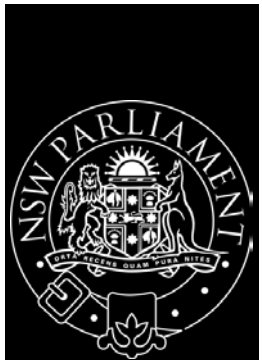

PARLIAMENT OF NEW SOUTH WALES

Committee on the Health Care Complaints Commission

REPORT INTO DRAFT AMENDMENTS TO THE HEALTH CARE COMPLAINTS ACT 1993 AND RELATED LEGISLATION

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Functions of the Committee

The Joint Committee on the Health Care Complaints Commission was appointed in 1994. Its functions under Section 65 of the *Health Care Complaints Act 1993* are:

a. to monitor and to review the exercise by the Commission of the Commission's functions under this or any other Act;

b. to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of the Commission's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

c. to examine each annual and other report made by the Commission, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

d. to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Commission;

e. to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.

The Joint Committee is not authorised:

a. to re-investigate a particular complaint; or

b. to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

c. to reconsider the findings, recommendations, determinations or other decisions of the Commission, or of any other person, in relation to a particular investigation or complaint.

Chairman's Foreword

The Committee was very pleased to undertake this review of the Draft Amendments to the Health Care Complaints Act 1993 and related legislation. During the course of our review the Committee consulted with relevant stakeholders and met with representatives of the Cabinet Office who produced the draft legislation following the Walker Inquiry and a Cabinet Office Review of the Act.

This Committee has made many recommendations concerning legislative amendments in its various reports over the years and I am heartened to see that quite a few of these recommendations have been incorporated into the draft legislation. The draft amending legislation is not merely an exercise to implement the recommendations of the Walker Inquiry and other comment upon the *Health Care Complaints Act* has been considered.

However, it must be noted that this is not a comprehensive review of the *Health Care Complaints Act* 1993 and the associated health professional registration Acts. The focus of these amendments is largely to give the Commission extra powers and tighten or clarify various parts of the Act.

It is my belief that in future all the health professional registration Acts must be reviewed in tandem with the *Health Care Complaints Act* to ensure that the overarching framework for dealing with health care complaints in New South Wales is both clear and consistent. This is something the Committee will continue to pursue.

The Committee has also made a number of very important recommendations which have not been addressed in the draft legislation. It is hoped that these may be considered in any future further review of the Act and its related legislation.

I believe the Committee, after ten years of continuous oversight of the Commission, is in a position to make a very informed submission to the New South Wales Cabinet Office on the legislative draft amendments. I hope that the Cabinet Office considers the Committee's comments to be valuable.

It should be noted that this report should be read in conjunction with the Committee's recently completed report into Alternative Dispute Resolution which also contains recommendations relevant to the draft legislation.

In conclusion I would like to thank my fellow Committee Members for their input into this review. I would also like to thank the Committee secretariat for their assistance in preparing this report

JEFF HUNTER MP
Chairman

List of Recommendations

1. The Committee recommends that the proposed section 34A(1)(a) and (c) be amended to specify that the time period for compliance must be reasonable. Similarly, so should the place of attendance be reasonable.

2. The Committee recommends that consideration be given to also providing for a disciplinary sanction under the relevant health professional registration Acts for non compliance with section 34A. Alternatively a note could be included to refer the reader back to the related sanctions in the relevant Acts.

3. The Committee recommends that proposed sections 37A(2) and (3) be amended to more clearly define and differentiate between "information" and "document" for the purposes of these sections.

4. The Committee recommends that proposed section 46(2) should be amended to read that *The Registrar may appoint more than one conciliator to conciliate the complaint if the Registrar considers that is desirable to do so.*

5. The Committee recommends that proposed section 87 should be amended to provide that the position of Registrar should be appointed as a result of an external competitive recruiting process.

6. The Committee recommends that proposed section 88 be amended to provide that at least the more senior staff of the Registry should be appointed following an external competitive recruiting process.

7. If a Director of Prosecutions is to be created, consultation between the Director of Prosecutions and the relevant health professional registration board concerning each case received by the Director should be mandatory.

Chapter One: Comments on the Health Legislation (Complaints) Amendment Bill 2004

SCHEDULE ONE

Schedule 1 (1) and (2)

Schedule 1 [1] replaces section 3 of the Principal Act so as to make it clear that the primary object of that Act is to establish the Commission as an independent body for the purposes of receiving and assessing complaints relating to health services and health service providers, investigating and prosecuting serious complaints and resolving or overseeing the resolution of complaints.

