mediations and the privacy and intimacy of the process, results in difficulties in ensuring accountability of the process. If residents have family members who can attend, this would assist, but for those lacking support, the process does not seem one that would encourage participation from aged, conservative, ‘stability motivated’ residents.³⁶⁹ In the event of a ‘settlement’ being reached, the mediator has to be assured that the content of the settlement will hold in the event of an appeal. If a mediator had doubts about this, the integrity of the

³⁶⁸ Ibid, 1593.

³⁶⁹ Chapter two has identified the key reasons people move into retirement villages; security and stability head the list. Engaging in conflict may be in direct opposition to these goals; silence and maintenance of the status quo is more likely to be the preferred option.

process would be compromised and the professional integrity of the mediator called into question.

A retirement village context with the potential for examples of extreme power imbalance would, in some instances, contain all the ingredients of a complex and challenging procedural and ethical maze for even the most experienced and sensitive mediator. On the other hand parties can attend mediation and exercise self-determination by attending mediation and fail to reach an agreement. Who would know whether the failure to reach agreement resulted from a genuine lack of agreement or from a strategic decision taken to ensure the conflict reached a determinative process?

In any event, whether mediation is undertaken voluntarily or mandated, whether it is a commercial, neighbourhood or family matter, parties can refuse to negotiate and retain the right to resolve their issues by adjudication.³⁷⁰

If adequately assessed using the principles of *fair and proper process* and *process pluralism*, it may be decided that some retirement village disputes should not be mediated; the age and relative vulnerability of residents disqualifying the process.

In summary, the independence, fairness and by implication effectiveness, of the mediation process in a retirement village would depend to a large degree on the model of mediation being used by the mediator; the self-awareness, perceptiveness, training, knowledge base and skills of the mediator, especially application of the ethical duty to facilitate a fair process. This would include whether the process is morally and contextually congruent with residents' situations. Whether the mediator made explicit their own value base including how they would deal with power differences and whether the parties were aware of their legal rights, especially if financial matters were at stake, are all critical to actual and perceived responses to the concepts of a *fair and proper process*. Whether *fairness of process* was or had been present in the perception of the

³⁷⁰ Brown, B and Marriott, A *ADR Principles and Practice* (2nd ed , 1999) 136.

resident may be demonstrated by their level of participation in the process and their evaluation of the process after the event.

Independent adjudication/mediation in the retirement village context is problematic. The identification, selection, and payment of adjudicator under the Act is the responsibility of one party, the operator. This is in direct opposition to the *statement of principle*. If mediation is used in the context of the *complaints facility*, the same issues arise. In addition, the responsibility to ascertain the independence of the mediator is also allocated the operator. In the case of ‘evaluative mediation’ the independence of the mediator takes on an even higher value because parties are reliant on the impartiality of the mediator and their knowledge and expertise of the matters requiring resolution. The connection of the mediator to the operator compromises the ethical duty of impartiality, even if only in the perception of the resident. These conditions make the process potentially unfavourable and unattractive to the resident.

If an operator has previously used a mediator in a village dispute this also compromises the independence of the mediator and the role itself. Residents usually go into DR processes knowing much less about the process and the DR professional than the operator which places them immediately in a disadvantaged position. While it may not be possible to avoid this totally, having residents choose the mediator may go some way in avoiding what can be seen as an unbalanced and unacceptable starting point in attempts to resolve a dispute.

Most significantly, the lack of independence of the process also impacts of the principle of *fair and proper process*. By not considering how authority placed with the operator to set up the process might seem from the resident’s perspective, the principle of *fairness of process* has been disregarded. This omission has illuminated the lack of synchronization in the Act model with context and culture/age of residents who are key participants in any DR processes.

Timeliness, cost and accessibility: It may be that not all trained and/or accredited mediators would meet the skill requirements implicated in the *statements of*

principle. Shortage of skills usually equates with time delays which in turn can push up costs. We have no way of knowing at this point, what the supply and demand for suitably qualified mediators is in the retirement village sector. If we use the information supplied by members of RVANZ,³⁷¹ the demand is extremely low, but come the implementation of the Code of Practice later in 2007 containing resident focussed requirements, the situation may change. Time, experience and credible evaluation will eventually tell. *Timeliness, cost* and *accessibility* therefore could be an issue if parties knew what they wanted and needed from a mediator and the supply of mediators to meet that 'ideal' was not as great as many professional bodies would hope.

Advocacy could be a mechanism by which residents' vulnerability may be reduced in a retirement village dispute. Having an advocate available to coach a resident prior to a mediation and if necessary act as the resident's representative³⁷² at the mediation has similarities to the concept of union involvement in employment disputes. Advocates would be partisan; qualified and experienced conflict specialists whose role would be incorporated within the *process pluralism* principle. They would be accountable to the resident and their own professional body and act as an extension of the resident's right to self-determination. Cost covering for this role may require policy initiatives.

5.3.2 Partnering

I have included partnering because of its dual features; it is both a dispute avoidance and resolution process. Partnering is used informally in many business and other relationships to avoid problems. It involves parties meeting and deciding by agreement to follow consistent and agreed steps in communication when relationships are working well and also when issues arise.³⁷³ The idea is to

³⁷¹ In October 2006 three RVANZ members responded to a request by RVANZ for information about the use of mediation in their villages.

³⁷² Acting as a non-legal advocate for an aged and distressed resident is a potentially radical move away from a third party neutral role. It offers promise for those residents who have legitimate issues with operators but lack the support or personal capability to follow through on a complaint action. Under the Act s 49 states "Resident's rights may be exercised by personal representative and s 67 (4) covers representation at a disputes hearing; residents can be represented at their own cost in the context of 'rights' and 'disputes'. Mayer's concept of advocacy is not limited to representation only.

³⁷³ Sourdin, T *Alternative Dispute Resolution* (2nd ed, 2005) 2.230.

make explicit particular ground rules to aid open communication about all aspects of the relationships and ‘normalise’ conflict as a predictable consequence of human relationships. It requires those involved to act in good faith and fair dealing with others in the partnership, and often involves consensual decisions about strategies to avoid future problems: it develops unique incremental communication building blocks particular to unique sets of relationships. It seeks collaboration on defining mutual objectives and will often include ways parties might deal with more formal problem-solving and include specific DR strategies.³⁷⁴ Its strength lies in its objective to set clear problem-solving strategies in place when relationships are first formed; when issues arise those involved in the partnership can deal with the issues according to their pre-arranged strategies and void disputes. The Employment Relations Act 2000 through its objective to build mutually trusting and productive working relationships is an example of partnering that will be discussed in Chapter Six.

I make the following points in relation to the statements of principles;

- The concept of ‘partnering’ in a retirement village setting could hold appeal if it forms part of the resident’s entry contract and has been vetted by the resident’s legal adviser. This may overcome the problem surrounding operators and residents not communicating their expectations to each other at the time contracts establishing relationships are being negotiated.³⁷⁵ Fairness and effectiveness are implicated here. Also timeliness as it would be an immediate contract. Should problems arise, one or other of the ‘facilitated’ processes could be utilised. As long as the resident’s rights were known to the facilitator and not compromised during any facilitated process, the process would maintain integrity.

³⁷⁴ Ibid, 2.230. Sourdin includes the Australian National Alternative Dispute Resolution Advisory Council (NADRAC) description; “Partnering involves the development of a “charter based on the parties” [sic] need to act in good faith and with fair dealing with one another. The partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem-solving and dispute resolution strategies”.

³⁷⁵ Keogh, J Bradley, P “The Potential for Contractual Disputes in Retirement Village Living: An Examination of Recent Litigation Arising from Resident Contract Disputes in NSW Retirement Villages” (2002) paper presented at *Pacific Rim Real Estate Society 8th Annual Conference*, January 21-24, Christchurch, New Zealand.

- The *independence* of the process of agreeing to a partnering contract is one aspect that would need to be ascertained; no duress, no coercion and legal advice could enhance independence.
- *Timeliness* and *accessibility* could be covered in the partnering contract and *costs* should not be an issue unless parties are paying for independent legal advice. If legal advice is used (presumably in drawing up the partnering contract) then it should fall on the operator to cover this cost and not pass it on to residents.
- *Fairness of process* could be enhanced by the involvement of the village residents' committee, which from 25th September 2007 will be a compulsory component of every retirement village, unless the village has an exemption. The process would only be fair if residents' rights were not at risk through the process.
- Additionally the concept of *partnering* has the potential to become a process of *morality*: it would address conflict avoidance and resolution and possibly shore up power imbalance between resident and operator. Partnerships necessarily require the good will of all parties in order to maintain mutual objectives and in some instances according to Sourdin "help parties handle unresolved problems efficiently using a nominated facilitator".³⁷⁶ The option of a facilitator is not precluded by *partnering*.

5.3.3 ***Facilitation and facilitated negotiation***

While the term *facilitation* can apply to situations such as chairing a meeting or acting as a Master of Ceremonies, in ADR the facilitator plays a different role. According to Sourdin;

The facilitator is generally an impartial person whose role is to assist parties to clarify issues in a dispute and move matters to a pre-stated conclusion (for example an outcome – not specified – is to be reached) with the assistance of an agenda. Facilitators may also assist parties to develop options and suggest the inclusion of other ADR processes where appropriate.³⁷⁷

³⁷⁶ Australian Competition and Consumer Commission, cited in Sourdin 2.230, 25.

³⁷⁷ Ibid, 220, 24.

In relation to residents, the process of facilitation provides an opportunity for a residents' committee to meet with management to work through issues that may be of concern to either residents or management;

- *Independence* would most likely be achieved if both/all parties were involved in the choice of the facilitator; any conflicts were revealed and openly discussed and the option of another facilitator freely accepted if any party was uncomfortable with the initial choice.
- It would be *accessible* because there are adequate numbers of appropriately trained and qualified dispute resolution professionals available in New Zealand to fill the role of facilitator. Depending on the location of the parties it is unlikely the process would be held up unreasonably due to a shortage or unavailability of facilitators.
- The principle of *fair and proper process* means viewing processes from the perspective of *process pluralism*. This can be achieved by the facilitator when assisting parties to develop options which may include other DR processes, consequently facilitators must have a comprehensive knowledge about all DR processes. *Fairness* can be achieved through the *impartiality* and *independence* of the facilitator and their skills in managing the process. *Fairness* would be compromised however, if power imbalance was affecting a party's ability to participate at an effective level. It would then be the responsibility of the facilitator to make a judgement on whether or not to proceed in these circumstances. Fairness and integrity of the process could also be compromised if the resident's rights were drawn into the negotiation and the resident was not aware of these rights. The facilitator would need to be aware of the rights of residents prior to the commencement of the negotiation and a principled approach would be taken in order to privilege these rights in the process of negotiation.
- It could be a *timely* process. Locating an experienced facilitator should not mean delays. LEADR and AMINZ both have lists of qualified and

experienced facilitators in most centres in New Zealand. The unknown factor is whether the available facilitators are knowledgeable and well trained in identifying situations where power imbalance is a factor and what interventions would be required to balance this. In some cases this could mean putting an end to the process.³⁷⁸

- Should facilitated negotiation be the chosen method for dispute resolution, it is likely the *cost* would be met by the operator. In the case of the Retirement Villages Act, it would be in the operator's interest to resolve the issues and avoid a dispute notice being issued which would result in greater cost to the operator and possibly negative publicity since dispute hearings are public and publishable unless special circumstances deem otherwise.

5.3.4 Disputes panels

The Retirement Villages Act refers to a 'disputes panel' reflecting the New Zealand reality; an increasingly large number of bodies with a wide variety of powers, set up for the purposes of dispute resolution are afforded different titles; tribunals, authorities, committees and boards being amongst these.

The Law Commission Report suggests "that the term tribunal is used to describe a statutory body..."³⁷⁹ with specific characteristics. The characteristics that relate to the disputes panel set out in the Act include; independence from the administration which in this case is the Department of Building and Housing; impartiality between the parties; ability to reach a binding decision; set up to deal with particular types of cases or a number of closely related types of cases; members do not often serve full time, are not professional judges and do not have to be lawyers (seven of the eight RVA panellists initially approved are experienced lawyers used to dealing with situations of power imbalance. The

³⁷⁸ The concern here is some facilitators/mediators follow a non-interventionist style believing it is up to the parties to negotiate for themselves. They would possibly see the parties' skills or lack of as the 'reality' of the situation and not intervene. Rather than create a contrived situation with too much intervention which could then impact on their impartiality, these facilitators are likely to allow the process and the parties to determine the balance – even if it is weighted significantly more on one side.

³⁷⁹ Law Commission Report, "Delivering Justice for All", 2004, 7.1, 6, 286.

eighth is an experienced professional adjudicator/arbitrator); procedure will be similar to, but more flexible and simpler than a court of law.

The areas of dissimilarity cover the characteristics identified in the Law Commission report concerning “panels” of adjudicators or more than one adjudicator holding permanent positions. There is a high likelihood that one member panel will be the norm for retirement village disputes and the ‘approvals’³⁸⁰ are not permanent but for a specified duration, namely five years. Other points of difference are; the retirement village panellists have set their own rate at \$300 per hour plus gst and costs³⁸¹ and will operate on a contract for services with an operator for each dispute; they have received no specialised training for the role they have been selected to fill and lack a ‘senior’ Principal Disputes Panel member to mentor and lead members. These points of difference set the Retirement Village disputes panel apart from most statutory panels where training is provided and performance is often monitored, making this system a subject of debate and speculation.

5.3.5 First disputes: Initial impressions

The first disputes hearing under the New Zealand Act took place near Wellington in late February this year.³⁸² The village management was legally represented and the resident represented himself. It was evident the resident nearing 80 years of age was unfamiliar with some legal terms and unclear about how the process would unfold. The lawyer on the other hand acted as a legally trained person operating from his legal *habitus* using his *symbolic capital* to defend his client at every opportunity.

At the conclusion of the hearing counsel for the owner commented to observers that the process resembled a “Kangaroo Court”. He also described the resident and his witness as “red necks”. These comments can also be seen as acts of *symbolic*

³⁸⁰ The Retirement Commissioner ‘approves’ the panellists and the operators ‘appoint’ once a disputes notice has been issued.

³⁸¹ This information is available from the Retirement Commission website <www.retirement.org.nz> on the page where disputes panel members are listed.

³⁸² The hearing was on 26th February 2007. The second disputes panel hearing took place in Auckland on the 3rd April and the third on the 8th June in Wellington. The decisions for these hearings are available on the Retirement Commission website <www.retirement.org.nz>.

violence. Through a self-centred view of his *habitus* in the legal world and possession of specific *intellectual capital*, the counsel failed to assess the situation as one that could reflect badly on him as a member of a particular ‘class’. Hopefully this example is an exception rather than the rule, in terms of professional legal behaviour.

At the time of writing, three determinations under the RVA have been made by disputes panels; all were brought by residents, one male and two female; one resident was represented by her attorney/son. The other male and female residents represented themselves. The operators in the two disputes involving large business corporates were legally represented. Two female and one male panellist have provided determinations; all are legally trained. In the second dispute, the resident was given a choice from a list of panellists available in the region. This is a sensible and fair way to manage the selection process when criticisms have been aimed at operators having the key selection role when a party in the dispute.

At this time there has been no evaluation of the residents’ experiences of the process although my observation at the first dispute and communication with the resident Ian Brown will be included. I shall attempt to apply ‘statements of principle’ from Chapter Three using his experience, the two written decisions issued in March and April 2007 and communication with dispute panellists. My perspective remains; the principles that ought to inform methods and models of DR, should attempt to balance the power relations between participants in such a way that the powerlessness ought to be recognised and reflected in the experience of the participants.

Equality before the law: The statement of principle *equality before the law* requires amongst other things that age, gender, and lack of legal representation be considered and not cause difficulties in dealings with the disputes panel. The first dispute involved a male resident who, during his working life, had developed skills in formal communication including written communications and had some understanding of formal processes (not necessarily legal), organisational systems and generally had a good understanding of the way business should be conducted. He was articulate, capable and showed concern for the residents in his village and

those who had left the village. He took the case on behalf of others being someone who may be ‘affected’ by any decision of an operator.³⁸³

In spite of his previous experience and language capability he struggled to understand legal terminology. He did not feel the process was sufficiently flexible or user friendly to prevent frustration during the pre-hearing meeting, in correspondence and at the hearing. He felt too much time was taken up by legal counsel for the operator. He did not feel able to participate fully because he did not understand the process and some of the procedural language.³⁸⁴ He was prevented from cross-examining or rebutting counsel by the disputes panel and has remaining concerns about this ruling in spite of the decision being favourable to him. He sometimes did not understand what happened in the process and why; he did not feel equal before the law mainly due to the adversarial manner of counsel.³⁸⁵ It seemed to him a “one-sided” process which reinforced his feelings of disadvantage when up against legal counsel in the context of a hearing.³⁸⁶

Section 67 (4) of the RVA states “The disputes panel may allow 1 or more parties to be represented, whether by counsel or otherwise, and to question the other party...” The Disputes Tribunals of New Zealand do not allow legal representation; parties represent themselves and the tribunal member manages the process according to the rules associated with *fair and proper process*. This raises the question of whether in the context of the RVA, the panellist considered disallowing legal representation for the operator. In addition it raises a bigger question about whether representation actually equalises existing power imbalance. There are a number of arguments that impact on this question including for example having the resources to employ experienced counsel versus using legal aid or Community Law Centres.

³⁸³ Section 53 (1) RVA 2003.