Schedule 1 [2] inserts proposed section 3A into the Principal Act which provides an outline of the roles of the Commission, the Director-General of the Department of Health, public health organisations under the *Health Services Act 1997* and health profession registration authorities in connection with the health care system.

The Committee agrees with the proposal to legislatively refocus the Health Care Complaints Commission on its core business.

The Committee has observed many instances over the years of the Commission investing its resources into areas which the Committee considered to be non core business. Core functions such as investigations and prosecutions suffered as a result leading to delays and backlogs. One such area was such as investigative training for Area Health Services.

Schedule 1 (3) and (4)

Schedule 1 [3] and [4] update a reference to mental health services and include a reference to forensic pathology services in the definition of *health service* in the Principal Act.

The Committee agrees with the proposed change.

Schedule 1 (5)

Schedule 1 [5] substitutes section 13 of the Principal Act dealing with the action that can be taken following consultation between the Commission and health registration authorities concerning complaints. The new provisions include the options of referring a complaint that neither the Commission nor the relevant health registration authority considers is appropriate to investigate for performance assessment or impairment assessment. It is noted that only the *Medical Practice Act 1992* currently contains provisions relating to performance assessment. Similar provisions are also proposed to be inserted into the *Nurses and Midwives Act 1991* by the *Nurses and Midwives Amendment (Performance Assessment) Bill 2004.*

The Committee agrees that the Commission should be given increased options concerning where complaints which are not to be investigated should be referred.

Schedule 1 (6)

Schedule 1 [6] substitutes section 16 of the Principal Act to provide that notice of a complaint is to be given to the person against whom the complaint is made not later than 14 days after the complaint is assessed by the Commission for the purpose of determining the action to be taken by the Commission. At present, the initial notice under section 16 is to be given within 14 days after the receipt of the complaint by the Commission.

Existing section 16 enables the Commission to withhold any such notice in certain circumstances where it believes a person would be at risk or the investigation would be prejudiced if the notice were given. However, notice must be given no later than 60 days after the complaint is received. The new provisions remove the requirement to give the notice within that 60-day period but require the Commission to keep under review a decision to withhold giving notice.

The Commission will also be placed under an obligation to give the notice regardless of the circumstances if of the opinion that it is essential on the grounds of natural justice or to investigate the complaint effectively or it is otherwise in the public interest (the *Protected Disclosures Act 1994* places a similar obligation on public authorities dealing with protected disclosures to give notice to a person who is the subject of the disclosure).

The Committee agrees with the proposed change. This change has been previously recommended by the Committee in its report on investigations and prosecutions undertaken by the Commission.

Schedule 1 (7)

Schedule 1 [7], [8], [13], [14] and [31] make minor statute law revision amendments.

The Committee agrees with this proposed change. It believes it will clarify the interpretation of the Act.

Schedule 1 (8)

Schedule 1 [7], [8], [13], [14] and [31] make minor statute law revision amendments.

The Committee agrees with this proposed change. It believes it will clarify the interpretation of the Act.

Schedule 1 (10)

Schedule 1 [10] requires the Commission, as part of its assessment of a complaint and as soon as practicable after commencing the assessment, to identify the specific allegations comprising the complaint and the person or persons whose conduct appears to be the subject of the complaint and to use its best endeavours to confirm those matters with the persons who provided the information.

The Committee agrees with this proposed change.

Schedule 1 (11)

Schedule 1 [11] imposes a duty on the Commission to keep under review its assessment of a complaint while dealing with the complaint. It also enables the Commission to revise its assessment of a complaint at any time (after consulting with the appropriate registration authority) and take appropriate action in relation to the revised assessment. If the Commission revises its assessment of a complaint, it must give certain notices to the persons who are the subject of the complaint.

The Committee agrees with the proposed change.

Schedule 1 (12)

Schedule 1 [12] extends the power of the Commission under proposed section 34A to obtain documents during the investigation of a complaint for the purposes of assessing whether a complaint should be investigated (but only in respect of hospital and medical records and documents relating to a health practitioner's practice).

The Committee agrees with the proposed change which has been previously recommended by the Committee in its report into investigations and prosecutions.

Schedule 1 (13)

Schedule 1 *[7],* [8], [13], [14] and [31] make minor statute law revision amendments.

The Committee agrees with this proposed change. It believes it will clarify the interpretation of the Act.