³⁸⁴ The process issues also occurred at the pre-hearing meeting. Due to the language of counsel, who was Brown’s adversary, Brown felt pressure to ‘do things properly’ having been challenged by counsel when he used incorrect terminology or did not understand some of the legal requirements. This upset Brown who found the pre-hearing preparation particularly stressful and time consuming. He felt severely disempowered and disadvantaged during the pre-hearing period in spite of his thoroughness and competent presentation of written submissions.

³⁸⁵ The time taken up by counsel and being prevented from challenging what he determined to be misrepresentation about the way contracts were handled by management frustrated him and provoked loss of faith in the fairness of the process.

³⁸⁶ Email communication from Ian Brown dated 8th March 2007.

The second dispute proceeded without legal representation of either party. It was clear from the remedies sought by the female resident that she did not understand the purpose of the process, what could reasonably be achieved from the process or what she was required to provide in order for the adjudicator to fairly consider her dispute issues. Actions taken by the village manager were found to have breached the resident's rights and numerous other matters were found not to be within the jurisdiction of the panel. Also, the panel lacked authority to make certain orders but authority aside, it was willing to comment on practices and make recommendations to prevent certain matters reaching dispute proportion in future. It seems these recommendations were accepted by the operator.

Adherence to the rule of law is questioned by Brown who remains concerned about why he was not permitted to cross examine or rebut counsel. Consequently he questions the even handedness and flexibility of the adjudicator. Both disputes produced reasoned decisions and both contained 'right to appeal' statements.

- *Fair and proper process*: In both disputes it is clear that both sides were able to present their cases and these were properly considered by the adjudicators. In Brown's case there is a grievance felt about his ability to fully participate when cross-examination was refused by the adjudicator. This impacted on his sense of fairness of process. The outcomes in both cases³⁸⁷ were morally appropriate and not contested; outcomes took account of the law and substantial merits and justice of the case. In both instances, the processes were conducted in a timely and efficient manner.
- *Independent adjudication*: The disputes panel under the Act achieves some level of *independence* through the approval, management and monitoring functions carried out by the Retirement Commissioner. It has proven to be accessible to parties in the first two disputes under the Act. The tenure of office has been set at "not longer than 5 years"; institutional support is not provided. The selection and payment of adjudicators is not neutral with the Act determining this should be undertaken by the operator. This is not thought to have impacted adversely on the

³⁸⁷ Refer to discussion on pages immediately following.

adjudicator's compliance with the rules of natural justice; hearing both sides including the evidence of witnesses and making a determination according to the law and merits of the case. Whether flexibility of process was practised by the adjudicator in the first dispute would seem to be dependent on the participants' experience of the process.

The disputes panel process appears to be *accessible* and has proven to be *timely*. However *fairness of process* may be compromised when residents lack representation or are beyond carrying out the research required for self-representation.³⁸⁸ *Costs* are met by the operators though this can be passed on to residents in cases where it is not ruled out within the resident's occupation right agreement.

The *effectiveness* of the process in delivering a *moral* outcome has been demonstrated by the first two determinations and appeals have been ruled out in both cases. The first dispute decision was delivered four weeks after the hearing; five months after the resident's complaint was first lodged.³⁸⁹ In the second dispute the resident first made a complaint to management in mid 2006 prior to the dispute provisions coming into force. A dispute notice was issued at the end of February 2007 and a hearing held on the 3rd April 2007. Compared with the time-frames involved in the NSW and Queensland consumer tribunals, the first New Zealand disputes have been determined in a very much shorter period. The full implementation of all aspects of the Act including the Code of Practice when in force in September 2007 should eliminate the delay in the second dispute between the initial complaint and the hearing.

The fact that the residents did not engage legal counsel and succeeded to win on matters of law and also morality in the second case, provides additional evidence of independent adjudication. In Brown's case it could be reasonably argued the adjudicative process was a fairer process than any facilitated process could have been, given the nature of the dispute which involved the residents' rights, the law and money.

³⁸⁸ The experience of the first NZ resident to issue a dispute notice under the Act and experiences reported from NSW and Queensland, suggest considerable skill and support is required for residents to be able to represent themselves at a tribunal hearing.

³⁸⁹ Christmas intervened which meant delays were experienced.

- *Process pluralism*: The principle *process pluralism* in Brown's case would have allowed him to utilize the collective voice of residents at his village because all would be affected by any decisions. Fortunately in his case section 53 (1) of the Act covered residents' rights to give dispute notices concerning operators' decisions "affecting the resident's occupation right or right to access services or facilities". This was a refurbishment issue affecting him though he was not leaving the village at the time. The Act does not provide for 'class' or group actions that do not fit within the provisions in section 53 (1).

The second dispute involved issues that would have been best dealt with by utilizing the principle *process pluralism* when applied to the spectrum of processes available. Had the disputes panel been able to vary its role and operate as a triage³⁹⁰; refer matters to facilitative, advisory or determinative processes or conduct those processes itself, the unresolved issues could have been resolved with opportunity for participants to exercise self-determination within the context of a number of processes.

- *Advocacy* : The role of advocacy in the first two disputes had the potential to reduce the stress and frustration of the residents and provided specialist knowledge about conflict and helpful ways of dealing with it. This would have provided the residents with a sounding board to clarify their issues in a safe environment and validate their resolve to do something about an injustice or other issue, also, understand the issues involved at a deeper level, and learn something about themselves and the process they were going through. Then, having negotiated the essential stages that precede readiness to take action, their opportunity to strategise the next steps and raise the conflict to a level that would engage the source or sources of the conflict would have been achieved. Helping residents to pursue conflict effectively and constructively would mean residents could then positively experience the impact of their own resourcefulness; they would feel empowered at least at a personal level

³⁹⁰ An email communication from Professor Tania Sourdin 23rd January 2007 explained, triage "in this sense 1. Facilitative would mean – mediation (ordinarily small numbers of parties), facilitation (large scale disputes) 2. Advisory – case evaluation, expert appraisal (using an expert eg medical to comment on a particular aspect of a dispute) 3. Determinative – as per industry based schemes – binding on the facility".

and possibly at a socio-political level such as contributing to a greater social cause.

In the second dispute, advocacy would have clarified for the resident the spectrum of processes available to deal with her issues and possibly prevented her taking issues and seeking remedies that were inappropriate in the context of the disputes panel hearing.

The residents involved in the first two disputes have been described as articulate and strong characters³⁹¹; both fall into the under 80 age category. This puts them in a category characterised by higher autonomy and therefore more likely to challenge what they perceive as injustice within the management or practices within their villages.³⁹² *Advocacy* should be accessible to all residents particularly those who are aged and frail who have issues they wish to have addressed. *Advocacy* in their case could mean non-legal representation which could also be an empowering experience for the resident or groups of residents.

5.4 Summary

In this chapter I have used the principles and ‘statements of principle’ that emerged from Chapter Four to examine the DR processes of mediation, partnering, facilitation and facilitated negotiation, and disputes panels. These *statements* when applied to the processes show what might be evident when a principle is present in the process. I have highlighted the disadvantages of mediation for older people, particularly older women, suggesting mediation may not be a suitable or fair process for retirement village disputes; *advocacy* could provide additional strength to a resident in mediation. I have concluded that negotiation (or mediation) where a settlement is the anticipated outcome from a resident’s complaint should be *facilitated negotiation* with settlements vetted by counsel acting for the resident. I have suggested *partnering* may be an advantageous approach to initial contractual contexts in retirement villages.

³⁹¹ Having not met the second disputant, I have relied on others’ descriptions.

³⁹² Streib, C Folts, W La Greca, “Autonomy Power and Decision Making” *The Gerontologist*, 25, 4, 1985, 403-409. The data from this study is quoted in Chapter Two.

In relation to the *statements of principle* I have undertaken a preliminary and limited evaluation of the first two disputes taken under the Act. I found in the first dispute, the process was stressful and onerous on the unrepresented resident and the adjudicator's perceived inflexibility of process surrounding rebuttal, caused the resident to experience the process as one-sided and dominated by counsel for the operator. The favourable outcome for the resident has not altered his views on the process yet clearly the adjudicator complied with the principles *equality before the law*, *independent adjudication* and *adherence to the rule of law*. The second dispute, due lack of legal involvement prior to and during the hearing highlighted the adjudicator's flexibility and an appropriate outcome appears to have resulted. It was however, a heavyweight process for relatively lightweight issues; *advocacy* and *process pluralism* would have provided more effective and appropriate alternatives. In the exemplar disputes, the application of the principles *process pluralism* and *advocacy* could have balanced the imbalance between resident and operator. The principle *process pluralism* requires that all those affected by decisions be involved in any process concerning those decisions. In Brown's dispute, all residents were affected. The correct application of the principle would have meant a residents' committee would rightfully participate in a decision-making forum such as a disputes panel hearing.

I have found the involvement of operators in the selection and payment of adjudicators to seriously compromise the principle of *independent adjudication* even when the adjudicator meets all ethical and legal requirements; the perception of independence being as important as the reality to residents.

The next chapter will consider a range of statutory and one private dispute resolution process to ascertain how principles or *fairness* and *independence* operate in the contexts examined. It will also consider how macrosystem influences such as ideology and class impact on less powerful groups through state endorsement via exosystem processes.

Chapter 6 Statutory and Private Dispute Resolution: issues of independence and fairness of process

6.1 Introduction

This thesis sets out to answer key questions concerning the principles of independence and fairness of process as they apply to the Retirement Villages Act 2003. To assist in this task I will examine a range of circumstances in which mediators, conciliators and adjudicators practise and the different rules that apply when appointments are made from within statutory organizations compared with private contexts. The tensions between mediating and adjudicating privately and undertaking these roles within a statutory legal framework will be explored in the search to uncover how the principles are applied in a number of different contexts. Fairness and lack of fairness will be demonstrated in the examples selected and the role of ideology, hegemony, class, and cultural capital will be illuminated to show how class domination can occur in statutory contexts; essentially the macro system impacts on the microsystem through exosystem decision-making which is based on ideology supported by the dominant class.³⁹³ People experience the consequences of those decisions through the silent force of hegemony. If dissatisfied with exosystem outcomes the less powerful class has to negotiate their way through a process set up by the dominant class to review the decisions of the systems instituted by that class. Systems that contain concepts or processes that may be usefully applied to retirement village disputes will be identified and offered later to strengthen the situation of residents in dispute with operators.

In order to appreciate and evaluate the processes contained in the Retirement Villages Act 2003, I will first provide a perspective on statutory dispute resolution and its application to the growing industry of retirement villages. This discussion covers the increasing trend to include mediation and conciliation in statutory contexts, and the issues this raises.

³⁹³ The dominant class being the 'educated' middle class who occupy positions within the state bureaucracy.

Second, the innovative dispute resolution processes contained in the Employment Relations Act 2000 will be discussed and unique features identified. This will be followed by The Injury Prevention Rehabilitation and Compensation Act 2001; the third example. I will include a critical examination of the Accident Compensation Corporation's processes for dispute resolution and the use of Dispute Resolution Services Limited, an organization owned and directed by the Corporation.

Fourth, an evaluation of the Australian National Native Title Tribunal will be included providing an example of the impact of ideology on the way Tribunals emphasize (or de-emphasize) certain dispute resolution processes and the outcomes that result.

The fifth area of discussion looks at the work of Tribunals, their role in administrative decision-making and issues surrounding independence of the tribunals from the entities whose decisions they are reviewing. The sixth example, the Health and Disability Commissioner considers the role of an Ombuds/Commissioner in administrative justice and two private Ombudsman schemes; banking and insurance and savings. Finally, the complaints process of the New Zealand Press Council is included, providing an example of an internal private sector model for dealing with complaints.

6.2 Statutory dispute resolution: a socio-legal perspective

Viewing dispute resolution at a macro level allows us to make sense of the breadth of potential positive influence that legislation which supports informal mechanisms for resolving disputes may have on social cohesion and economic stability. For example, legislation that specifically includes mediation such as the Family Proceedings Act 1980; Residential Tenancies Act 1986; Human Rights Act 1993 and the Employment Relations Act 2000 provide opportunities for aggrieved parties to meet aided by a neutral third party (mediator) for the express purpose of attempting to resolve whatever issues are put forward as part of a dispute. Mediation has previously been considered a voluntary and consensual

process, yet under the exemplar jurisdictions mediation is a non-voluntary part of the dispute resolution process. In spite of the apparent contradiction, it is possible to imagine that resolution of conflict can have positive flow-on effects.

For example, resolution of family conflict can positively impact on family (and work) life including the well-being of dependent children. Resolving tenancy issues can impact on personal lives and economic viability both from the point of view of the tenant and the landlord. Human rights issues may have a pervasive effect in undermining cultural and personal values along with a person's ability to identify as a valued member of society, therefore resolution of these issues is desirable. Employment issues strike at the heart of class relations with stand-offs and protracted legal battles escalating class conflict (eg National Distribution Worker's Union members lock-out by Progressive Enterprises, the supermarket giant, during September 2006). This lock-out no doubt resulted in a detrimental economic impact on both parties but it also achieved a level of public conscientisation³⁹⁴ about the impact of multi-national global strategies on low-paid workers. This is likely to have reflected badly on the employer while provoking public sympathy for the workers; in this case, higher hourly rates resulted.

At a micro level, the private lives of citizens can be seen as reflected within the institutions that support constitutional values such as individual rights and access to justice. It has long been held that the Court system is a 'backstop' available to determine disputes between citizens and between citizens and the state.³⁹⁵ It is only in the past fifteen-twenty years that serious efforts have been taken to establish alternative mechanisms for dealing with conflict and disputes in the vast array of settings that give rise to differences, conflict and outright hostility.

³⁹⁴ *Conscientisation* is a term used to describe a liberating process advanced by the educator Paulo Friere in his book "Pedagogy of the Oppressed" (1972). Friere's insights into illiteracy among vast numbers of Brazil's poorest peasants during the 1960 and 1970's led to a movement promoting group efforts to make people aware of themselves and their situations; ie becoming *conscious beings*. Theoretically, in order for this *conscientisation* to occur they (the peasants) first had to become aware of the world and their place in it, in order to act upon it. The central feature of this action-reflection model is *praxis*; people act, then reflect upon their actions, mobilize the parties (the illiterate masses) to achieve liberation by transforming personal troubles into public issues. This is the basis of *conscientisation*. In the case of the National Distributions workers 'lock out' by Progressive Enterprises, the media, the public and politicians began to pick up on the 'public issue' of low pay and worker exploitation.

³⁹⁵ "Delivering Justice for All", Report 85, *Law Commission*, 2004

Dispute resolution in the context of retirement villages raises particular issues, not least the average age and potential vulnerability of the residents in relation to the power developers/operators/managers can exercise, and in a number of cases have exercised, to the disadvantage of residents or potential residents. It has often been stated that the way to measure a society's humanity is to ascertain how well it cares for its most vulnerable members. For many older people, choosing a retirement village as a place to live in later years means investing most of their life savings. Complex legal transactions need to be executed in the most ethical manner, after which conditions of contract must be complied with fairly in order that residents can live their lives free from the worry of unexpected costs or major changes to their contractual arrangements.

6.3 *Statutory mediation and conciliation*

Observing mediation and conciliation as statutory procedures requires a different lens through which to view the processes. This comes about because of the legal context in which the processes previously seen as informal and flexible, fall under the shadow of the law where different rules apply. The principal is the rule of natural justice which disallows a judge (or adjudicator) from hearing one party in private without the other party being present. This is underpinned by the principle of a fair, proper and accountable process. Whether mediation, this formerly private, consensual and neutral process is compatible with the rule of law has become the subject of significant legal and academic debate. Some authors see state endorsement of mediation as intensifying debate about mediator standards and accreditation and call for a more principled approach to the enactment of statutory models of mediation and conciliation.³⁹⁶ Others such as the former Chief Justice of New South Wales Sir Laurence Street have spoken strongly in opposition to the notion of incorporating mediation within the judicial institution.

One expects the procedures to be operated fairly, but the principles of natural justice simply have no relevance in a mediation: the process does not involve the imposition of any decision affecting the rights or interests of any of the disputants. Natural justice or due process have no more relevance to the

³⁹⁶ Bayliss, C and Carroll, R "The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation", [2002] 14, BLR 317; Sourdin, T "Alternative Dispute Resolution" (2nd ed 2005).

mediation of a dispute than they have to the mediating of any other commercial deal ...³⁹⁷

The greater use of state endorsed mediation in recent times has come about through legislation and private contractual arrangements both in Australia and New Zealand. In spite of strong opposition and promotion of the “incompatibility principle”³⁹⁸ which in Australia takes its lead from the Australian Constitution; Judges are acting as mediators, tribunal members are engaging in facilitative methods and mediators are involved in directed mediation and decision making³⁹⁹ in efforts to resolve disputes and avoid litigation. Thus, opposing views in both jurisdictions have been overtaken by practice.⁴⁰⁰

Whatever position ADR practitioners and writers hold, it is increasingly evident that mediation and conciliation are now established within state machinery. This is partly because conventional court processes are viewed increasingly in non-adversarial terms and ADR has become a preferred, legitimate and credible option.⁴⁰¹ However, the key legitimising principles of mediation; consensus, neutrality and confidentiality remain contestable when examined within a statutory framework. Lack of definition of ADR processes in statutory contexts has added to confusion and debate.⁴⁰²

The terms ‘mediator’ and ‘conciliator’ also cause difficulties when encompassed in statute. Writers have drawn attention to practices that appear to compromise the fundamental principles of these processes especially when the functions and duties of mediators include giving advice, making suggestions and recommendations and doing “such things as they think right and proper for

³⁹⁷ Street, L “Mediation and the Judicial Institution” [1997] ALJ 71, 795.

³⁹⁸ The incompatibility principle is connected to Chapter three of the Australian Constitution which relates to a situation that may arise “in the performance of non-judicial functions of such a nature that the capacity of a judge to perform his or her judicial functions with integrity is compromised or impaired”. (Moore cited in Sourdin, 2005, 113).

³⁹⁹ For example the Employment Relations Act 2000, s150; Residential Tenancies Act 1986; Family Proceedings Act 2000; Health and Disability Commissioner Act 1994.

⁴⁰⁰ Green, P *Employment Dispute Resolution* (2002); Sourdin, T *Alternative Dispute Resolution* (2nd ed 2005).

⁴⁰¹ Baylis, C “Statutory Mediators and Conciliators: Towards a Principled Approach” [2002] NZULR, 20, 1, 101-131.

⁴⁰² Spiller, P and Hooper, S “Dispute Resolution in a Statutory Context”, in Spiller, P (ed) *Dispute Resolution in New Zealand* (1999).

inducing parties to come to a fair and amicable settlement”⁴⁰³ Power of this type afforded mediators in human rights and tenancy disputes for example can be seen to confuse terminology, compromise neutrality and according to some, raise serious questions about the integrity of the mediation process implicit and explicit in some statutory models.

6.4 Exploring unique opportunities – the Employment Relations Act 2000

Moving from retirement village relations to employment relations provides opportunity to consider the mechanisms available to resolve disputes between an employee and employer. The Employment Relations Act 2000 (ERA) contains a hierarchy of mechanisms to deal with employment relations issues. These are mediation, the Employment Relations Authority and the Employment Court. I will focus on mediation because in the context of this study it is the process that is likely to have most relevance to the context of disputes in retirement villages.

The Employment Relations Act has been described as a “leading edge” approach to employment relationship problems; its philosophy of low level consensual decision making is encapsulated within its objective to build mutually trusting and productive working relationships in all aspects of the employment environment.⁴⁰⁴ These are seen to exist within the relatively complex arrangement of processes, procedures and rules operating within each of its three institutions. Its features include encouragement of the “active” management of mediation; covering disputes involving both state and private sector employees and more recently, work related relationships such as independent-contractor/principal relationships, also ensuring the operations of the Employment Relations Authority are independent of Court intervention into its processes.⁴⁰⁵

⁴⁰³ Human Rights Act 1993, s76(2)(c). The Residential Tenancies Act 1986 s76(5)(b); Employment Relations Act 2000, s144 (2) and the Family Proceedings Act 2000, s14(2)(a)(b) implicate mediators in unspecified powers to try to obtain agreement and settlement.

⁴⁰⁴ Employment Relations Act 2000, Part 1, s3 (a).

⁴⁰⁵ Employment Relations Act 2000, s144, (2) (a).

6.4.1 *Dispute Resolution under ERA 2000*

The Department of Labour through its professional and specialist services reported that between December 2002 and December 2005, approximately 32,250 applications for mediation by Mediation Services were received and 80 per cent were resolved. According to the Department this figure proves mediation has been “extremely successful” in resolving employment disputes.⁴⁰⁶ Mediation Services is the term used to describe the Department of Labour’s mediation service (a permanent body of mediators) established under the Employment Relations Act 2000 (ERA). The Employment Relations Amendment Act (no.2) (ERAA) made changes to the ERA providing for a fast and effective mediation process that could ensure finality in employment disputes without redress to higher authorities such as the Employment Relations Authority.⁴⁰⁷

The policy intent behind the changes is linked to the Act’s statutory objective⁴⁰⁸ and effective resolution of employment relationship issues. Mediation under the Act covers both private mediation and mediation provided by the Department of Labour’s Mediation Service. It is the role of the department’s chief executive to administer the Act and the requirement to employ or engage mediators whether within the department’s Mediation Service or privately (in specialist roles if required) is mandatory.⁴⁰⁹

6.4.2 *Mediation and independence of Mediation Services personnel*

Section 144 of the Act requires that mediators appointed under the Act by the chief executive “act independently and are independent of any parties to whom

⁴⁰⁶ Hicks, C “Employment Mediation – Getting the Best Results from Mediation” [2005] ELB 44; Scott-Howman, A “Employment Institutions – A Practitioner’s Perspective” [2005] ELB 42; Quivooy, M “Employment Relations Service mediations – statistics and analysis” [2006] ELB (2) 45.

⁴⁰⁷ The Employment Relations Amendment Act (no2), 2004 came into force on the 1st December 2004.

⁴⁰⁸ The ERA requires good faith and collective bargaining. The Retirement Villages Acts in NSW and Queensland recognize a similar concept through ‘Residents’ Committees’ and their ability to take cases to the state Commercial and Consumer Tribunals. The New Zealand Retirement Villages Act does not recognize or give power to Residents’ Committees in this way.

⁴⁰⁹ Section 144(1)

the mediation services relate”.⁴¹⁰ However, unlike conventional mediation where mediators usually determine the parameters and processes involved in their practice – frequently in consultation with their clients – mediators operating under the Act can be given “general instructions” by the chief executive. These “general instructions”⁴¹¹ relate to the Act’s statutory objectives (promotion of good faith, collective bargaining etc).

Given the overlap of the chief executive’s obligations under the Act and the role of the Mediation Service mediators, it is apparent a major shift in dispute resolution procedure has occurred. Mediation is now the paramount process for resolving employment disputes and its use has been given a high level of legislated emphasis.⁴¹² Mediation in the employment context provides different options and methods for resolving employment relations disputes than has traditionally been the available.⁴¹³ It does so through the Act’s statutory objectives that extend the role of the mediator operating within the department’s Mediation Service to that of ‘information provider’ covering employment rights and obligations; information about availability of services to individuals, unions other body corporate experiencing employment relationship problems and “other services”.⁴¹⁴ The Act, including the “fast track” mediation amendments clearly recognise the need for supportive facilities such as prompt and expert problem-solving, information and assistance when employment relationships falter.

To effectively resolve problems and maintain productive working relationships a comprehensive and relatively radical approach was instituted via the 2004 amendments. This has had the effect of stretching the capacity of mediators in ways not previously experienced in New Zealand. The amendments provided disincentives for seeking legal representation. It did this through promotion of unionism and removing “legalism” from procedures within the Employment

⁴¹⁰ Green, P *Employment Dispute Resolution* (2002) 65.

⁴¹¹ Section 153(2)(3)

⁴¹² Green, supra n 410 (xi).

⁴¹³ Mediation is not a statutory requirement under the Retirement Villages Act 2003; it is implicated within the “complaints facility”, Part 4 s (51) of the Act and is part the RVANZ’s internal process.

⁴¹⁴ The “other services” cover a range of employment circumstances including promoting smooth conduct of employment relationships, assisting with prompt and effective resolution of employment relationship problems including fixing of new terms and conditions of employment. This is covered in section 144 (2).

Relations Authority.⁴¹⁵ Rather than deal with issues in an adversarial manner the emphasis of the specialist employment institutions is to support employment relationships. Experts can provide supportive assistance at short notice on an informal and flexible basis. If resolution is not reached, the Employment Relations Authority can make prompt decisions on employment matters.⁴¹⁶

The option of resolving disputes through union representation and the disincentives for seeking legal representation may be useful in the context of a retirement village dispute. Throughout this thesis, reference is made to the age and potential vulnerability of residents especially in the context of a dispute with a more powerful operator. The concept of union representation is one that has been followed in the NSW and Queensland Retirement Village legislation; residents' committees can activate dispute proceedings and represent residents in legal disputes. This avoids individual residents having to 'take on' operators and provides support to residents who would otherwise be overwhelmed by the power imbalance they face. If disincentives for legal representation were extended to the disputes panels under the RVA, the effects of power imbalance could be further mitigated.

6.4.3 *The Employment Court and the mediation process*

Based as it is on the notion of resolving employment problems at the lowest possible level, mediation is the lowest level mechanism. Therefore, any matter coming before the Authority or the Court will be examined to ascertain whether mediation has been attempted. If not, the requirements to consider mediation are likely to apply, especially proceedings founded in tort resulting from a strike or lockout where mediation has not been attempted, and also some matters of law.⁴¹⁷ While mediation is attempted, Court proceedings are suspended.⁴¹⁸

⁴¹⁵ Roth, P "Recent Institutional Developments in Employment Law" [2005] ELB 3, 37.

⁴¹⁶ Ibid. The intention of the Act is to focus responsibility on the parties and the specialist institutions to resolve the problems at hand with the assistance of union representation. The idea of the Court reviewing how the lower level institutions dealt with a problem previously is not part of the scheme.

⁴¹⁷ Green, supra n 410 at 157. There are some exceptions to the requirement to mediate but the high priority given to attempts in 'good faith' to reach a mediated settlement is contained in s 188(3) of the Act. If a matter reaches the Employment Court it is likely close attention will be given to whether the parties should be referred to mediation or even back to mediation if it has

The Retirement Villages Act does not contain a mediation clause; its first step is a ‘complaints facility’ which from the 25th September 2007 requires operators to set up a procedure for making and acknowledging complaints by residents.⁴¹⁹ It is anticipated mediation will be the preferred process for resolving complaints that cannot be settled through communication or negotiation. In any event, the notion of an unsupported aged resident negotiating with an operator is the antithesis of the principle of *fair and proper process*. In the context of employment relations disputes both the Employment Relations Authority and the Employment Court can refer parties back to mediation. The second dispute under the RVA involved numerous matters that would have been more appropriately dealt with in a supported mediation.⁴²⁰ Having a disputes panel refer parties to mediation for all or part of their issues would be outside their current jurisdiction but an interesting concept to consider.

6.5 The Injury Prevention Rehabilitation and Compensation Act 2001

The year 2001 saw the introduction of a renamed accident compensation Act - the Injury Prevention Rehabilitation and Compensation Act 2001 (IPRC Act) came into force. This followed a number of changes both in ideology and policy within the government and the Accident Compensation Corporation over a period of some twenty years. From 2001 there was to be a concentrated focus on accident prevention and rehabilitation. This required ACC to work in a partnership with claimants in a way not experienced under the accident insurer relationships of the past. As a result of this ‘partnership’ relationship, a code of rights for claimants was instituted. The purpose of the Code of ACC Claimant’s Rights was “to meet the reasonable expectations of claimants about how the Accident Compensation Corporation should deal with them”.⁴²¹ The internal complaints system is

been attempted. Parties must comply with a direction to mediation from the Court and they must also act in ‘good faith’ to try to resolve the employment issue.

⁴¹⁸ Ibid, 157.

⁴¹⁹ Cl 31 Retirement Villages Code of Practice 2006.

⁴²⁰ I mean by “supported mediation”, the resident could choose to have an advocate present during the process. The advocate would have good knowledge of the issues and know the legal rights of the resident. A representative of a residents’ committee could fill that role once the committees are established and have the necessary information to support a resident following the making of a complaint.

⁴²¹ Rennie, D “The Laws of New Zealand” (2002) 31.

completely separate from the Corporation's dispute processes and covers only breaches of the code by the Corporation.⁴²²

6.5.1 *Dispute Resolution: Seeking a review*

Part 5 of the Act covers Dispute Resolution. A claimant or employer of a claimant wishing to have any decisions relating to their claims reviewed can make application for a review within three months of the Corporation's decision on their cover or entitlements. It is the Corporation's duty to secure independence of a reviewer⁴²³ and it does this through a company it owns, Dispute Resolution Services Ltd (DRSL). ACC delegates the appointment of reviewers to DRSL.

DRSL was set up to provide a review service to any or all of the companies that were expected to enter the market following the part privatisation of accident insurance. There were 2 foundation shareholders; ACC and Farmers Mutual Group. There are [currently] 23 reviewers.⁴²⁴

DRSL was set up initially by ACC as a response to the partial privatisation of accident insurance during 1998. Initially employees of ACC were involved as reviewers. However the later requirement for reviewers to be engaged on contracts for services inevitably led to reviewers resigning from their positions within ACC to become part of the DRSL team of reviewers and mediators involved in claimants' (or employers') disputes with ACC. Others with no prior working relationship with ACC joined the DRSL team; reviewers around the country are almost all legally trained. The review process is deemed to be investigatory, informal and non-adversarial.⁴²⁵ Hearings are presumed to be part of that process. By consent of the parties, sometimes a hearing with parties in attendance is not held; then the reviewer will conduct the hearing on the basis of

⁴²² The code of ACC Claimants Rights covers complaints made from 1st February 2003. Section 40 of the Act deals with the Purpose of the Code which amongst other things, provides for "the procedure for lodging and dealing with complaints about breaches of the Code by the Corporation"(sec 40(1)(b)).

⁴²³ Injury Prevention, Rehabilitation and Compensation Act 2001 s 139 (1)(2)(3)(4).

⁴²⁴ This information was provided by the Manager, Client & Business Development, Dispute Resolution Services Ltd in an email communication dated 16th February 2007. It is the duty of a reviewer to act independently when conducting a review. Hearings must be held within three months of the review application. It is intended that reviews are *independent* of the Corporation and the reviewers have had no previous involvement with the claim other than as a reviewer (s 138 (1) (2)).

⁴²⁵ IPRC Act 2001, s 138 & 140. Section 140 covers general principles for conducting a review. This includes complying with the principles of natural justice (c) and (e) adopting an investigative approach with a view to conducting the review in an informal, timely, and practical manner.

the papers submitted which include the claimant's full ACC file and any other relevant documents. In the event of a full hearing parties attend usually without legal representation and this has been identified as an issue in the current review climate.

6.5.2 *Reviews - User friendly?*

It was recently stated that “unaided claimants are no longer well served by the review process”.⁴²⁶ This view relates to what Mackinnon terms “institutional facts” which are those facts that rely on a legal system of rules that alter the facts’ original state from a “brute” state (stated as it happened) to institutional state (stated as it was transformed by legal rules in a particular institutional setting after the event). He found the opinion of UK writers Logie and Watchman who wrote about Social Security Appeal Tribunals “equally applicable to ACC reviews”. These writers found:

Claimants do not necessarily realise what they have to prove and how they have to prove it, what documents to bring with them and what the function of the tribunal is.⁴²⁷

Mackinnon’s review of the history of the various ACC schemes operating in New Zealand since the introduction of the first no fault accident insurance scheme in 1972, notes some influential parallel changes that occurred within the review processes and the powers delegated to the independent reviewers.⁴²⁸ It was at this point, Mackinnon contends, the process moved from inquisitorial to adversarial. He writes:

It is no coincidence that all the reviewers appointed in recent years have law degrees, though there is no statutory requirement for that nor was it the case under earlier legislation.⁴²⁹

⁴²⁶ Mackinnon, K, “Redefining the Facts; changing the process” (2006). Paper presented at the 9th Annual AIJA Tribunals Conference, 2006, 19.

⁴²⁷ Logie, G and Watchman, P cited in Mackinnon, 2006, 19.

⁴²⁸ Changes that occurred from 1992 included the removal of powers under the Commission of Inquiry Act 1908 and the focus of investigation by the reviewer was replaced with emphasis on an oral hearing. These changes impacted on the powers of the reviewer and concomitantly the public (claimants) were affected by alterations to the eligibility and entitlement criteria, having the overall effect of reducing both. ACC then became a “party” to a review which took the form of a hearing.

⁴²⁹ Mackinnon, Ibid, 20.

The current Injury Prevention Rehabilitation and Compensation Act 2001, section 140 allows the reviewer to “conduct the review in any manner he or she thinks fit” having regard to the other sections of the Act and its regulations.⁴³⁰

6.5.3 DRSL View from the inside out

A DRSL manager interviewed for this research confirmed the company’s awareness of the “independence argument” that can be raised in relation to the ownership by ACC of its reviewing agency. He said it was “a small minority of people” who raised the issue with them and the New Zealand Law Society has a designated ACC sub-committee with an interest in the *independence* issue.⁴³¹ King’s experience in the management of the organisation has led him to believe “no-one has been able to prove bias and there is no evidence of a reviewer being biased”.⁴³² He emphasised that the reviewers were aware they are constrained by the law and added that they and the organisation subscribe to the law. For those who question the link between ACC and DRSL, he said the organisation’s response is “experience us and see”. He did not allude to any constraints felt by reviewers in light of the adversarial nature of the process: i.e. once a review is underway the “partnership” relationship between ACC and its client becomes *client v ACC*.⁴³³

He explained the hierarchical process of review for ACC claimants; the first being an approach to ACC; the second, an independent review and third, the District Court which ACC also funds.⁴³⁴ The District Court, he reports, overturned 10% of DRSL review decisions at de novo hearings. This small percentage King says is possibly attributable to information that was not available to the reviewer prior to the claimant obtaining legal representation for the Court hearing. It seemed he was suggesting the reviewer may have come to a different decision had they been in

⁴³⁰ These include compliance with s138 duty to act independently; (c) complying with the principles of natural justice; (d) exercising due diligence and (e) “adopting an investigative approach with a view to conducting the review in an informal timely and practical manner”.

⁴³¹ Several attempts to obtain comment from the person designated to this role by the Law Society were unsuccessful.

⁴³² Paul King, DRSL phone interview 12th October 2006

⁴³³ Mackinnon, *supra* n 426.

⁴³⁴ The District Court recovers costs every year from ACC under s 164 (a) (b). These involve “reasonable administrative costs” of appeals and “reasonable costs” of appeals.

receipt of the complete (medico-legal) picture. One possible interpretation of this is legally unrepresented claimants are more vulnerable to a decision going against them at review than those represented. If this is the case, then ACC clients whose cases are reviewed on papers only, may be at even greater risk of having a review go against them than those who attend a review hearing.