Schedule 1 (14)

Schedule 1 *[7],* [8], [13], [14] and [31] make minor statute law revision amendments.

The Committee agrees with this proposed change. It believes it will clarify the interpretation of the Act.

Schedule 1 (15)

Schedule 1 [15] removes the requirement that a complainant must verify a complaint by statutory declaration.

The Committee does not agree with this proposal. In its report into investigations and prosecutions the Committee noted that a statutory declaration was not required in most comparative jurisdictions. However, it was considered that the requirement placed an onus on complainants to be as truthful as possible. The Committee was mindful of the serious consequences which can arise for a practitioner as a result of a complaint being lodged against them.

Schedule 1 (16)

Schedule 1 [16] substitutes section 24 of the Principal Act (currently dealing with referral of complaints to the Health Conciliation Registry for conciliation) to provide that the Commission must refer a complaint for conciliation if required by section 13 of the Principal Act or if it decides to do so under proposed section 20A and to enable the Commission, in appropriate circumstances, to deal with a complaint under proposed Division 9 of Part 2 of the Principal Act (see Schedule 2 [8]) relating to alternative dispute resolution procedures).

The Committee agrees with this change if the Registry is to be transferred to the Commission.

Schedule 1 (17)

Schedule 1 [17] amends section *25* of the Principal Act which requires the Commission to notify the Director-General of the Department of Health if it appears to the Commission that a complaint involves a possible breach of certain specified Acts so as to include the *Anatomy Act 1977,* the *Health Records and Information Privacy Act 2002* and the *Human Tissue Act 1983.*

The Committee agrees with the proposed change.

Schedule 1 (18)

Schedule 1 [18] enables the Commission to refer a complaint to the Director-General of the Department of Health if the Commission is of the opinion that the complaint relates to a matter that could be the subject of an inquiry by the Director-General under section 71 of the *Public Health Act 1991* or section 123 of the *Health Services Act 1997.* A complaint may only be so referred if the Director-General consents. The Commission is not prevented from continuing to deal with a complaint in so far as it concerns the professional conduct of a health practitioner or a health service which affects the clinical management or care of an individual client. Schedule 1191 makes a consequential amendment.

The Committee agrees with the proposed change.

Schedule 1 (19)

Schedule 1 [19] substitutes section 26 of the Principal Act to enable the Commission to refer a complaint to an area health service for resolution at a local level if the area health service consents or to the appropriate registration authority for performance assessment or impairment assessment.

The Committee agrees with the proposed recommendation.

Schedule 1 (20)

Schedule 1 [20] enables the Commission to discontinue dealing with a complaint if it has actually been referred to another person or body for appropriate action. Currently, section 27 (1) (d) of the Principal Act provides that the Commission can discontinue dealing with a complaint if it raises issues that are required to be investigated by another person or body.

The Committee agrees with the proposed change.

Schedule 1 (21)

Schedule 1 [21] substitutes section 28 of the Principal Act to provide for the following:

(a) that the Commission's notice to the parties to a complaint of the action it proposes to take after assessment is to be given within 14 days,

(b) to enable the Commission to give notice of the investigation of a complaint against a health practitioner to a person who currently employs or engages the health practitioner,

(c) to ensure that the Commission gives notice despite certain exemptions if it is essential on the ground of natural justice and certain other grounds,

(d) reviews of decisions to withhold notice,

(e) removing the obligation of the Commission to review its assessment of a complaint if the request from the complainant is not made within 28 days.

The Committee agrees with this proposed change. Schedule 1 (21) (a) is in line with a recommendation made by the Committee in its report on investigations and prosecutions undertaken by the Commission. The proposed changes also serve to illuminate the circumstances in which notification can be given or withheld.

Schedule 1 (22)

Schedule 1 [22] requires the Commission, when seeking expert advice from a person concerning a complaint, to give the person all the relevant information that it possesses concerning the complaint.

The Committee agrees with this proposed change which was recommended in the committee's report into investigations and prosecutions undertaken by the Commission where the Committee expressed concern about the "summaries" of evidence being given to peer reviewers.

Schedule 1 (23)

Schedule 1 [23] prevents the Commission or the Commissioner from being compelled to produce or give evidence on a report of any such expert advice in certain proceedings.

The Committee agrees with the proposed change.

Schedule 1 (24)

Schedule 1 [24] extends the current power contained in section 33 of the Principal Act that enables an authorised person to enter premises used by a person against whom a complaint has been made in connection with the matter with which the complaint is concerned so that the authorised person may enter any premises if it is necessary for the investigation of the complaint. Under section 32, the power cannot be exercised except with the consent of the owner or occupier of the premises or with the authority of a search warrant.