6.5.4 *Mediation*

Mediation as a discrete process is not mandated within the Act. However DRSL undertake the vast majority of ACC reviews and have three means of referring cases to mediation facilitated by DRSL mediators.

1. DSRL staff screening files may see mediation as an appropriate option at which point management will offer mediation.
2. ACC may identify a mediation opportunity and inform DRSL that they are in dispute with a client and mediation may assist to resolve the issues.
3. Claimants will approach DRSL about mediation, more so when involved with a lawyer.

Attending mediation does not alter the review right of the parties and reportedly some 90% of the disputes referred to mediation are resolved at mediation. Referrals to mediation have doubled every six months over the past three years with 1,000 occurring this financial year out of a total of 5,000 review applications.⁴³⁵

Over the last year ACC has been running a voluntary⁴³⁶ mediation trial with DSRL in Hamilton and Invercargill for ACC claimants in dispute with ACC. ACC has been the prime mover in this trial.⁴³⁷ The mediation “trial”, we can assume, has come about because it is viewed as the preferred process for resolving disputes by DRSL (and perhaps ACC): their “high resolution rate” and an increasing number of claimants annually agreeing to attend mediation would seem to support this. There is a question however around whether some ACC disputes should be mediated. Presumably some disputes are more amenable to mediation

⁴³⁵ Paul King, DSRL phone interview 12th October 2006

⁴³⁶ The trial is voluntary because mediation is not enshrined in law.

⁴³⁷ Paul King, DSRL email communication 16th February 2007.

than others; e.g. rehabilitation plans are, but being entitled to cover for an accident is a right that should not be able to be negotiated. How ACC is selecting cases for mediation and how mediators are ‘practising’ mediation when ‘rights’ are concerned⁴³⁸ is unknown. Recently DSRL became “uncertain whether mediation is always the best option for ACC and parties”⁴³⁹ and has embarked on a three month trial using a more “targeted approach” offering additional DR processes. Its approach may be in line with *process pluralism* which if clients have advocates or representation and know their rights, may provide better safeguards for them. Resolving disputes quickly, professionally and cheaply must be in the best interests of any business involved in the dispute resolution industry: DSRL is no doubt actively engaged in the business of dispute resolution through offering advisory services “to everyone” (not only ACC) and charging in an “even-handed way”.⁴⁴⁰

One of the positive features of mediation is its capacity to allow parties to deal with their issues face to face and come to their own resolution without the influence of legal input. If, as Mackinnon states “unaided clients are no longer well served by the review process” then it is perhaps self evident that for some whose cases rely on ‘brute facts’, mediation may be either the saviour or the devil depending on the knowledge and skills of the mediator and their ability to manage power imbalance in something other than an “even-handed” way.

A negative side of mediation and facilitation is that citizens may not know their rights and when negotiating with a statutory agency, the outcome focus of ‘resolution’ and getting it over with⁴⁴¹ may place them unwittingly in a position of giving up their rights and settling for considerably less than they are entitled. Should this be the reality for some claimants, then mediators and those practising hybrid combinations of ADR must be required to understand ‘principled approaches’ to mediation and be aware of emerging knowledge (and theory) that

⁴³⁸ A principled approach to mediation would make explicit, claimants rights and keep these rights active and transparent during mediation.

⁴³⁹ Pullen, D “ADR in a statutory adjudication scheme – a New Zealand experiment” (2007, May) *Adjust* (Newsletter of the Council of Tribunals).

⁴⁴⁰ Paul King, DSRL phone interview 12th October 2006.

⁴⁴¹ A standard form of meeting and greeting by mediators to parties as they begin mediation, involves the mediator complimenting the parties for their commitment to finding resolution and putting the conflict behind them.

raises questions about the notions of ‘impartiality’ and ‘fairness of process’ being consistent within the statutory context.⁴⁴² Mediation in such a context intensifies debates about mediator standards and accreditation, as will hybrid processes.

6.5.5 *Interpreting statistics: the ideology of success*

The ACC website under a heading “Working Towards Sustainable Development” includes comment on the organisation’s commitment to social responsibility which includes “a fair go for all” and “claimant satisfaction”. ACC has this to say;

Claimant satisfaction with ACC has risen to a high of 80%. We register 1.6million claims each year. Only about 400 of these cases are referred to the Courts each year to settle disputes between ACC and claimants, and about 70% of decisions are made in ACC’s favour.⁴⁴³

The 30% of decisions made in the claimants’ favour according to these figures means 120 claimants have been through at least the review process (if not mediation) and had that determination overturned. In these cases, possibly the reviewer simply got it wrong - which is the reality of the adjudication process.

A check to verify the ACC figures has revealed “that the figure of 400 is in addition to the mediation undertaken by DRSL”.⁴⁴⁴ Added to this, DSRL reports 5,000 review applications in the same year. ACC is therefore incorrect in claiming the 400 claimants going to Court are the ‘dissatisfied clients’. The 5,000 review applications must also be included as ‘dissatisfied clients’ making the percentage of satisfaction considerably less than the 80% claimed by ACC.⁴⁴⁵

⁴⁴² According to Baylis and Carroll a “principled approach” to mediation would involve more explicit recognition of likely power differentials in process design and closer attention to the potential impact of statutory mechanisms on the integrity of the process. Baylis, C & Carroll, R The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation [2002] Bond LR. 14, 317.

⁴⁴³ ACC Sustainable Development Report 2005 “Working Towards Sustainable Development”, obtained from ACC website <www.acc.co.nz> August 2006.

⁴⁴⁴ Chief Advisor, Marketing and Communications, ACC email dated 27th October 2006.

⁴⁴⁵ Paul King, Manager Client and Business Development, DSRL has provided figures for the first 7 months of the financial year (July 06 to Jan 07) reviewers issued 1809 decisions; 905 review applications were withdrawn and 422 mediations have been completed. It appears approximately half the review applications were withdrawn and we can assume the 422 mediations formed part of the withdrawn reviews leading to the possible conclusion that mediations also should be added to any figures ACC provides on client satisfaction. If this is the case, the 80% satisfaction claimed by ACC in 2005 is significantly overestimated.

Presenting a more favourable picture of ‘satisfaction’ than the figures of ACC and DRSL actually reveal, is a topic that will be canvassed later under the banner of retirement village resident satisfaction surveys conducted in New Zealand and Australia. For some reason, the subject of dispute and conflict resolution does not seem compatible with ‘satisfaction’ surveys (or analysis) as will be demonstrated.

6.5.6 ACC, Independence & the Crown Entities Act 2004.

When exploring the question of *independence* surrounding statutory dispute resolution, consideration of the legislation covering Crown entities provides some clarification. Under the Act, the Accident Compensation Corporation is an *Agent of the Crown* and falls into the category having the highest level of government influence. In its role as the state insurer for all accidents and injuries it also has a predictably high number of claims made against its decisions.

The Act sets out three levels of statutory entities and their proximity to government policy. Section 7 sets out the meaning of Crown entity and the categories of Crown entities. The different types are listed as:

Crown agents (which must give effect to government policy when directed by the responsible minister). These are named in Part 1 of Schedule 1

Autonomous Crown entities (which must have regard to government policy when directed by the responsible Minister). These are named in Part 2 of Schedule 1

Independent Crown entities (which are generally independent of government policy). These are named in Part 3 of Schedule 1

ACC owns DRSL and maintains a directorship of personnel appointed at its discretion. This is consistent with the provisions of the Crown Entities Act. The previous Chair was also on the board of ACC. This link has apparently not been questioned in such a way as to alter the arrangement as far as claimants in dispute with ACC are concerned. The belief of the manager interviewed is that the reviewers appointed are compelled by law to act independently and the organisation fully supports the law. We are led to assume any links between the board and ACC and the board and the reviewers is unaffected by the status of ACC being a *Crown agent*. Its reviewers are either employed or contracted by DRSL; they are to act independently and like judges are paid for all decisions whatever their outcome.

6.5.7 *Systemic realities*

ACC as the owner can remove and appoint directors from DRSL. This can be seen as indicative of its interest in the governance of the organization; it is not an “arm’s length” relationship with its responsible minister but more one of “hands on”. It would seem to follow that the agency set up to deal with a “hands on” Crown agent’s disputes could be more susceptible than it is aware, to be influenced by prevailing government ideology and the policies and practices that flow from that.

Viewed systemically, macrosystem influences such as ideology can be seen to exist within the law and regulations of a state or country. The governance frameworks, management practices and performance targets of organisations and individual employees who carry out the roles that support the political and legal infrastructure, are also set up to respond to the prevailing ideological determinants. None is independent of the other; rather an interdependent dynamic results with organisational policy becoming the driver of individual ‘outputs’ which in turn impact on the lives of citizens.⁴⁴⁶

The interview with the DRSL manager indicated DRSL ‘outputs’ are open to public scrutiny and therefore can be measured against the ‘owner’ organisation’s business goals. Without knowing precisely what DRSL and ACC business goals might be, at the most basic level it could be assumed that ACC would want to minimise its costs in terms of dispute resolution processes and therefore minimise the opportunity for successful claims against its decisions. DRSL possibly carries one of the highest workloads of any dispute resolution business in the country with reviews for ACC alone numbering 5000 per year; a significant proportion of these reportedly resolved at mediation. The figures provided by King for the first seven months of this financial year (July 06-January 07) show reviewers have issued 1809 decisions and conducted 422 mediations.⁴⁴⁷

⁴⁴⁶ Bronfenbrenner, U *The Ecology of Human Development*, 1979.

⁴⁴⁷ Email communication from Paul King, 16th February 2007.

ACC as a *Crown agent* is the principal corporate under the Injury Prevention Rehabilitation and Compensation Act 2001. The Act defines the parameters within which citizens are able to make claims for compensation and have their cases reviewed when dissatisfied with ACC decisions. DRSL, the Corporation's legitimate reviewing and dispute resolution service, must give effect to the law when conducting reviews⁴⁴⁸ "not government policy".⁴⁴⁹

Unconscious contradiction is evident in King's experience of DSRL's role with ACC however. P.King has been willing to be involved in the mediation trial in Hamilton and Invercargill as a result of ACC policy; whether or not DSRL sees this as being involved in "government policy" is a moot point. The fact that ACC has, according to King, been the "prime mover" in the mediation trial which DSRL took up, provides evidence of DRSL's willingness to follow ACC policy.⁴⁵⁰ Linked to the context of reviews perhaps it is not surprising that the results of reviews are in the majority of cases in ACC's favour. It seems that *ideology* is present in DRSL's business whether it is recognised or not. Perhaps for DRSL, *ideology* is like power and until recognition occurs, its influence will not be resisted.⁴⁵¹

Can we expect the reviewers will deal with reviews in ways that are professionally principled and statutorily compliant while at the same time acknowledge ideology that may unfairly alter outcomes for unrepresented clients seeking reviews of ACC decisions? Whether this is actually possible would depend on the skills and knowledge of the reviewers. This would include their ability to apply a political analysis to illuminate the inevitable underlying ideology pervading their role and the regulations that govern it. There remain unanswered questions beyond the scope of this study which are nevertheless critical, when considering the issue of

⁴⁴⁸ Paul King reports that "the legislation is very clear, the reviewer must put aside ACC policy" when conducting a review. Email, 16th February 2007.

⁴⁴⁹ King refers to s 139 (3) which states "The Corporation must not include in the reviewer's contract any term or condition that could have the effect, directly or indirectly, of influencing the reviewer, when conducting a review, in favour of the Corporation".

⁴⁵⁰ Chapter 4 of this thesis cites a NZ study surrounding 'participation and control' in retirement villages. The author Mary Simpson introduces the work of Lukes to illuminate how it is that residents of a retirement village are apparently so easily controlled by a staff member. Her finding was consistent with Lukes' thesis "that power cannot be resisted until it is recognised".

⁴⁵¹ Lukes, cited in Simpson, M "Participation and control in retirement villages: Implications for customer service" Conference paper presented at 10th Annual Waikato Management Student Research Conference, University of Waikato, 20th October 2006, 8-9.

the *independence* of DRSL from ACC. The example of DRSL raises questions about *independence* from entity (ACC) and fairness of process for clients of ACC. It particularly highlights the difficulties in recognising how ideology can impact on the way operations are viewed, especially for those looking from the ‘inside’ out. In relation to the RVA disputes panel and perceptions of lack of independence surrounding their selection by operators, ACC reviewers could be seen as joined at the hip of ACC. This situation is ripe for review from the outside in.

6.6 Australia – National Native Title Tribunal

The matter of how effectively statutory processes fairly, impartially and independently deal with claimants, is further illuminated in a study conducted on the workings of the National Native Title Tribunal of Australia. The writer, a PhD candidate researching Commonwealth indigenous policy argues:

National Native Title Tribunal (NNTT) presents a façade of indigenous advocacy via its ‘outcome and output framework’ which it uses to report and measure its performance in accordance with Commonwealth requirements. The framework implies that all of the Tribunal’s ‘outputs’ contribute to its sole stated ‘outcome’; ‘the recognition and protection of native title’...It is shown that the NNTT tends to rule in favour of non-indigenous interests when making arbitration decisions. The façade conceals the reality that when arbitrating between indigenous and non-indigenous parties competing for valuable resources the Tribunal tends to rule in favour of the latter party.⁴⁵²

The formation of the NNTT was a legislative response to the watershed *Mabo* decision from the High Court of Australia in 1992. This decision followed Aboriginal Australian Eddie Mabo’s ten year litigation battle to achieve recognition (four months after his death) of the right to land ownership “by virtue of occupation rather than conferral of rights by government”.⁴⁵³ Corbett uses the NNTT’s 2004-2005 annual report as a way to demonstrate how its processes disadvantage those seeking native title. The report proclaims the Tribunal’s main role as assisting people to resolve native title issues. It does this through agreement making. Arbitration, by tending to favour non-indigenous parties also

⁴⁵² Corbett, T “The National Native Title Tribunal’s Façade of Indigenous Advocacy” [2006] *Social Alternatives*, 25, 2, 37; Corbett, T and O’Faircheallaigh, C “Unmasking the Politics of Native Title: The National Native Title Tribunal’s Application of the Arbitration Provisions” *UWALR* [2006] Nov, 33, 1.

⁴⁵³ Pearson, N (1994) and French, R (2003) cited in Corbett 2006, 37.

has the effect of reducing the bargaining position of indigenous people: the disadvantage then is two-fold.

The Native Title Act 1993 provides a dispute resolution system that can occur at the same time native title applications are being resolved. This apparently avoids the years of struggle occurring in *Mabo*. The process is called the “future acts process”. It allows claimants to negotiate some proposed developments, although the right to negotiate is not a right to stop a project going ahead, and it is usually only applicable in certain types of cases.⁴⁵⁴ The right to negotiate (RTN) is “triggered” by the government advertising its intention to approve a future act. The media advertising and notification to claimants and their representative bodies allows claimants the opportunity to exercise their right to have a say on how the development might proceed.⁴⁵⁵

Section 32 of the Act includes the “expedited procedure” where the right to negotiate can be bypassed for reasons of “low impact” and unlikely disturbance of community and social activities and without disturbance to land or waters. Native title parties can object and invoke an arbitration which if found in the applicants’ favour is limited to having their right to negotiate observed: however, if found against the applicant native title holders “the act may be done”.⁴⁵⁶ In this context, the cliché *damned if you do and damned if you don’t* appears true.

Corbett makes further points: in contrast to expedited procedure arbitrations, future act arbitrations are rare and have “never” resulted in the Tribunal ruling “that the act must not be done” a determination available under section 38(1) and further, the Tribunal has been “reluctant to attach conditions that could be viewed as onerous”.⁴⁵⁷ This tendency of the Tribunal according to Corbett...

To rule in favour of non-indigenous parties in future act arbitration has important political implications for both the outcomes for indigenous people

⁴⁵⁴ This would include mining that may occur on the claimants land.

⁴⁵⁵ This is part of a “good faith” opportunity to negotiate an agreement on how the planned development will take place. Either party can request mediation and have six months to endeavour to find agreement, after which either party can approach the Tribunal to arbitrate “on whether the development should proceed, and if and what conditions should be attached” (Corbett 2006, 39).

⁴⁵⁶ Corbett, *supra* n 452 at 40.

⁴⁵⁷ *Ibid.*

from agreements, and the dynamics of mediation and/or negotiations that occur prior to reaching them. From this perspective the Tribunal's arbitration activities, which it de-emphasises, are more significant than its mediation and agreement making activities which it emphasises. The different emphases reflect an ideological view that agreements are inherently beneficial to all parties and suggests they do not occur as a result of political processes that are dependent on bargaining positions.⁴⁵⁸

The Tribunal's 2004-2005 Annual Report comments on performance for future act determination with regard to 27 mining tenements where 15 out of 19 applications were finalised by consent rather than through arbitration. The report cites its previous reporting period reaching similar conclusions and determines that this "reflects the climate of cooperation and negotiation fostered by the Tribunal".⁴⁵⁹

The Tribunal does not appear to consider that the low occurrence of arbitration may actually be the result of strategic avoidance by indigenous parties because of their awareness of the low probability of a ruling in their favour, rather than a 'climate of cooperation'.⁴⁶⁰

Corbett's thesis can be found in his analysis of the way the Tribunal achieved its data which concludes that most disputes are resolved at mediation and few cases now move on to arbitration.⁴⁶¹ The emphasis on mediation falsely, according to Corbett, promotes a climate of co-operation through the process of mediation.⁴⁶² This is a very disturbing claim and one that mediators operating within this system should take seriously if they are sincerely open to ethical challenges and want to practice mediation with morality and integrity.⁴⁶³ These writers have

⁴⁵⁸ Ibid.