The Committee agrees with the proposed change.

Schedule 1 [25] makes a consequential amendment.

The Committee agrees with the proposed change.

Schedule 1 [26] inserts proposed section 34A into the Principal Act which enables the Commission to require information or documents (including medical records) during the investigation of a complaint from the complainant, the person against whom the complaint was made or a health service provider.

While the Committee is not totally opposed to the Commission being given this power and has previously noted that many comparative jurisdictions already have similar powers, it does have some concerns about misuse of this power given the previous over zealous approach taken by the Commission.

The Committee is concerned that Section 34A (1) (a) and (c) provide no specified time limits in which the other party must either provide information or appear before the Commission. The legislation leaves this to the Commission to decide.

The Committee is concerned about unrealistic time limits being set. Alternatively the legislation currently leaves open whether these time limits must be consistent or vary on a case by case basis.

The *Health Rights Commission Act 1991*(Qld) gives the Queensland Health Rights Commission similar powers to those contained in the proposed Section 34A amendments. However, Section 96(1)(a) of that Act states that the respondent must provide specified information "*within a specified reasonable period and in a specified reasonable way"* Similarly Section 96(1)(b) states that a respondent is to attend "*at a specified reasonable time and place".*

The Victorian Health Services Commission derives their power to compel from Sections 14 and 15 of the *Evidence Act 1958* (Vic). It also contains the provision of a "*reasonable time*" to respond.

The Committee suggests that the proposed 34A be amended to specify that the time period for compliance must be reasonable. Similarly, so should the place of attendance be reasonable.

The Committee is also concerned about the proposed Section 34A(2)(c) which states that a person must comply if they are a health service provider. This seems unnecessarily broad.

The Committee suggests that this section should require some sort of relationship between the provider and the case being assessed or investigated. The Commission should not be able to use this provision for "fishing expeditions".

The maximum penalty of 20 penalty units ($2,200) for non-compliance seems fairly low given the earnings of senior specialists. They may lose more in income attending the Commission.

The Committee suggests that it may be more appropriate to also provide for a disciplinary action under the relevant health professional registration Acts.

RECOMMENDATION 1: The Committee recommends that the proposed section 34A(1)(a) and (c) be amended to specify that the time period for compliance must be reasonable. Similarly, so should the place of attendance be reasonable.

RECOMMENDATION 2: The Committee recommends that consideration be given to also providing for a disciplinary sanction under the relevant health professional registration Acts for non compliance with section 34A. Alternatively a note could be included to refer the reader back to the related sanctions in the relevant Acts.

Schedule 1 [27] extends the current offence of furnishing false or misleading information to an authorised officer to ensure that it covers the situations outlined above in relation to Schedule 1 {26] where information is given to the Commission, the Commissioner or a member of staff of the Commission.

The Committee agrees with the proposed change.

Schedule 1 [28] deals with issues of self-incrimination in relation to the giving of information or the production of documents under the amendments made by Schedule 1 [26].

The Committee is concerned about the proposed section 37A which does not give a practitioner the right to not answer a question or produce a document on the grounds that it may incriminate him or her. This provision appears to be completely at odds with a person's basic rights at common law.

Further the Section appears confusing in its failure to distinguish between "information" and "documents". Proposed Section37A(2) states that: *any information or answer given by a natural person in compliance with a requirement under section 34A is not admissible in evidence against the person in any civil or criminal proceedings (except disciplinary proceedings or proceedings for an offence under this part)* if the person objected on the grounds of self incrimination or was not informed that he or she could object on these grounds. However, section 34A(3) goes on to state that any document produced in compliance with section 34A was not inadmissible in any proceedings.

If these two sections are supposed to be differentiating between existing material and material which is prepared by the respondent expressly for the purposes of section 34A the Committee believes that this could be more clearly expressed in these legislative provisions.

RECOMMENDATION 3: The Committee recommends that proposed sections 37A(2) and (3) be amended to more clearly define and differentiate between "information" and "document" for the purposes of these sections

Schedule 1 [29] amends section 39 of the Principal Act to include, as one of the options that the Commission has on concluding an investigation into a complaint, referring the complaint to the appropriate registration authority for consideration that the health practitioner be referred for performance assessment or impairment assessment.

The Committee agrees with the proposed amendment.

Schedule 1 [30] makes a consequential amendment.

The Committee agrees with the proposed amendment.

Schedule 1 [32] protects a person making a complaint, or reporting any matter that could give rise to a complaint, to the Commission or a registration authority from personal liability if the person's actions were done in good faith.

The Committee agrees with the proposed amendment. It believes it will further encourage full and frank disclosure.

Schedule I [33] notes the provisions of the *Ombudsman Act 1974* dealing with the powers of the Ombudsman to investigate the conduct of certain public authorities including the Commission. The provision ensures that the provisions of the Principal Act or any other Act do not prevent the Commission from providing information to the Ombudsman.

The Committee agrees with the proposed amendment.

Schedule 1 [34] enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act and the proposed *Health Registration Legislation Amendment Act 2004.*

The Committee agrees with the proposed amendment.

Schedule 1 [35] contains specific provisions dealing with certain savings and transitional matters consequent on the enactment of the proposed Act and the proposed *Health Registration Legislation Amendment Act 2004*.

The Committee agrees with the proposed amendment.

Schedule 1 [36] restricts the operation of the privative clause contained in Schedule 5 (Special provisions relating to Walker Special Commission of Inquiry).

The Committee agrees with the proposed amendment.

SCHEDULE TWO

Schedule 2 [8] substitutes Division 8 of Part 2 of the Principal Act which deals with the conciliation of complaints and inserts a new Division 9 of Part 2 into the Principal Act relating to other complaints resolution procedures that may be carried out by the Commission.

Proposed Division 8 re-enacts (with certain modifications) the repealed Division and contains the following provisions:

(a) proposed section 46 which provides for the appointment of a conciliator to conciliate a complaint referred to the Health Conciliation Registry *(the Registry),*

The Committee largely agrees with the proposed amendment. However, it suggests that there should be no limit on the amount of conciliators which may be appointed by the Registrar in each case if it can be justified. Although the Committee acknowledges that the appointment of more than two conciliators would be unusual, resolution of complaints should be approached on a case by case basis. The complexity of some cases, the number of parties involved and the physical proximity of complainants and respondents from each other may occasionally warrant a more stylised approach. The Committee therefore believes that the legislation is being unnecessarily prescriptive and should leave greater flexibility to the Registrar in this area.

The Committee suggests that section 46(2) should be amended to read that *The Registrar may appoint more than one conciliator to conciliate the complaint if the Registrar considers that is desirable to do so.*

RECOMMENDATION 4: The Committee recommends that proposed section 46(2) should be amended to read that The Registrar may appoint more than one conciliator to conciliate the complaint if the Registrar considers that is desirable to do so.

(b) proposed section *47* which requires the Registrar to give notification of the referral of a complaint for conciliation,

The Committee agrees with the proposed amendment. This amendment is in line with Recommendation 2 of its 2002 report into the Health Conciliation Registry entitled *Seeking Closure: improving conciliation of health care complaints in New South Wales.*

(c) proposed section 48 which provides that participation in the conciliation process under the proposed Division is voluntary,

The Committee agrees with the proposed amendment. It disagrees with the Recommendation 49 of the 1997 Review of the *Health Care Complaints Act* which recommended that participation in conciliation should be mandatory for respondents. The Committee is firmly of the view that conciliation will only be effective if participation is voluntary for all parties.

(d) proposed section 49 which sets out the role of conciliators,

The Committee agrees with the proposed amendment.

(e) proposed section 50 which provides that the parties to a complaint are not entitled to be legally represented during conciliation of the complaint but may, in certain circumstances, be assisted by another person who is not a legal practitioner,

The Committee agrees with the proposed amendment to allow complainants to be accompanied by a support person as a right and respondents to be accompanied at the discretion of the Registrar. This reflects Recommendations 28 and 29 of the Committee's 2002 report into the Health Conciliation Registry entitled *Seeking Closure: improving conciliation of health care complaints in New South Wales.*

(f) proposed section 51 which prevents anything said or documents prepared in connection with the conciliation of a complaint from being used in proceedings without the consent of the persons concerned,

The Committee agrees with the proposed amendment.

(g) proposed section *52* which provides that the conciliation process is concluded when either party terminates it, the parties reach agreement or the conciliator terminates it for specified reasons,

The Committee agrees with the proposed amendment.

(h) proposed section 53 which requires the conciliator to give a report to the Registrar on the conclusion of the conciliation process and the Registrar to give a copy of the report to the Commission, the parties to the complaint and the appropriate registration authority,

The Committee agrees with the proposed amendment.