⁴⁵⁹ NNTT 2005, 75 cited in Corbett, 2006, 40.

⁴⁶⁰ Ibid.

⁴⁶¹ Corbett notes "...importantly the Tribunal has used the raw score of 'arbitration decisions on objections to the expedited procedure' as an 'output' which contributed to the recognition and protection of native title, regardless of whether the objection is upheld or not (NNTT 2003a, 78-82). In other words the tribunal includes determinations regardless of who won each case and in doing so uses cases where the RTN is by passed as a performance indicator for the recognition and protection of native title" 2006, 40.

⁴⁶² Corbett's comments on mediation are consistent with Nader's view (cited in Menkel-Meadow 2003, xiv at n 330) coercive pushes towards participatory processes result in a sense of "false harmony" and may be as unjust as conventional institutions.

⁴⁶³ A later study undertaken by Corbett and O'Faircheallaigh examines the NNTT's application of arbitration provisions on the Native Title Act 1993 between 1994 and 2006. They argue two points; (1) the Tribunal's arbitration function does not follow accepted rules such as parties' willingness to agree (in advance) to arbitration or the rule of natural justice which addresses procedural fairness providing each party the opportunity to be heard, to ask questions and contradict the evidence of the other party and (2); the NNTT is not an independent judicial body but is part of the executive. In this case the executive has the power to override tribunal decisions. Members are not on fixed term appointments and a government minister determines appointments and renewals. A government priority is to facilitate development of Australia's mineral resources a factor likely to be reflected in tribunal members' determinations and one that "privileges the

‘unmasked’ a lack of both *fairness of process* and *independence* particularly in the application of the arbitration provisions of the Native Titles Act. The tribunals approach is said to be “inconsistent with the Act’s objectives and systematically disadvantages native title parties and can deny them the RTN [right to negotiate]”.⁴⁶⁴

The inequitable conditions under which Aboriginal Australians are compelled to negotiate and resolve disputes about land and resources seem a long way from retirement village residents in dispute with operators. The reduction in the bargaining position of indigenous people through the promotion of mediation is rarely so clearly illuminated. Proponents of mediation portray a sense of faith in the process that mediation in some situations does not live up to. This seems especially so in contexts where power imbalance is strikingly obvious and valuable or limited resources are at stake. Where ‘settlements’ are the expected outcome, the inequity is increased. In this thesis, mediation is not promoted as an ideal process for unrepresented residents or situations where resident rights become part of a contestation.

In contrast to the strategic avoidance of arbitration by indigenous parties, early indications are that the disputes panel will be favoured by residents as the process for dispute determination. At the time of completing this thesis, three disputes have been determined in the first nine months of the RVA implementation; none have gone to mediation. The ability of the disputes panel to act *independently*, without recourse to political influence other than the ideology implicit in the Act seems at this point, to be sustained. The age and ability of residents to prepare for and represent themselves at a hearing if they have no family members available or cannot afford representation, remains an issue.

6.7 Tribunals in Aotearoa/New Zealand

interests of resource developers over those of native title parties”. Corbett, T and O’Faircheallaigh, C “Unmasking the Politics of Native Title: The National Native Title Tribunal’s Application of the NTA’s Arbitration Provisions” [2006] *UWALR* 33, 1, 155.

⁴⁶⁴ Ibid, 176.

Chapter Four considered enduring principles contained in the 1957 Franks Report. These include general and closely linked characteristics that should be reflected in tribunal procedures. These characteristics, seen to reside under the umbrella of natural justice are; openness, fairness and impartiality. The Franks Committee also emphasised *independence* as a key principle of tribunals as they carry out their role as adjudicators designated by parliament. Tribunals therefore should not be part of the machinery of administration and therefore provide adjudication outside and independent of the Department concerned. The Law Commission Report 85, “Delivering Justice for all” recommended for most of New Zealand’s tribunals, a unified tribunal structure headed by a “President” who is a primary Civil Court judge⁴⁶⁵. Other recommendations included; future tribunals should be established only in accordance with principle and in conformity with fixed guidelines⁴⁶⁶; the structure should build up a core of experienced tribunal members who should sit in more than one of the constituent tribunals⁴⁶⁷ and perhaps of greatest significance:

To ensure independence exists and is seen to exist, the Ministry of Justice should administer all the tribunals in the unified structure.⁴⁶⁸

6.7.1 *The current situation*

The Law Commission found that tribunals in New Zealand have often been created as ad hoc responses to a variety of situations and in response to specific needs. The report identifies “a lack of any coherent framework or settled pattern” and an “unnecessary jungle of different jurisdictions”⁴⁶⁹ as problems that have developed mostly over the past fifty years. Added to this the Commission observes there is no clear entry point for ordinary citizens seeking assistance and the wide variations in process for no principled reason adds to the lack of coherence.⁴⁷⁰ Encompassed in the general lack of cohesion the Commission found inconsistency in a number of areas including public use of some tribunals;

⁴⁶⁵ Recommendation 139, Law Commission, *Delivering Justice for All*, Report 85, 2004.

⁴⁶⁶ Ibid, R138.

⁴⁶⁷ Ibid, R141.

⁴⁶⁸ Ibid, R142.

⁴⁶⁹ Ibid, 7.1.

⁴⁷⁰ Ibid, 7.1, 2.

personnel experience and skills level of tribunal members raises concerns about standing, authority and competence.⁴⁷¹

The New Zealand Royal Commission on the Courts⁴⁷² defined *independence* as “a state of affairs where (decision makers) are free to do justice in their communities, protected from the power and influence of the state and also made as immune as possible from all other influences that may affect their impartiality”.⁴⁷³ The Commission’s interpretation of *independence* when applied to the many tribunals, authorities and commissions that currently exist within our state infrastructure, may not be sustained. The Commission’s definition of *independence* could be considered an ‘ideal’ in a statutory context. Tribunals and adjudicators being “as immune as possible from all other influences” suggests an acceptance of a level of “other” influence. This possibly indicates a realistic appreciation of the tensions that are likely to be present in a statutory decision-making context and the adequacy of protection from external influences, especially the Executive government.

Administrative decision-making is an area of law that will always attract detractors who challenge the *independence* of the adjudicators and reviewers. The proximity of the reviewer, adjudicator or mediator to the entity will inevitably generate challenge and debate. In spite of this, organisations such as DRSL and the NNTT of Australia⁴⁷⁴ hold the view that they have the transparency,

⁴⁷¹ A further concern is the number of tribunals that are housed and resourced by the departments they serve, putting their independence in question. The Commission acknowledges these types of issues arise wherever tribunal justice exists and its recommendation is that New Zealand should follow the example of England, Wales and many parts of Australia in integrating “all but the largest and most prominent tribunals within a single tribunal framework, led by members of the judiciary” (LCR 85, 2002, 7.1, 5).

⁴⁷² Beattie, D S *Royal Commission on the Courts*, 1978.

⁴⁷³ Report of the Royal Commission on the Courts, quoted in McConnell, P “Tribunal independence: challenges and limitations”, Master Paper, 2005.

⁴⁷⁴ A code of conduct for members of the NNTT states in clause 1.1 “in carrying out the functions and duties of a member of the National Native Title Tribunal, a member must: (v) “comply with any lawful and reasonable direction given by the President in accordance with the responsibilities of the President under the Native Title Act”. Section 123 concerns “Arrangement of business” and includes (ii) “provide assistance in making or negotiating agreement under this Act or (iii) conduct a review under this Act”. Also consider Cl 1.2 (b) “it is acknowledged that directions cannot be given to members about decisions they are empowered to make where they are specifically appointed to carry out functions under the Native Title Act 1993 (e.g in the conduct of the right to negotiate inquiry and any decision made in respect thereto”. The tribunal’s code of conduct also states 1.2.(b) “A member must at all times behave in a way that upholds the integrity and good

professional ethics and training within their organisation to avoid partiality or co-option by, and collusion with, the entity whose decisions they review.

The theses of Corbett in the case of the NNTT and Mackinnon and ACC draw conclusions that have derived from a critical analysis of the systems the statutory organisations use to measure and assess performance outcomes (NNTT) and analyse and interpret types of facts (ACC). Both contexts involve ideological factors that have measurably influenced organisational outcomes. In the case of ACC Mackinnon found that legislative changes, underpinned by an identifiable ideological shift from inquisitorial to adversarial process, impacted negatively on the review outcomes for ACC claimants.

In Corbett's analysis, the ideological position taken by the NNTT held that agreements were inherently beneficial to all parties and negatively impacted on (indigenous) claimants. Ideology in these instances can be viewed as neither a neutral nor impartial concept in law: it reflects the dominant culture's worldview and vicariously imposes all this encompasses on the professionals carrying out the roles the state has determined will resolve disputes and compensate victims of harm or injustice. In both examples, legislative changes influenced the outcome possibilities for claimants and actually enhanced a result that would favour the entities goals' and disadvantage the claimants.

A stunning commentary on administrative justice delivered by the Australian Chief Justice Gleeson two decades ago remains relevant in the context of this discussion.

...Very few people seem to have noticed that the only independence which some of these tribunals enjoy is the freedom to do whatever the government of the day wants them to do, and that they operate in practice as a method of distancing potentially unpopular decision-making from those who should take responsibility for it...

reputation of the National Native Title Tribunal". The integrity of the NNTT concept of mediation and arbitration may not be compatible with the notion of *integrity of process* expected by an independent professional body such as LEADR or AMINZ in NZ. Another question to be considered is whether tribunal members belong to a recognised professional body, and whether the code of that body would find the practice of mediation and arbitration within the context of NNTT would meet the required standards of *integrity of process*. The problem of unrecognised collusion is always a possibility in an administrative context.

...We have in this country a proliferation of decision-making tribunals which are represented to the public as being 'independent'. I cannot believe that much more time will be allowed to elapse before the correctness of that representation is made subject to close public examination...⁴⁷⁵

Gleeson's commentary provides an example of how state ideology is transferred through the process of hegemony (manufactured consent) into laws and policy which are then applied to citizens through the decision-making power of tribunals. Examining *independence* within some of the organisations responsible for resolving disputes within or for, statutory organisations, can seem as though 'business success' or achieving resolution, means following with charismatic inclination, the ideas and 'speak' of the prevailing political ideology. Ensuring those in power stay in power requires many conscious and unconscious acts of oppression over many years. In the case of aboriginal Australians, the weight of these Acts is appallingly clear.

A very different approach to individual rights and systemic failure can be viewed through the role of the Health and Disability Commissioner in New Zealand.

6.8 The Ombudsman/Commissioner role in New Zealand

I have chosen the role of the Health and Disability Commissioner (HDC) to illustrate how patient protection has been dealt with in New Zealand and how complaints from consumers of the health system are investigated and dealt with by the Commissioner. I will also include the two private New Zealand Ombudsmen; the Banking Ombudsman and the Insurance and Savings Ombudsman to show how privately funded schemes operate and claim independence from their funding bodies.

The role of the HDC arose out of the Health and Disability Act 1996 enactment of the Code of Patients' Rights. The main enforcement mechanism for complaints is an independent advocate or the Health and Disability Commissioner. Complex and serious cases involving multiple providers or broader systemic issues can be

⁴⁷⁵ Chief Justice Gleeson, quoted in Tracey R "Administrative Tribunals – Some Emerging Issues" A paper given by Richard Tracey at the ABA Conference, July 1990.

investigated and this can involve calling of witnesses; reviewing patient records and

...where the appropriate standard of care is an issue, expert independent clinical advice is obtained. Although formal mediation is a resolution option, most investigations end in a written report from the commissioner to the parties and, where the provider is found to have breached the code, censure and formal recommendations [follow].⁴⁷⁶

These might include that a medical centre must review its policy and practice in relation to prescribing certain medications or in the most serious cases the health provider must undergo a formal competence review by peers and/or be subjected to a disciplinary process.

The New Zealand Health and Disability Commission's (HDC) role is focused on investigation and advocacy. The HDC looks at systemic issues and has the responsibility to investigate complaints. The HDC Act also complements and has some overlap with the Health Practitioners Competence Assurance Act 2003 and an independent Director of Proceedings can also take prosecutions providing different ways to address both problems with individual practitioners and systemic issues as well as giving individual redress.

The HDC is required to "promote, by education and publicity, respect for and observance of the rights of health consumers" and "to make public statements and publish reports in relation to any matters affecting the rights of health consumers".⁴⁷⁷ The educative role and "making of public statements" includes the Commissioner using "investigative reports for educational purposes and for underpinning systemic advocacy on behalf of health care consumers".⁴⁷⁸ A typical example of such a report is for the commissioner to frame the case and the issues within a case study that does not name individuals but does name organizations

⁴⁷⁶ "This law established a mechanism whereby complaints of malpractice or mistreatment could be lodged with an independent ombudsman, who has the authority to investigate, recommend changes in provider practices, and serve as the 'gatekeeper' for professional discipline. Significantly, although this structure was designed to provide consumers with a means to resolve individual complaints, it was also intended to serve as a catalyst for quality improvement throughout New Zealand's health care system" (Paterson, R, "The Patients Complaints System in New Zealand" [2002] *Health Affairs*, 21, 3, 74).

⁴⁷⁷ The Health and Disability Commissioner Act 1994, sec 14 (1) (c) (d) quoted in Paterson, R [2002] 75.

⁴⁷⁸ Paterson, R *ibid*, 75.

and locations; the Gisborne Hospital Report being one example.⁴⁷⁹ The advent of the health and disability ombudsman has meant that trend analysis obtained from resolution of individual complaints can be used to advocate in the health care system on behalf of public consumers.⁴⁸⁰

One of the advantages of the type of advocacy role is the ability to approach issues at both micro and macro levels. While dealing with the individual complaints of consumers, the commissioner also uses examples of individual problems to “drive systemic changes for all consumers”.⁴⁸¹ In addition, research conducted during 2005 in the health sector concluded “The relatively low propensity to complain among patients who are elderly...suggests troubling disparities in access to and utilization of complaints processes”.⁴⁸² This is a situation I believe also exists in retirement villages.

The broad term Commissioner indicates independence from policy making and the government system. When Parliament decides to appoint a Commissioner, it also decides what particular Commissioners do and what level of involvement will be prescribed. For example the Human Rights Commissioner like the HDC has a policy monitoring role as well as investigating complaints. The Parliamentary Ombudsman on the other hand has a narrower complaints focus. When Commissioners exercise both functions the term ‘ombudsman’ appears to be used interchangeably.⁴⁸³

⁴⁷⁹ The Gisborne Hospital investigation began in 2000 following a complaint to the Minister of Health and contact with the media by the New Zealand Nurses Organisation about concerns from nurses employed at the hospital at the time. The commissioner’s report included 34 recommendations relating to incident reporting and complaints handling within the hospital system. The Ministry of Health later audited the hospital and confirmed the recommendations had been implemented.

⁴⁸⁰ Ibid, 76. Paterson reports “For this to occur, the independence and accountability of ombudsman programmes need to be fostered through statutory authority, dedicated funding, and a requirement for reporting to the legislature and the public. As an independent statutory agency separate from the political and policy decision-making process, an ombudsman is well placed to advance consumers’ interests and to have a major influence in shaping the public policy debate”.

⁴⁸¹ Ibid.

⁴⁸² Bismark M, Brennan T, Paterson R, Davis P & Studdert D, “Relationship between complaints and quality of care in New Zealand: a descriptive analysis of complainants and non-complainants following adverse events”, [2006], QSHC 15, 17-22.

⁴⁸³ See Prologue by editor in Paterson, R “The Patients Complaints System in New Zealand”, *Health Affairs* [2002] 21, 3, 70-79.

The Ombudsmen role is usually seen as bringing “to account the actions of the domestic New Zealand executive, that is, the public sector in the name of the individual citizen”.⁴⁸⁴ In a non-Government sector such as banking, the role remains the same, but the cost is levied from within the sector. In the case of a Commissioner, costs come from Ministerial allocations. The Parliamentary Ombudsman however has an investigative and recommendatory role in terms of complaints and does recommend financial compensation. Recommendations are almost always followed by erring government/local government agencies; only in “extremely rare” circumstances have further steps been required such as reporting to the Prime Minister.⁴⁸⁵

Taking the ombudsman role into the private sector has been effected successfully in New Zealand; from 1992 with the advent of the Banking Ombudsman and 1995 the Insurance and Savings Ombudsman. Both schemes offer free, independent opinions on complaints and disputes with the relevant sector. Both are funded by the participating sector groups and both are “manifestly” independent of the sectors, providing impartial decisions, deciding each complaint on merit.⁴⁸⁶ Both secure independence through Commissions; the Banking Ombudsman Commission and the Insurance and Savings Ombudsman Commission. In each case it is the Commission’s function to appoint the Ombudsmen. In the case of the Banking Ombudsman the Code of Banking Practice incorporating Customer Rights preceded the appointment of the Ombudsman. The Consumer Guarantees Act 1993 added to those rights. The principle of rights determining dispute resolution mechanisms is therefore recognised.

Mutually agreed settlements are often reached and the Banking Ombudsman has the power to award compensation to cover “direct financial loss or damage up to \$200,000 and to compensate for inconveniences up to \$6,000”.⁴⁸⁷ A binding

⁴⁸⁴ *The Ombudsman Concept and Human Rights Protection* [1999] VUWL Rev 6. 1-7.

⁴⁸⁵ Tollemache, N “Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand” [1996] VUWLR 26, 243.

⁴⁸⁶ Ibid, 238 and also information obtained from the websites of the Banking Ombudsman <www.bankombudsman.org.nz> and the Insurance and Savings Ombudsmen <www.iombudsman.org.nz> May 2007.