(i) proposed section *54* which requires conciliators to furnish certain information to the Registrar for the purposes of proposed section 55,

The Committee agrees with the proposed amendment.

(j) proposed section *55* which requires the Registrar to make six-monthly reports to the registration authorities providing specified information about the complaints dealt with by way of conciliation,

The Committee agrees with the proposed amendment. This provision, in part, reflects Recommendation 8 of the Committee's 2002 report into the Health Conciliation Registry entitled *Seeking Closure: improving conciliation of health care complaints in New South Wales.*

(k) proposed section 56 which enables the Commission to investigate a complaint that has been dealt with under the proposed Division, but only in limited circumstances,

The Committee agrees with the proposed amendment.

(l) proposed section *57* which states that a member of staff of the Commission employed in the Registry or a conciliator is not subject to the direction and control of the Commissioner in relation to dealing with any particular complaint,

The Committee agrees with the proposed amendment. It believes that it is essential that conciliation be, and be perceived to be, totally independent and free from bias.

(l) proposed section *58* which makes it an offence for a conciliator or a member of staff of the Commission employed in the Registry to disclose information obtained during the conciliation of a complaint except in specified circumstances,

The Committee agrees with this proposed amendment. It believes that it is even more essential if the Registry is to be moved into the Commission.

(m) proposed section 58A which ensures that a conciliator is not liable to be proceeded against under section 316 of the *Crimes Act 1900* (dealing with offences for concealing information relating to a serious indictable offence) in relation to information obtained in connection with the conciliation process.

The Committee agrees with this provision.

Proposed Division 9 contains the following provisions:

(a) proposed section 58B which sets out the objects of the Commission when dealing with complaints under the proposed Division,

The Committee agrees with this provision. It is particularly supportive of the wording in section 58B(a) which says the Commission is to *"provide an alternate and neutral means of resolving complaints that is independent of the investigative processes of the Commission".* The need for total neutrality by the Commission in this area cannot be over emphasised. The Committee has observed over the years that this has not traditionally been part of the Commission's core culture. The Commission has tended to view itself as an organisation which largely acts as an advocate for complainants.

(b) proposed section 58C which sets out the function of the Commission under the proposed Division, being to take appropriate measures to assist in the resolution of complaints,

The Committee agrees with this provision.

(c) proposed section *58D* which provides that participation in the complaints resolution process under the proposed Division is voluntary.

The Committee agrees with this provision.

Schedule 2 [9] extends the functions of the Parliamentary Joint Committee on the Health Care Complaints Commission to include the function of monitoring and reviewing the exercise of functions by the Health Conciliation Registry.

The Committee agrees with this provision. Although the Committee considers that it would already have these powers of oversight over the Registry under the current provisions of section 65 the Committee believes that it is helpful to legislatively state this unambiguously.

Schedule 2 [11] substitutes Part 6 of the Principal Act to convert the Health Conciliation Registry from a statutory corporation to a unit of the Commission.

The Committee is philosophically opposed to the proposal to move the Registry into the Commission. The reasons for this are discussed in its current report: *Report into Alternative Dispute Resolution of Health Care Complaints in New South Wales.* However, as discussed in that Report the Committee accept that this may happen as a practicality.

The comments the Committee makes in relation to this section reflect the views and recommendations made by the Committee in its recent report into the issue.

Schedule 2 [11—17], [10], [12] and [13J make consequential amendments.

The Committee agrees with the proposed section 86 which sets out the functions of the Registry.

The Committee has concerns about the proposed section 87 which provides that: *The Commission is to appoint a member of its staff as Registrar of the Health Conciliation Registry to manage the Registry.*

The Committee is firmly of the belief that the Registrar must be appropriately qualified, skilled and experienced for the position. This provision is written in a way which seems to indicate that the Commission can just make an internal non competitive transfer of any of its staff over to the position of Registrar. The Committee considers that it is unlikely that the Commission would have internal staff who have been employed for other positions who would meet the criteria it believes is essential for the position.

The Committee also believes that to appoint a member of the Commission in the position may compromise the external perception of the Registry's independence from the Commission which is essential if the conciliation process is to be effective.

Further, the Registrar must be able to act independently of the Commissioner in accordance with proposed section 57. This may be difficult in a situation where the Registrar has been used to being under the direction of the Commissioner in their previous position. Particularly if they are only acting as Registrar for a limited time period and then returning to their old position or seeking to advance their career at the Commission.