⁴⁸⁷ Facts sheet “How We can help you” obtained from website, <www.bankombudsman.org.nz>

award can be made against a bank.⁴⁸⁸ The Insurance and Savings Ombudsman provides reasoned opinions on disputes and companies are bound by the ISO's decisions.⁴⁸⁹ The ISO cannot award compensation or order a company to pay any money outside of the terms of the policy. However the decisions of the ISO are confidential to the parties and this lack of transparency was recently criticised by the popular TV programme "Fair Go".⁴⁹⁰

6.9 Recapping to this point

The discussion to this point has considered four areas of dispute resolution; the larger public domains of employment (ERA); tribunals including the Australian NNTT; no-fault accident compensation ACC and the ombudsman facilities provided through the Health and Disability Commissioner, the Banking and Insurance and Savings Ombudsmen.

The employment area distinguishes itself through its statutory objectives to promote good faith and collective bargaining; its hierarchy of DR processes; and the way in which mediation is used as the primary process for resolving employment relations disputes. In this context mediators carry out a number of roles in order to maximize opportunity for resolution without legal involvement and take general instructions from the chief executive; a unique factor in employment mediation.

Dispute resolution under the Injury Prevention Rehabilitation and Compensations Act 2001 has a two tiered system; one which deals internally with complaints concerning breaches of the code of claimants rights by the Accident Compensation Corporation and the other surrounds disputes between claimants or employers about the Corporation's decisions. The distinguishing features of the ACC disputes context surround the use of the Corporation's company DSRL to conduct reviews and mediation on behalf of the Corporation. In both contexts unrepresented clients are considered to be disadvantaged and *independence* in

⁴⁸⁸ Ibid.

⁴⁸⁹ Fact sheet "What we do" obtained from website <www.iombudsman.org.nz>

⁴⁹⁰ T.V One, "Fair Go" 18th June 2007.

both contexts is questioned. If measured against the principle of *independence* in Chapter Four requiring certainty about DRSL reviewers' *independence* from the entity (ACC) whose decisions they are reviewing, it is unlikely DRSL reviewers and mediators would attain that certainty: *fairness of process* is also contested in this example.

Statutory tribunals are governed by the principles of *natural justice* and *independence* providing adjudication outside government administration. In the case of the Australian NNTT its distinguishing features are its lack of *independence* from the executive in terms of its decisions and the involvement of a government minister in appointments and renewals. These features together create an inconsistency incompatible with the Act's objectives, and also disadvantage native title parties. Statutory tribunals in New Zealand have been reviewed and recommendations favour clearer differentiation from the administration through placement of the majority of tribunals into a unified structure under the umbrella of the Ministry of Justice. The perception and actual *independence* of some tribunals in New Zealand is not necessarily clear given the ad hoc manner in which many have been founded.

The Ombudsman/Commissioner role deals with disputes and client protection and operates in statutory and private domains. Investigation and recommendation are the functions of the Parliamentary Ombudsman; the HDC has an investigative and advocacy role with the ability to influence systemic change. Independence is achieved in these statutory roles through their establishment as independent statutory agencies. In the case of the private ombudsmen, independence is achieved through Commissions; all ombudsmen operate under the principle of natural justice.

6.10 *Dispute Resolution in the private sector*

6.10.1 *New Zealand Press Council*

The New Zealand Press Council was established in 1972 by newspaper publishers and journalists. It is funded by the industry and deals with *independence* through its five public members, and an independent chair. Five further members represent the journalists' union and the NZ Amalgamated Engineering Printing and Manufacturing Union (EPMU). The intention was "to provide the public with an independent forum for resolution of complaints against the press". While complaint resolution is its core work it also promotes freedom and maintenance of the press "in accordance with the highest of professional standards".⁴⁹¹ The Council's mission

...is to provide a full service to the public in regard to newspapers, magazines or periodicals published in New Zealand (including their websites) regardless of whether the publisher belongs to an organisation affiliated with the Council. If the publication challenges the jurisdiction of the Council to handle the complaint, or for any other reason does not cooperate, the Council will nevertheless proceed to make a decision as best it is able in the circumstances.⁴⁹²

The Press Council's complaints process has been set up by the industry to try to present and maintain a high standard of journalism and ethical propriety in the media and the community. At the same time it defends freedom of speech and maintenance of the press. It could therefore be seen to be arbiter of its members and through the enforcement of printed determinations when editors err, it can also be seen to dispense its own sanctions.

The complaints procedure requires complainants to first deal with the editor/publisher they are complaining about within three months of the publication or non-publication of an item.⁴⁹³ If the Council upholds a complaint in full or in part, the publication "must publish the essence of the adjudication, giving it fair prominence". If a complaint fails, the publication "may" publish a shortened

⁴⁹¹ NZPC *Principles* obtained from website <www.presscouncil.org.nz> 13th January 2007.

⁴⁹² NZPC *Complain* obtained from website <www.presscouncil.org.nz> 7th February 2007.

⁴⁹³ This is a similar process to the complaints facility contained in the Retirement Villages Act; the first step in attempting to resolve an issue without external involvement. If there is no satisfaction with the response or no response, a letter must then be written to the Press Council: a formula is provided. There are no time periods given to cover these actions. The terms "reasonable interval" and "promptly" are stated. It is therefore at the discretion of the complainant to interpret what this means. However once the Press Council has received the written complaint the Council copies the complaint to the editor who must respond in 14 days. The editor's response is forwarded to the complainant by the Council. If the complainant is satisfied with the editor's response, no further action is taken. If the complainant wants to make further comment this is then passed on via the Council to the editor who has a further 14 days to respond.

version of the decision.⁴⁹⁴ A Council “adjudication” cannot be appealed but the Council is prepared to re-examine a decision in certain circumstances. The Council has protected itself from being used as a “trial run” for litigation by insisting on a written undertaking that if the Council takes up a matter, complainants “will not take or continue proceedings against the publication or journalist concerned”.⁴⁹⁵

The lack of specific timeframes is something that may be problematic in a legal context but in a private context should be examined according to criteria of *fairness, impartiality* and *effectiveness*. In the context of this broader thesis and in spite of half the Council comprising public representatives, it may not necessarily be considered an *independent* process due to its ‘internal’ nature. It would also be useful to know how ‘consumers’ of its complaints process have experienced its effectiveness. However, the Council publishes its ‘rulings’ on a website and names the Council members who have made the rulings. This seems a fair and open process; it certainly ensures transparency. In addition, it provides an accountability mechanism which can be easily accessed and it makes no secret of the issues it considers, the positions of the parties and the reasons it has come to the ‘rulings’ it publishes.

The Council operates as an adjudication panel and uses terms such as “adjudicate” and “rulings” suggesting borrowed legal terminology. If legal purists however critiqued its processes from a definitional angle, some inconsistencies may be found and rules used in legal adjudication may not be present. It provides a mechanism for the public to complain about matters from grammatical irritations to more serious issues of discrimination and the publishing of names and background information of family members of those convicted of serious drugs charges.⁴⁹⁶ When linked to the retirement village context, the question could be asked of RVANZ; would the Association consider taking action against member

⁴⁹⁴ NZPC *Complain, 2*.

⁴⁹⁵ *Ibid*

⁴⁹⁶ See case number 1059 *Complaint against the Dominion Post* <www.presscouncil.org.nz>. This case ‘ruling’ shows how the Council operates as a panel with not all members agreeing; a ‘split’ decision occurred in this case over some aspects of the complaint. The case was taken on a *breach of privacy* principle and upheld on the basis of a majority decision by six to five. The names of the eleven Council members and how they voted is published at the conclusion.

organisations that breach any part of the Act including the Retirement Villages Code of Practice and the Code of Residents' Rights, and publish the results?

6.11 Summary

In this chapter I have examined statutory models for dispute resolution which have raised questions about whether these models satisfy principles of *equality before the law*, *independent adjudication* and *fair and proper process*. I have demonstrated through the work of Mackinnon how policy changes occurring within ACC in 1992 caused a move away from an inquisitorial approach to adversarial 'hearings' resulting in disadvantage to uninformed claimants.

A case has been made to show DSRL's connection to government policy and by association, ideology, highlighting its lack of *independence* and its susceptibility to influences that may affect its partiality.

Using Corbett's work I have shown how the Australian Native Titles Tribunal is influenced by its proximity to the entity whose decisions it is reviewing, compromising its *independence* and *impartiality* and significantly disadvantaging native title claimants. This has encroached on the principles *equality before the law*, *adherence to the rule of law*, *fair and proper process* and *independent adjudication*. Its processes are not truly *independent*; *impartiality* is compromised and the influence of *ideology* on the dispute professionals involved and the process outcomes can be seen to have compromised the integrity of both.

Using the example of the Employment Relations Act 2003, I have shown how mediation in this statutory context is unique, providing a fast track response to employment disputes effectively allowing for power balancing between employer and employee. Mediation is compulsory and preferred over the two higher institutions who can refer parties back to mediation; mediators give directions, legal input is prohibited and unions usurp individual autonomy demonstrating how the objectives of the Act covering productive employment relationships

through promotion of mutual trust and confidence, work. The ERA example demonstrates resistance to hegemonic influences through working class capital in the form of strong union organisation and representation; strategies of ‘good faith’ and ‘collective bargaining’; and rejection of legal culture. Metaphorically speaking, this has been achieved by strengthening the tail of the dog (the mesosystem) and the dog (the macrosystem) taking its direction from the wagging tail.

I have covered the Health and Disability Commissioner role which appears to ideally meet the communities’ needs for advocacy, investigation and exposure of systemic issues as well as providing individual redress. I have identified the problem of translating patients’ rights “from slogans into regulatory levers for improving the quality of health”.⁴⁹⁷ I have included the private sector ombudsman schemes in banking and insurance and savings to demonstrate the differences in funding and the application of decisions either through recommendation in the case of the Parliamentary Ombudsman or a binding determination in the case of the two private schemes. In a private context, I have reviewed the transparent and accessible complaints process of the New Zealand Press Council and identified some areas that raise questions about precision of its processes which may impact on *equality before the law* and *fair and proper process*.

The right of citizens to seek redress through complaints and disputes facilities is central to a democratic society. This chapter has covered a range of statutory DR processes and one private process. *Equality before the law*⁴⁹⁸, *independent adjudication*, *fair and proper process* are the principles most often compromised in some of these examples.

The following chapter will examine retirement village DR processes in NSW and Queensland and compare these with the New Zealand process. Key differences that have relevance to resident protection will be sought.

⁴⁹⁷ Paterson, R, “The Patients Complaints System in New Zealand” [2002] *Health Affairs*, 21, 3, 78.

⁴⁹⁸ The principle *equality before the law* has been adapted to fit the contexts being examined.

Chapter 7 The Australian retirement village comparison

7.1 Introduction

This chapter considers the retirement village industry in Australia and New Zealand. I will first discuss the need for regulation in both countries following rapid growth in the sector. Second, I will focus on the key areas of difference between Australian state retirement village legislation and New Zealand legislation as it impacts on residents in dispute with operators; the Australian states being NSW and Queensland. Third, I will contextualize the sector in both states; relative to this is the potential size of problems in the sector from the perspective of resident groups. Fourth, I will consider aspects of both state Acts and include the DR processes of the Queensland Commercial and Consumer Tribunal (CCT) including the views of the Executive Officer. Fifth, the issue of residents' committees and the New Zealand Act will be contrasted with the Australian situation. Sixth, the realities of age and financial capital in relation to disputing will be highlighted and linked to the role of 'counsel for the child' in the Family Court context.

7.2 The growth of an industry and its issues

Australia and New Zealand have experienced the booming retirement village industry over the past three decades and found some of those operating within the industry wanting. An examination of tribunal decisions in several states in Australia reveals problems are not limited to the for-profit sector.⁴⁹⁹ From the mid-1980's to the late 1990's all Australian states and the Northern Territory introduced legislation to regulate and protect retirement village residents and their assets⁵⁰⁰ and New Zealand followed in 2003. Tasmania's Retirement Villages Act

⁴⁹⁹ For example refer to Residents of Wishart Christian Village v Wishart Christian Village Association [2004] QCCTRV 5 (24 May).

⁵⁰⁰ Victoria's Retirement Villages Act 1986 now incorporates amendments following a Government initiated review in mid 2002. Full consultation was undertaken with stakeholders and residents and included the for-profit and not-for-profit sectors. The major findings which were incorporated in the amendments to the Act surrounded the need for improved mechanisms for "solving a wide range of problems...[which] will make villages better for residents, now and into the future. The amendments deliver important reforms in the areas of contracts, disclosure, statements, dispute resolution and exit arrangements". In addition a Residents' Association to

came into force in July 2005. Consistent with most other settings in society, the retirement village sector is not immune from dishonest and opportunistic developers and operators.

New South Wales with approximately 700 retirement villages, private and not-for-profit, has evolved a legislated system which results in the Government working with several mechanisms to monitor the conduct of retirement village owners and operators. A compliance programme undertaken by the Office of Fair Trading (OFT) has investigation powers under the Retirement Villages Act 1999 and is focussed on village owners and operators through the monitoring of industry publications, resident complaints and other market information.⁵⁰¹ The NSW Consumer, Trader and Tenancy Tribunal which deals with retirement village disputes can refer matters to OFT for investigation. Retirement Village legislation in most states in Australia incorporates residents' committees which can take and defend matters before a relevant consumer and trade tribunal on behalf of some or all residents. Retirement Villages in Australia are in the same situation as New Zealand villages; they are independent of Government and operate within the private sector; in both countries governments have deemed the age and vulnerability of the residents entitles them to legislative protection from the vagaries of the market and the possibility of unscrupulous operators.

In the New Zealand context there is no evidence to suggest dispute resolution processes set up to protect the interests of retirement village residents will not be used any less frequently than they are across the Tasman.

7.3 NSW and Queensland in the beginning

One of the unspoken principles by which people conduct their lives in the commercial world must surely be: leave yourself open to exploitation by others and that exploitation will inevitably take place. Elderly people have become greater targets for exploitation over the years it is generally acknowledged.....The

"provide a collective voice for retirement village residents" was recommended (Reported by Consumer Affairs Victoria on website <www.consumer.vic.gov.au> under Laws applying to Retirement Villages. The state of NSW is currently undergoing a review of its Retirement Villages Act with the aim of "strengthening the rights and security of residents as well as cutting red tape for village operators". (News Release Minister Fair Trading, Diane Beamer 23 November 2006). The Retirement Villages Amendment Bill 2006 can be viewed on the Fair Trading website <www.fairtrading.nsw.gov.au> accessed February 2007.

⁵⁰¹ CHOICE Australian Consumers' Association website <www.choice.com.au> and <www.fairtrading.nsw.gov.au> accessed 9th September 2006.

oppressive nature of the [retirement village] system on the individual cannot be overstated.⁵⁰²

Queensland, from this side of the Tasman is often viewed as the home of corporate body living arrangements. Possibly this has something to do with the climate and the way New Zealanders perceive the popular apartment style holiday accommodation on the sunny Queensland coast. A July 2001 review conducted by the Office of Fair Trading found 190 retirement villages in Queensland, 35% being operated by non-profit organisations. By 2006 the ARQRV reported 246 registered retirement villages in Queensland.⁵⁰³ At that time around 700 retirement villages were operating in New South Wales with approximately 15% being much larger for-profit villages; numbers of villages do not equate with numbers of residents living in a particular village, this depends on the number and size of units in each village.⁵⁰⁴ Nevertheless, the Retirement Village Association Ltd of Australia⁵⁰⁵ in its opening statement provides some idea of the industry's burgeoning popularity.

...Through professional collaboration and dedicated industry leadership, the RVA strives to deliver the support that our members and their residents deserve by working closely with government bodies to meet the challenges of **the fastest growing industry in Australia.**⁵⁰⁶ [emphasis added]

There is no doubt Australia like many Western countries is bracing itself for the surge of baby boomers now reaching 60 set to double in the next two decades. These cohorts will consider their housing options and include retirement villages as an option. Last year in her opening address to the Association's regional conference, the Western Australia Minister of Consumer Protection, Michelle Roberts forewarned; "baby boomers are sophisticated, confident and demanding".⁵⁰⁷ But it will be another 18 years before they reach the current average entry age to retirement villages.

⁵⁰² This is a quote used by Keogh and Bradley 2002, 7 to demonstrate "comparable meekness" as perceived by a resident in *King v Tasman Securities Pty Ltd* 96024970, Residential Tribunal of NSW 1996.

⁵⁰³ Email communication from the secretary of the Association of Residents' of Queensland Retirement Villages 23rd November 2006. The Association reports it has 7000 members.

⁵⁰⁴ This information was obtained from the website of the Australian Consumers' Association <www.choice.com.au> 9th September 2006.

⁵⁰⁵ The Retirement Villages Association is a national owner/operator group.

⁵⁰⁶ <www.retirementvillagesaust.com.au>

⁵⁰⁷ Hon Michelle Roberts, Minister Consumer Affairs, Opening address to the Retirement Village Association Ltd 2006 WA Regional Conference, Friday 4th August 2006.