The Committee has previously recommended that the selection process for the Health Conciliation be formalised in its 2002 report: *Seeking Closure: improving conciliation of health care complaints in New South Wales*.

The Committee suggests that section 87 should be reworded to provide that the position of Registrar should be appointed as a result of an external competitive process.

The Committee similarly has concerns about section 88 for the same reasons as outlined in relation to section 87. The Committee believes that it will compromise the independence of the Registry for both complainants and respondents to be given the impression that the staff of the Registry and the Commission are interchangeable.

The Committee therefore suggests that the legislation specify that at least the more senior staff of the Registry should be appointed following an external competitive recruiting process.

The Committee agrees with the proposed section 89.

The Committee agrees with the proposed section 90.

The Committee agrees with the proposed section 96.

The Committee agrees with the proposed section 97.

RECOMMENDATION 5: The Committee recommends that proposed section 87 should be amended to provide that the position of Registrar should be appointed as a result of an external competitive recruiting process.

RECOMMENDATION 6: The Committee recommends that proposed section 88 be amended to provide that at least the more senior staff of the Registry should be appointed following an external competitive recruiting process.

SCHEDULE THREE

Schedule 3.1 amends the *Freedom of Information Act 1989* as a consequence of the amendments made in relation to the Health Conciliation Registry.

Schedule 3.2 [1] amends the *Health Administration Act 1982* as a consequence of the amendments made in relation to the Health Conciliation Registry to the Commission.

Schedule 3.2 [2] inserts proposed Division 6C into Part *2* of that Act which contains provisions establishing a root cause analysis team *(RCA team)* for area health services, and for statutory health corporations and affiliated health organisations prescribed by the regulations *(relevant health services organisations).* The relevant health services organisation is to appoint members to constitute the RCA team when a reportable incident (to be identified through regulations) occurs that involves the organisation. A RCA team is required to notify the relevant health services organisation of certain matters and report on its findings. Information given to a RCA team and reports made by it are protected and the members of the team are also protected from personal liability for actions done in good faith as a member. Regulations may be made with respect to the functions, procedure, constitution and membership of RCA teams, the furnishing of reports and information by those teams and enabling a RCA team to be established by a relevant health services organisation for a reportable incident at another such organisation.

Schedule 3.3 amends the *Health Services Act 1997* to require the chief executive officers of public health organisations to report conduct of visiting practitioners and employees that they reasonably suspect may constitute professional misconduct or unsatisfactory professional conduct to the relevant registration authorities.

The Committee does not consider that it is in a position to comment upon these provisions.

Chapter Two: Comments on the Health Registration Legislation Amendment Bill 2004

The object of this Bill is to amend various Acts which provide for the registration of health professionals:

(a) to standardise, as far as practicable, the concepts of "professional misconduct" and "unsatisfactory professional conduct" where used in those Acts so that they relate to conduct that demonstrates that the knowledge, skill, judgement or care possessed by the relevant health professional in the practice of their profession is significantly below the standard reasonably expected of such a health professional of an equivalent level of training or experience, and

(b) To make it clear that when disciplinary proceedings in relation to a complaint are taken under those Acts the complaint may at that stage relate to matters arising out of the investigation of the complaint as originally made, and

(c) To remove the requirements that complaints under those Acts need to be verified by statutory declaration, and

(d) As a consequence of *Health Legislation Amendment (Complaints) Bill 2004.*

The Bill also amends the *Medical Practice Act 1992* and the *Nurses and Midwives Act 1991* to enable a person to be represented before the relevant Professional Standards Committees by a non-legal advisor and to ensure that members of the New South Wales Medical Board or the Nurses and Midwives Board cannot sit on the relevant Professional Standards Committees.

The Committee only wishes to comment on three areas of this legislation: the standardisation of the definition of "professional misconduct" and "unsatisfactory professional conduct"; the ability for doctors and nurses to be represented before Professional Standards Committees; and the exclusion of Members of the Medical Board from sitting on a Medical Tribunal and Professional Standards Committee and Members of the Nurses and Midwives Board from sitting on a Professional Standards Committee.

Standardisation of the definition of "Professional Misconduct" and "Unsatisfactory Professional Conduct"

The Committee agrees with the legislative amendments. The lack of a clear definition of these concepts has been an ongoing concern for some time.

REPRESENTATION FOR DOCTORS AND NURSES BEFORE PROFESSIONAL STANDARDS COMMITTEES

The Committee agrees with this proposal. This was a recommendation of the Committee's Report of the Inquiry into Procedures Followed During Investigations and Prosecutions Undertaken by the Health Care Complaints Commission.

The Committee was clearly of the view that the current system unfairly favours the prosecution. Essentially Professional Standards Committees proceed in an essentially adversarial manner.

The Commission uses officers to prosecute who have been specially trained and who built up a considerable amount of experience before these Committees.

It is clearly unfair that a practitioner who is not legally trained, particularly in relation to the rules and processes of examination and cross examination of witnesses be asked to defend themselves in such a forum.

Allowing practitioners to be represented by non legally qualified but experienced advocates merely places the practitioner on an equal footing as the Commission.

EXCLUSION OF MEMBERS OF THE MEDICAL BOARD FROM SITTING ON A MEDICAL TRIBUNAL AND PROFESSIONAL STANDARDS COMMITTEE AND MEMBERS OF THE NURSES AND MIDWIVES BOARD FROM SITTING ON A PROFESSIONAL STANDARDS COMMITTEE

The Committee agrees with this proposal. It was a recommendation of its *Report of the Inquiry into Procedures Followed During Investigations and Prosecutions Undertaken by the Health Care Complaints Commission.*

In this Report the Committee took the view that it was not appropriate that Members of these Boards sit on these disciplinary panels. The practice often tended to create a perception amongst practitioners that the adjudication process was not entirely impartial.

The Committee observed that it did not happen in most other jurisdictions of Australia or overseas.

The practice was not even consistent with other health professional Acts within New South Wales such as the Dental Practice Act.

Chapter Three: Previous recommendations of the Committee involving legislative change which are not reflected in the proposed legislative amendments

INVESTIGATIONS

1. That Section 23 of the *Health Care Complaints Act* 1993 be amended to provide the Health Care Complaints Commission with a discretion as to whether to investigate types of matters listed in that section in certain prescribed circumstances.

2. That Section 40 and Section 43 of the *Health Care Complaints Act* 1993 be amended to require that the Health Care Complaints Commission provide the respondent with **all** the information collected during the course of the investigation including any peer review reports. The respondent should be given the right to request and receive a further 28 day extension as a matter of course.

3. That the *Health Care Complaints Act* 1993 be amended to require that the Health Care Complaints Commission provide the relevant health professional registration board with **all** the information collected during the course of the investigation including any peer review reports.

PROSECUTIONS

1. That Section 89 of the *Medical Practice Act* 1992 be amended to allow for *de novo* appeals on fact as well as law on the basis of the transcript from tribunals to the New South Wales Court of Appeal.

2. That appeals from disciplinary committees on lesser matters of practical application be heard by another similarly constituted disciplinary committee rather than a tribunal.

3. That a legislative review be undertaken of all the relevant Acts relating to the receipt and handling of complaints against health practitioners and subsequent disciplinary processes.

CONCILIATIONS

1. That the *Health Care Complaints Act* 1993 be amended to provide for the splitting of a complaint enabling conciliation and investigation to proceed concurrently.

Chapter Four – Director of Prosecutions

The Committee has considered the proposal put forward to Cabinet Office by the Health Care Complaints Commission for the creation of a statutory office of an independent Director of Prosecutions.

The Committee is familiar with the New Zealand Health and Disability Commissioner system and has no objections to the proposal in principle.

However, the Committee has some concerns about how the new system would operate. It notes that in its submission to Cabinet Office the Health Care Complaints Commission has suggested that:

> *At the end of an investigation.....the Commissioner would be given the option of referring the complaint to the Director of Prosecutions for consideration of whether or not the complaint should be prosecuted before a disciplinary body.*

The Commission goes on to suggest that:

> *The draft bill should also contain a provision to the effect that the Director of Prosecutions may consult with the various Registration Boards at any time.*

The legislative framework established by the *Health Care Complaints Act 1993* and the relevant health professional registration Acts is a co-regulatory one. Collaboration between the Health Care Complaints Commission and the registration boards must occur at regular points throughout the assessment and investigation process.

The Committee believes that any provisions relating to the powers of a proposed Director of Prosecutions should also reflect the spirit of the existing legislation.

Consultation between the Director of Prosecutions and the relevant registration board in each case should legislatively be made mandatory. Particularly if the Director of Prosecutions decides to change any aspect of the path which has been agreed upon by the Commission and the relevant board in the meeting which occurs under section 39(2).

RECOMMENDATION 7: If a Director of Prosecutions is to be created, consultation between the Director of Prosecutions and the relevant health professional registration board concerning each case received by the Director should be mandatory.