Both NSW and Queensland had new retirement village legislation in 1999. Both states consider their legislation will help to close some of the most obviously exploitable gaps from which unscrupulous or lax operators can gain advantage. The Minister for Fair Trading in NSW at the time, saw the Act as “one of the most important social justice reforms ever made in the fair trading area”. The 1999 (NSW) Act represented “a complete overhaul of all legislation and codes of practice governing the conduct of retirement villages in New South Wales”.⁵⁰⁸

The New Zealand Law Commission in a report on Retirement Villages published in 1999 made the following observation;

The solution proposed by the Law Commission is that there be enacted a Retirement Villages Act tailored to the situation of retirement villages. There is proposed provision for disclosure, continuing prudential supervision, swift and informal dispute resolution and the overruling of unconscionable contract terms. This would be a very light-handed regulation. The New South Wales Department of Fair Trading published in June the exposure draft of a Retirement Villages Bill that seems to regulate every facet of the operation of retirement villages in minute and petty detail. Perhaps they have more under-arm bowlers in that jurisdiction. We have not reached the stage in New Zealand where that degree of protection is needed. When and if we do, the New South Wales legislation will be available as a model to law-makers.⁵⁰⁹

The experiences of NSW (and Queensland) residents outlined in Chapter Two do not necessarily indicate a proliferation of under-arm bowlers but their experiences of their Act and Tribunal dispute resolution process do not give assurance that the system necessarily protects residents in some situations; for example when contracts are over-ruled due to wrong-doing by operators. The reality of this action imposed by the Tribunal is the resident loses the place they have called home.

A resident who courageously pursues – and wins - a dispute (usually about fees and charges) and the Tribunal finds in their favour, paradoxically finds the table has turned against them with the Tribunal setting aside their ‘residence contract’. The resident then has to move on leaving the operator undisturbed: though financially compensated for their loss, residents are also forced to leave their home and familiar people and surroundings. Both the Queensland and NSW state residents’ associations see this as a huge injustice.

⁵⁰⁸ Keogh, J Bradley, P “The potential for contractual disputes in retirement village living: an examination of recent litigation arising from resident contract disputes in NSW retirement villages”, paper presented at *Pacific Rim Real Estate Society 8th Annual Conference*, January 21-24, 2002, Christchurch, New Zealand.

⁵⁰⁹ Dugdale, D F “Retirement Villages”, The Law Commission, 1999.

They also have concerns about older women and their vulnerability when operators want to increase charges. According to Residents' Committees in New South Wales and Queensland, older women residents either succumb to pressure from operators to pay unjustifiable fees or they welcome the support of the more business or professionally experienced male members of their village committees and their state Residents' Association. The office holders of the state residents' associations are mostly men, some with considerable experience in business, the professions and government bureaucracies.

...The generation mainly consists of women who were home makers and family rearers. They sold their family home to go into a retirement village. The cost of a unit is generally less than the price of a suburban home. Many could afford to move into a village with a reasonable sum of money in the bank....most do not question the operator's figures for fees even when a resident might say that the operator is charging residents for items of expenditure for which the company is responsible. They have never been in a trade union and dislike what they have heard over the years about strikes and industrial action. They compare the work of the RVRA with the industrial action and many think we are radical and trouble makers...

...There is a lot of good theory in the Act. Especially when residents can go to the CTTT⁵¹⁰ under section 123 to have your contracts re-written. I cannot see how a resident could handle that without expert legal assistance and even if the resident won at the Tribunal, the decision would undoubtedly be appealed to a higher court and who knows where it would finish. The saving grace for the residents could be that if the matter attracted media interest, the operator could back off because the reporting of it could damage his business prospects...⁵¹¹

The NSW Act is currently under review.

7.3.1 Retirement Villages Act 1999 Queensland : Steps in the DR process.

Legislation in Queensland covering the corporate body accommodation sector was first instituted in the 1970's: it now includes retirement villages. The Retirement Villages Act 1999 covers all Queensland retirement villages. Disputes involving retirement village residents and operators come under the jurisdiction of the Commercial and Consumer Tribunal of Queensland (CCT). Both mediation and adjudication in the form of a Tribunal hearing is undertaken by the Tribunal with separate professional groups involved in each process: both require applicants to have attempted to resolve the dispute through negotiation within the village prior

⁵¹⁰ CTTT refers to the Consumer Trader and Tenancy Tribunal (NSW).

⁵¹¹ Email communication from the secretary NSW Residents' Association 22nd November 2006.

to making an application to the Tribunal. Approved forms and an application fee of \$56 must be submitted to the Registrar in both contexts.⁵¹²

In the case of a resident's 'residence contract' being terminated by an operator, the dispute notice must be given within 4 months after the payment of the former residents exit entitlement. A party may be represented at mediation by a lawyer or an agent. Mediation is private and attendance at mediation is not enforceable. Any notes taken by the mediator are destroyed. Any agreements reached are recorded by the mediator and signed by the parties with a copy of the signed agreement going to the registrar.⁵¹³

7.3.2 Tribunal hearing

A party to a retirement village dispute may apply to the tribunal for a hearing if;

- (a) The parties to the dispute can not reach a mediation agreement to the dispute; or
- (b) a party to the dispute does not attend the mediation conference for the dispute; or
- (c) the dispute is not settled within 4 months after the dispute notice is given to the registrar; or
- (d) the party claims that another party to a mediation agreement has not complied with the agreement within the time specified in it or, if no time specified, within two months after the agreement is signed.⁵¹⁴

In addition, residents have a right to apply for an order for a tribunal hearing if threatened with removal, deprivation or restriction of use of land by operators; if residents are given false or misleading documents or are materially prejudiced by the contravention. In the above circumstances the resident may also apply for an order to have their residence contract set aside. A former resident who has not received their exit entitlement may also apply to the tribunal for an order that the operator pay the exit fee.⁵¹⁵

⁵¹² Information supplied by the Executive Officer, Commercial and Consumer Tribunal, Tribunal Registry, Brisbane, 19th July 2006.

⁵¹³ Ibid.

⁵¹⁴ Part 10, Division 2, s67 (a) (b) (c) (d) Retirement Villages Act 1999 (Queensland).

⁵¹⁵ Part 10, Division 3, s170 (1) (a) (b) and (2); s171 (1) (a) (b) and (2) Retirement Villages Act 1999 (Queensland).

The Executive Officer of the Queensland Commercial and Consumer Tribunal recognises power imbalance can be an issue in both mediation and tribunal hearings when operators use legal counsel and residents are unable to afford the same assistance. She described the playing field as not level in these circumstances.⁵¹⁶ Residents' associations in both Queensland and NSW report this imbalance occurring and the Tribunal has the say as to whether lawyers can be present.⁵¹⁷ At this time they are unaware of operators being prevented from using legal representation at mediation and hearings. The fact that legal representation is not always available to residents is possibly why some residents' committees and state residents' associations (Queensland and NSW) have gained expertise in the law affecting retirement villages and why they are seen as a thorn in the side of operators and others who have a different view on the relative power discrepancy between operators and residents. New Zealand has followed the NSW and Queensland Acts in regard to use of counsel. Section 67 (4) of the RVA applies and was not invoked in the first NZ dispute when a resident represented himself against the largest corporate operator Metlifecare. The day a represented resident faces an unrepresented operator is apparently yet to come.

7.3.3 Group applications

One of the outstanding differences between the Australian and New Zealand legislation is the provision in the various state retirement village legislation is for a group of residents within a retirement village to apply jointly to the tribunal about a matter arising from the same or similar facts or circumstances.⁵¹⁸ Actions taken by residents and residents' groups have not always been seen as fair by some writers who report under a heading "Dispute Resolution and over-zealous consumerism"

...There is an increasing trend in most states and territories to impose a judicial overlay on the relevant legislation to expand the rights of residents in retirement villages. This is particularly evident in these areas:

- the operator's entitlement to departure fees being invalidated

⁵¹⁶ Executive Officer, Commercial and Consumer Tribunal Registry, Brisbane, 19th July 2006.

⁵¹⁷ Section 67 (4) of the New Zealand RVA has the same effect.

⁵¹⁸ Part 10, Division 4, s173 RVAQ. A search of decisions under the various tribunals handling retirement village disputes provides evidence that resident groups have been successful in overturning financial decisions made by operators including non-profit religious based villages.

- the operator being made liable for some items of repairs, maintenance and other user-pays village outgoings
- the liability to make automatic refunds extended beyond the scope of the original legislation which has already been discussed...

...Many consumer advocacy groups and state consumer protection agencies have shown a ready willingness to fund test cases in these areas which has the potential to bankrupt smaller operators of retirement villages...

In many retirement villages, there often exists one or several activists who provide a catalyst for this type of litigation. It is important for village management to be resident-friendly and responsive and for management to be vigilant in identifying and responding positively to these types of situations.⁵¹⁹

The conclusions of these writers are consistent with the Keogh and Bradley⁵²⁰ study which emphasised the importance of good communication between operators and residents, especially at the critical time of entering into residency contracts.⁵²¹ Residency contracts have been the starting point of some of the most prejudicial actions taken by operators against residents.

7.4 Comparing apples: eating versus cooking

Unlike Australia, New Zealand has no equivalent of the state residents' associations representing retirement village residents. Now the proposed variation to the Code of Practice setting refurbishment standards appears to be the catalyst for collective resident action in New Zealand. Seeing little in the Act that offers benefit to residents other than clause 49.1 (e)⁵²² residents are incensed that moves

⁵¹⁹ Vinden, G and Shailer, J "Legal Challenges for the Industry" in Stimson, R J(Ed) (2002) *The Retirement Village Industry in Australia: Evolution, Prospects, Challenges* (Brisbane: Queensland University Press, 2002, 123).

⁵²⁰ Keogh & Bradley, *supra* n 508.

⁵²¹ Good communication means being able to talk about difficult issues and attempting to see others' point of view. This is a skill that requires tolerance and an ability to actively listen. As a conflict avoidance strategy it must be in the interests of operators and staff of retirement villages to the basic elements of these skills; it being unlikely the same can be expected of residents in their 80's although residents' committees have been known to deal firmly with errant members if behaviour slips and offends others'. A residents' committee in New Zealand has reportedly devised a system where feedback is given to residents whose attitudes and behaviour towards other residents, staff and manager are deemed inappropriate. This seems an effective self-monitoring system set up by residents to promote harmony and respect in their village.

⁵²² This clause refers to the Retirement Villages Code of Practice effective from the 25th September 2007 and the clause replacing terms such as "pristine condition" and "as new" which feature currently in occupation right agreements. The new clause; "e. State the residential unit is to be refurbished to no more than the condition of the unit when the resident entered it, less fair wear and tear" offers what residents' see as a reasonable standard.

to vary this clause are underway.⁵²³ To date reports of owner/manager resistance to the concept of residents' committees has hampered progress in spite of the new legislative climate supporting a residents committee in every village.⁵²⁴ Under the Act, the only way an operator can prevent formation of a residents' committee is to formally apply for an exemption. Exemptions are intended to cover special circumstances that would take account of the type of village (including legal status) and capacity of residents to engage in committee activities. It is likely this will be a rare exception to the rule in New Zealand due to the resident's right to have a personal representative.⁵²⁵ However, residents' committees have no legal standing in the disputes context.

In Brisbane there are a number of avenues available for residents or concerned others to seek help. The Office of the Adult Guardian covers retirement villages in Queensland for cases where there is concern about the treatment of vulnerable adults. Also, the legal recognition of residents' committees⁵²⁶ and the existence of organised state residents' associations in NSW and Queensland bring a presence and consumer 'watchdog' factor into the political climate of the sector.⁵²⁷ In addition, the Act provides further protection to residents through section 75 (4);

The operator must not prevent or hinder the attendance of an investigator at a meeting of the residents if the residents at the meeting consent to the investigator's presence.⁵²⁸

Also section 66 (e) requires the operator

must use his or her best endeavours to ensure that each resident lives in an environment free from harassment and intimidation.

These provisions are in stark contrast to the threat RVANZ seems to believe is posed by resident harassment. Though the New Zealand Act now extends the role of the statutory supervisor and allows resident's to take complaints directly to

⁵²³ Personal communications from residents during April and May 2007 have drawn attention to this variation.

⁵²⁴ Telephone interview with Grey Power Retirement Villages representative, 18th November 2006.

⁵²⁵ Section 49 RVA 2003.

⁵²⁶ This legal recognition gives the committees the right to take or defend matters before the Consumer, Trader and Tenancy Tribunal in NSW and the Commercial and Consumer Tribunal in Brisbane.

⁵²⁷ As at September 2006, 50,000 residents occupy 700 retirement villages in NSW posing an effective mass lobby. (Figure obtained from Office of Fair Trading, Parramatta, NSW, 20th September 2006).

⁵²⁸ Section 75 Retirement Villages Act 1999 (NSW).

their village statutory supervisor, the perceived lack of independence of that role will mean many residents will be sceptical about this option.

7.5 *Waiting for God – the realities of age*

During the course of this research, I came into contact with a number of residents in Australia and New Zealand experiencing serious life-threatening illnesses or age associated medical conditions. These people were heavily involved in assisting other residents in setting up residents' committees; keeping residents informed about their rights and obligations and doing administrative work for their village committees and state associations. One active state office-holder, an 'expert' on retirement village legal issues, died suddenly at Christmas time 2006. This brought to the forefront a number of factors; the first surrounds the age of entry to retirement villages. This has increased over the past decade from 68 to 78⁵²⁹ years which has consequently increased the average age of residents to around 83 years.⁵³⁰ Based on these figures it will be another eighteen years before the first 'stropky' baby-boomers enter retirement villages as residents. The second factor is retirement village residents are now often living out their final few years. In New Zealand, NSW and Queensland, the legislation in place and the various regulations supporting the Acts', offer forms of 'protection' but none include representation other than through residents' committees in Queensland and NSW; the New Zealand Act does not include that potential support.

In relation to this, the Retirement Commission survey revealed 61% of New Zealand residents rely solely or mostly on NZ Superannuation.⁵³¹ On average we are considering the needs of a group sometimes described as very 'elderly' or the old 'old'⁵³² on low incomes. Since it has been established that disputes usually

⁵²⁹ This was confirmed at a presentation Wellington, 14th March 2007 and is a trend also reported by the NSW Residents' Association.

⁵³⁰ Retirement Commission, Retirement Villages Survey 2006 showed the average age of entry to a retirement village is around 78 years; 73% of residents are 80 years or over, only 7% are under 70 years and 12% are over 90 years of age. Statistics NZ at 30th March 2004 found, based on mortality in 2000-2002, a newborn girl can expect to live 81.1 years and a new-born boy 76.3 years. Our current 'villagers' born in different times have probably already lived longer than many of their age cohorts. Australian data shows a similar gradual increase in age (Stimson, 2002).

⁵³¹ 58% state their total assets as \$400,000 and 7% estimate their current assets as being over \$600,000.

⁵³² The way to describe this older group of residents was discussed at a presentation in Wellington 14th March 2007. Operators, managers and residents attending used the term 'old old' when describing their residents. An Australian study described 84 yrs as the top level of "middle-old aged" and 85+ yrs as "old-old age" (Stimson & McGovern, 2002, 1).

surround fees and charges, not only do some residents face problems paying extra charges but they have no ability to pay for legal representation if they are in dispute with an operator. Added to this, the older the age of the resident, the more likely the resident will be female and the less likely she will be to 'take on' an operator. This scenario is covered in Queensland and NSW through representation by residents' committees in mediation and in the state tribunals. From a moral and ethical point of view, this could be considered the minimum advocacy requirement for people on average at the end stage of their lives, yet New Zealand residents have been deprived of even that level of support.

When set alongside 'protective' legislation for children, an argument can be made that similar consideration should be given to people at the end stage of life when financial assets are tied up in accommodation they cannot leave for reasons including financial and physical.

Residents in retirement villages and rest home care should be protected from rogue operators, unscrupulous business practices and intimidation by staff or operators just as children are from abuse and damaging parental relations. Appointment of 'Counsel for the child' is usual practice in the Family Court; appointment of 'Advocate for the aged' may offer similar oversight for elders in rest home care, retirement villages and their own homes.

The issues implicated in this proposition will be considered in the following chapter.

7.6 Summary

In this chapter I have discussed the growth of the retirement village industry and its consequent problems. I have identified key areas of difference surrounding resident support between the state legislation of NSW and Queensland and the New Zealand legislation, these being; the role of the Adult Guardian in Brisbane; provisions in the legislation for residents' committee autonomy including the right to involve investigators to attend meetings in the village and protection from exploitation and harassment from operators. The representative role of residents' committees in both mediation and at hearings and the involvement of residents'

committees and support of state associations overall is an enhancement to residents' relative power imbalance, especially for female residents. The ability of residents' to take class actions in Queensland and NSW is a significant development. I have found the age of residents, their socioeconomic status and age related health issues provide adequate reason for some form of 'protective' representation. I have included all 'old' people within this analysis, not only those in retirement villages.

Chapter 8 Seeking an appropriate solution

8.1 Introduction

This chapter is primarily concerned with the problems faced by residents in dispute with operators and how these problems could best be overcome. I will first summarise the needs and issues of residents that have emerged from previous chapters. Second, I will consider which processes discussed in this thesis might offer some enhancement to the disadvantaged position of residents in dispute with operators. This will be done in conjunction with application of the *statements of principle* from Chapter Three. From this, an ideal process will emerge and third, I will offer suggestions for its implementation.

8.2 The sum of issues

Chapter Two identified the following issues surrounding residents

- legal representation
- advocacy
- ability to take class actions
- attitudes of operators, sector representatives, legal counsel
- legal recognition of residents' committees
- education surrounding power and control dynamics

Chapter Four produced areas that residents would need to be aware of or avoid

- coercion to mediate
- negotiating without representation
- mediation and confidentiality issues
- allowing issues to be decided on papers only
- ideology and impact of policy
- caution around "success" claims
- consider proximity of agency to mechanism (e.g. tribunals) to Minister
- consensual processes and "false harmony"
- independence of process
- fairness of process
- transparency of process
- prejudicial treatment

Chapter Five has added to the list

- age
- gender – including process appropriateness
- money – low income
- lack of knowledge about legal process
- fair process – inclusive of rights, accessibility in terms of written requirements and understanding
- format of decisions – legalistic and meaning of decision perhaps not accessible to residents
- inflexibility of process
- inappropriateness of process for dispute
- mediation – mediator perspective; lack of transparency; gender issues; power imbalance

Chapter Six raises further issues

- lack of autonomy and leadership of panel adjudicators
- morality of outcomes
- power imbalance
- operator control in all areas of DR
- ambiguous and conflicted role of statutory supervisor
- RVANZ promotion of Review Authority and the lack of transparency of this role
- RVANZ's process for operators to make complaints about residents

And Chapter Seven

- lack of national residents' body
- being an activist to the end; average age of residents; shortage of experienced men and confident women; health issues in later life

This is a daunting list of issues when considered together. Devising a process that takes account of all the data will be assisted through the use of the *statements of principle* from Chapter Three. I now return to the processes from Chapter Four offering components that may be suitable for inclusion in the ideal

model. Following discussion of each process I will utilize the relevant *statements of principle* from Chapter Three, adapting them to fit the context.

8.3 What do other statutory processes have to offer?

8.3.1 The Employment Relations Act 2000

I have identified two components of The Employment Relations Act 2000 which could be useful for dispute avoidance and dispute resolution in retirement villages. These are the concepts of ‘good faith’ and ‘collective bargaining’. In addition to these two concepts, I would include the facilitative dispute resolution process *partnering*⁵³³ which would take the form of a relationship contract between the resident and the operator and the residents’ committee and the operator at the time a new resident entered a village.⁵³⁴ An appropriately worded standard contract could apply.

‘Partnering’ is inclusive of the notion of ‘good faith’. Having a residents’ committee involved would mean a collective voice to assist a resident with representation. While “collective bargaining” in the ERA context is about negotiating a new contract in the context of a retirement village, the meaning would have more to do with collective support and collective involvement. The residents’ committee would be involved in the partnering “charter” which is based on the need to act in good faith and fair dealing with one another – residents and operator.⁵³⁵ The partnering process focuses on defining mutual objectives, improved communication and identification of likely problems. It has the effect of formalising problem-solving and dispute resolution strategies. This could offer a proactive option prior to the use of *complaints facilities* and the *disputes panel*.

Equality before the law and *fair and proper process*: These principles would be evident if parties were engaged in respectful communication and demonstrated willingness to share information and concerns in open and honest exchanges; when operators accepted residents’ committee involvement as a legitimate activity in the relationship contract and when an environment encouraging the expression

⁵³³ See Chapter Five p115 for T. Sourdin, 2005, 20 “Process Map”.

⁵³⁴ Using partnering at this point may alleviate some of the problems identified in the Keogh and Bradley study (2002).

⁵³⁵ NADRAC in Sourdin, T *Alternative Dispute Resolution* (2nd Ed, 2005) 2.230.

of concerns and reciprocal engagement to find acceptable remedies was evident. The principle of *process pluralism* would be evident through the involvement of representatives of all parties affected by any decisions; when conflict was understood and accepted as a necessary and positive side to village living and issues were overt and explicit ensuring recognition and attention. This also includes the *advocacy* principle.

8.3.2 Tribunals

It has been suggested the work of the Retirement Villages Act Disputes Panel should come under the jurisdiction of the proposed unified tribunal structure administered by the Ministry of Justice.⁵³⁶ While this would bring greater credibility and *independence* to the process the same concerns that exists with the disputes panel apply; concerns such as residents' capability to take a case to the tribunal or use a representative with the personal attributes and knowledge required to engage in an adversarial legal process on behalf of the resident. The possibility of a tribunal with the power to allow a residents' group or regional group to bring a claim on behalf of a resident, has also been considered and may offer an alternative that could work for residents.⁵³⁷ Disallowing legal representation would reduce the impact of legal formalities and language and the type of intimidation experienced during the first dispute process. Attention would need to be given to the experience and quality of adjudicators and their ability to provide authoritative decisions in this specialised area.⁵³⁸

The acknowledgement from the Health and Disability Commissioner that older people do not readily complain⁵³⁹ suggests processes are too daunting for many to

⁵³⁶ Trish McConnell, the Chief Adjudicator under the new Weathertight Homes Resolution Services Act 2006 has mooted this idea which is consistent with the Law Commission report *Delivering Justice for All*. See 4.10 and recommendation R141, p284 also "The Future of Tribunals in New Zealand" presented by Trish McConnell 5th April 2006 at the International Tribunals Workshop, Centre for International and Public Law, ANU College of Law.

⁵³⁷ Patricia McConnell, Chief Adjudicator for the Weathertight Homes Tribunal confirms "the Disputes Tribunal does not allow parties to be represented but others such as Tenancy do if the amount of the dispute is over \$3000, the issues are legally complex or due to the imbalance of power...In some tribunals there is also the facility for group or representative claims to be filed....if for example Retirement Villages went to the Disputes Tribunal it could include specific provisions to allow for either lay or legal representation or could even allow for a group or representative action on behalf of a group of villages or by village committees" (Personal email communication received 7th June 2007).

⁵³⁸ *Delivering Justice* (7.1, 3, p 284) raises issues about "unsupported tribunals that have little opportunity to gain experience in their tribunal role" saying this raises concerns about "standing authority and competence".

⁵³⁹ See Bismark M, Brennan T, Paterson R, Davis, P and Studdert, D *supra* n 482.

consider. Another possibility may relate to the perceived risk of consequence in the aftermath of a complaint.⁵⁴⁰ No matter what the chosen process, if operator costs can be passed on to residents as Greenwood and Burke confirm,⁵⁴¹ residents who cause the fees of other residents to increase may be affected by negative response. The data on residents collected for this study, confirms older people enter retirement villages seeking stability and security, not conflict. It is therefore possible some residents may isolate others with legitimate issues with operators. It is important therefore that residents and operators promote behaviour that is consistent with good partnerships and encourage a climate that supports open engagement with conflict through the principle *advocacy*.

In the context of a statutory tribunal, *equality before the law*, *adherence to the rule of law* and *fair and proper process* would be present when the resident felt able to take part in the hearing in a manner that allowed questions to be asked and concerns expressed in such a way that the resident felt heard, had concerns acknowledged and responses provided so that the resident felt empowered. In the event of the case going against the resident, the resident would be provided with an easily understood explanation about appeal rights. The resident would experience *independent adjudication* through the use of adjudicators appointed by the Ministry of Justice receiving payment through the Ministry and have decisions and practices monitored by the Ministry. *Process pluralism* would be experienced by the resident through the chosen involvement or representation by the residents' committee of the resident's village. *Advocacy* could also be expressed through representation by the residents' committee.

8.4 Ombudsman/ Commissioner: the ideal model for residents

8.4.1 Why this is so

Demographic predictors indicate the certainty of a burgeoning retirement village industry over the next two decades and beyond, ensuring continuing disputes over fees and charges. Analysis of data has shown an increase in the age on entry into

⁵⁴⁰ The first NZ Disputes Hearing saw Counsel for Metlifekapiti Ltd raise the matter of increased fees for all villagers because of Ian Brown's complaint action; Greenwood and Burke, 2007, 1, confirm operators can pass on costs where residents initiate disputes.

⁵⁴¹ Greenwood, J and Burke, M "Retirement Villages – the full impact of the Act" New Zealand Law Society, March 2007, 1.

retirement villages in Australia and New Zealand over the past decade⁵⁴² and the unlikelihood of the elderly to complain has been established by Paterson, the current Health and Disability Commissioner.⁵⁴³ Altogether, this profile paints a picture of needs well beyond self-representation. The data provided by NSW and Queensland state residents' associations adds to the overall impression that a proportion of residents in their final years are preoccupied with the stressful task of ensuring they and their members are not being exploited by operators keen to pass on charges. There is no reason to suspect the situation will be any different in New Zealand as the industry burgeons.

The established increase in the number of older citizens requiring varied housing options over the next three decades indicates also, a heightened need for a facility offering advocacy and protection to all older people. Problems of elder abuse have been identified within families⁵⁴⁴ and in residential care facilities in New Zealand.⁵⁴⁵ When these situations come to light in residential care, publicity has resulted in investigation and at times, caused closure.⁵⁴⁶ In these instances a number of agencies step in to deal with problems surrounding care and breach of patient rights but it likely many are unreported. Retirement Villages also provide contexts for opportunistic exploitation and abuse of power. Because retirement villages involve private financial arrangements between residents and operators and residents are generally able to care for themselves, oversight and advocacy has not been promoted other than through the 'protective' components of the new Act and role of the statutory supervisor.⁵⁴⁷

⁵⁴² See Grant, 2006; Greenwood & Marks 2004 in Chapter One. The studies of Stimson and his colleagues show the "old-old", those 85+yrs can increasingly be found in retirement villages in Australia (Stimson, 2002). In addition, a survey undertaken by RVANZ in 1999 put the age of retirement village residents as 68-88 yrs. By 2006 the Retirement Commission survey (p3) shows the average age of entry as 78 yrs with 73% aged over 80 years. Only 7% are under 70 years and 12% are over 90 years.

⁵⁴³ See Bismark, Brennan, Paterson, Davis and Studdert, 2006, *supra* n 482 for verification.

⁵⁴⁴ In the private domain of the family, elders are found to be particularly at risk of abuse of money. This comes in the form of relatives gaining access to their elders superannuation payments and savings and sometimes even depriving the older person of necessities such as regular healthy food, visits to the doctor and social engagement with others. This form of abuse was discussed at a Senior Citizens meeting in Hamilton on the 22nd September 2006.

⁵⁴⁵ Age Concern New Zealand Incorporated has promoted elder abuse awareness and taken an advisory role in this area. See website <www.ageconcern.org.nz>

⁵⁴⁶ The Director General of Health closed the Pacifika Centre and Hospital in April 2006 due to substandard care and neglect of residents. The Centre had been the focus of attention by health authorities for over a year prior to the closure. Opportunity to improve facilities and quality of care over that period, failed to prevent closure.

⁵⁴⁷ New Zealand Law Society Seminar *Retirement Villages*, Greenwood J and Marks S, 2004.

I have established the vast majority of retirement village disputes surround payment of fees, on-going charges and disagreements about refurbishing requirements. This all adds up to money, claimed by operators to be paid by residents. The Ombuds/Commissioner model where investigation is carried out without the need for party representation, appears the least disturbing process for the aged; it is certainly a well proven, transparent and independent process in the New Zealand DR context. The process would need to be timely; I suggest within a four month time frame. There is always the possibility an aged person taking a dispute would be emotionally affected, become ill and die before a matter is resolved or simply die because their life came to an end; age being a determining factor.

The model of the Ombuds/Health and Disability Commissioner would be a fair and responsive process to meet the needs of retirement village residents whose age and vulnerability places them in a very limited position in terms of representing themselves. The Act includes a Code of Residents' Rights,⁵⁴⁸ making residents' circumstances similar to patients' within the health system and the private banking scheme.

This model could capture all aged New Zealanders including those in their own homes, rest home care and those living with relatives.

Using the Ombuds/Commissioner role would result in reduced stress to residents because they would not have to enter an adversarial process with operators, prepare for a hearing or have someone do that for them. It would be a free process releasing them from anxiety about cost. The 'statement of principle' *Equality before the law* would be evident through the established processes of the ombudsman role, *adherence to the rule of law* would be demonstrated through the inquisitorial procedures of the office which is based on the principle of natural justice. Accountability would be achieved through annual reporting to the Commission having responsibility for the appointment. The principle of *fair and proper process* would be demonstrated through the Ombudsman's ability to attend to the older person's issues in a sensitive and professional manner, operating at all times from a position that follows the rules of procedural justice. The experience

⁵⁴⁸ The Code of Residents Rights came into force on the 1st May 2007.

of the older person would be reflected in their sense of satisfaction in the manner their issues had been received and confidence that the process would deliver a fair outcome whether or not it was favourable to them.

The principle *independent adjudication* would be demonstrated through the Ombudsman's lack of connection in any way with the operator. Payment of fees and administrative base would be unequivocally neutral; issues about selection would be redundant in this context. The principle of *process pluralism* would apply and be demonstrated when a residents' committee instigated a dispute action and the Ombudsman heard the collective voice of residents' and investigated a matter on the residents' behalf and possibly later provided advice to relevant authorities. In this way, the Ombudsman would be acting as an advocate in terms of their ability to practice make recommendations where this was felt necessary and offer policy recommendations at a systemic level. *Advocacy* would be achieved through the involvement of residents' committees with the Ombudsman.

8.4.2 Village people and everyone else: an inclusive advocacy ideal

An especially designated Ombuds/Commissioner with a systemic role to investigate and determine complaints and recommend changes in industry and provider practices would provide an optimal model for dispute resolution in retirement villages.

In addition, I propose the Ombuds/Commissioner role as the ideal model for DR involving all older people whose circumstances provide opportunity for exploitation and abuse by others. The imminent spectacular population growth of people in this older age category warrants specific attention, whatever their living context might be.⁵⁴⁹

I believe there are several possible locations for this role. This is not the most important factor. The role must be an independent agency of government; an Independent Crown Entity with complaints and advisory capacity.

⁵⁴⁹ Ministry of Social Development "Positive Ageing in New Zealand" (2001) 8.

Chapter 9 Conclusions and recommendations

9.1 Suggestions for improvement and reform

In this thesis I have uncovered a number of factors and systemic influences that impact on the wellbeing and right to fair and independent processes for residents in dispute with operators of New Zealand retirement villages. This has been achieved partly through comparison with the situation of residents in Queensland and NSW; through the examination of law, regulations and codes pertaining to retirement villages in both countries; and the Tribunal DR mechanism in NSW and Queensland. I have specifically focussed on the dispute resolution aspects of the Retirement Villages Act 2003 and considered the New Zealand provisions alongside DR processes in other statutes and different jurisdictions. From this examination and analysis, I have proposed an ideal dispute resolution model for retirement village residents and all other aged New Zealanders.

By using the conceptual ideas in the ecology of human development and incorporating ideology and the concept of hegemony, it has been possible to critically examine how the Retirement Villages Act 2003 was shaped. The powerlessness of aged residents compared to the power held by operators has been illuminated through assessment of macro and exosystem influences on the way responsibility has been allocated for selection and payment of the three key DR roles. By allocating to operators, the responsibility for selection of the roles of mediator, disputes panel and statutory supervisor and not giving statutory recognition to residents' committees, the operator 'class' is assured of continuing domination of the aged in the disputes context. On the one hand, the provisions of the Act appear to have been (paternalistically) constructed to avoid resident involvement in the logistics of setting up DR facilities and on the other, seeing residents as capable of managing and participating unrepresented⁵⁵⁰ in an adversarial disputes process. By weighting the DR responsibilities so heavily with the operators; not including a code of practice for statutory supervisors; and ensuring residents stand alone in a dispute if unable to afford representation, runs

⁵⁵⁰ None of the residents in the first three disputes under the RVA were legally represented. Affordability is likely to have been the determining factor.

counter to the objectives of “protective legislation” and therefore must be seen as unfair to residents.

In the event the Ombuds/Commissioner model is not accepted I propose the following remedies to address the existing unacceptable situation. Firstly the position of residents needs to be strengthened through the legal recognition of residents’ committees to act on behalf of residents in dispute with operators. This should apply in mediation and disputes panel hearings and also to prevent unrepresented or unsupported residents being compelled to mediate on their own.⁵⁵¹ In this regard, residents involved in processes that may include settlement or a determination, should not be without legal representation or an experienced lay advocate.

Second, the responsibility for monitoring and assessment of the role of statutory supervisor should be undertaken by the Department of Building and Housing or the Retirement Commission. This would include training and ensuring the establishment of a code of conduct for all statutory supervisors of retirement villages. Third the payment of the disputes panel and the statutory supervisors should come from levies on operators administered by the Department of Building and Housing or another statutory body. This would remedy the perception (and possible reality) that operators selecting and paying for the disputes panel compromise the independence of the role. Fourth, a principal disputes panellist should be appointed to mentor and allocate panellists to disputes. This would also enhance the independence of the disputes panel.⁵⁵²

Finally, a disputes avoidance strategy based on good faith, incorporating a ‘partnering agreement’ should be initiated at the time of setting up an occupation right agreement between residents and operators.

9.1.1 Research

From this study, I have identified areas where further qualitative research is needed.

⁵⁵¹ If mediation is used in the complaints facility, operators should not select mediators; AMINZ and LEADR could assist with lists and residents or their representatives could be involved in the selection process.

⁵⁵² The disputes panel group may also act as a ‘triage’ body requiring for itself quality control; training relevant to the needs of office; peer support and supervision.

- Further research is required to identify suitable processes for dealing with conflict involving people in the ‘old-old’ age group – especially women.
- We need to understand and know why so few older people complain.⁵⁵³
- Age is absent from dispute resolution literature; race, ethnicity, gender, socioeconomic status and disability are included. What are the reasons for this omission?
- What are the reasons residents leave retirement villages?
- How can we ‘normalise’ conflict in retirement villages in order to effectively engage in its resolution?⁵⁵⁴
- Elder abuse is a recognised and growing concern of age care groups. What is the extent and scope of this abuse in New Zealand and what are the most effective preventative and remedial responses?

⁵⁵³ RVANZ reported last year knowing of only two mediations in recent years and the Association’s Review Authority had provided one determination. The Health and Disability Commissioner has established the under representation of older people in complaints.

⁵⁵⁴ Stuart Hampshire’s thesis that “justice is conflict” makes this endeavour all the more important (Hampshire, S 2000).

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