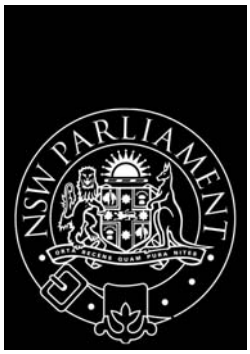

PARLIAMENT OF NEW SOUTH WALES

Committee on the Health Care Complaints Commission

REPORT INTO ALTERNATIVE DISPUTE RESOLUTION OF HEALTH CARE COMPLAINTS IN NEW SOUTH WALES

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Table of Contents

TABLE OF CONTENTS ..... **I**

MEMBERSHIP & STAFF ..... **III**

TERMS OF REFERENCE ..... **V**

FUNCTIONS OF THE COMMITTEE ..... **VII**

CHAIRMAN'S FOREWORD ..... **IX**

RECOMMENDATIONS ..... **XI**

CHAPTER ONE - BACKGROUND **1**

The role of conciliation in dealing with health care complaints 1

Conciliation versus mediation 1

When is conciliation appropriate? 2

What happens in other jurisdictions? 2

CHAPTER TWO - CURRENT ROLE AND OPERATIONS OF THE HEALTH CONCILIATION REGISTRY **5**

Legislative framework 5

History/structure of the Registry 5

Advantages/restrictions of the current model 6

CHAPTER THREE - PREVIOUS COMMITTEE FINDINGS AND RECOMMENDATIONS **9**

Consents 9

Direct access from the local level 9

External performance review 10

More detailed feedback to the Health Care Complaints Commission and Registration Boards 10

Splitting complaints 10

Financial settlements 10

Linkages with interstate bodies 11

Training for Area Health Service staff in alternative dispute resolution 11

CHAPTER FOUR – THE WAY AHEAD **13**

Current operations of the Registry 13

Stakeholder views 15

Separate bodies for complaint resolution and investigation 17

The Health Conciliation Registry within the Health Care Complaints Commission 19

Legislative Safeguards 20
Patient Support Service 24
Financial Settlements 24
Performance Reviews 25
Separate Premises 25

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Terms of Reference

The Committee is conducting an Inquiry into Alternative Dispute Resolution of Health Care Complaints in New South Wales. Terms of Reference include

(a) The role, functions and operations of the Health Conciliation Registry;

(b) Whether the Health Conciliation Registry has adequate powers under Part 6 of the *Health Care Complaints Act* 1993 (NSW) to perform its functions;

(c) The role of the Patient Support Office in mediating and conciliating complaints;

(d) Other appropriate methods of resolving health care complaints other than investigation;

(e) Any other relevant matters.

Functions of the Committee

The Joint Committee on the Health Care Complaints Commission was appointed in 1993. 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

In June 2004 the Committee tabled a *Discussion Paper on the Health Conciliation Registry* which sought submissions on various aspects of the Registry's functions and operations, including the issue of whether the Registry should remain an independent agency.

The first three chapters of the Discussion Paper which contain background information to the inquiry are reproduced in this report. Chapter Four of the report canvassed options for future Registry models.

Since then the Cabinet Office has undertaken a review of the Health Care Complaints Act 1993 and has a proposed a number of legislative amendments in addition to those recommended by the Walker Inquiry. Those amendments are contained in three draft exposure bills which the Minister for Health tabled in Parliament and invited public comment. One of these bills, the *Health Legislation Amendment (Complaints) Bill 2004,* places the Registry within the jurisdiction of the Health Care Complaints Commission.

During the course of our inquiry, however, the Committee formed a slightly different view. The Committee agreed with the New South Wales Medical Board that the optimum model would be to create two totally separate bodies, one to conduct investigations and one to resolve complaints by all other means. This would bring New South Wales into line with models such as Queensland, which the Committee has studied in some detail.

In the submissions the Committee received to the inquiry, most stakeholders argued strongly for a totally independent Registry. The Committee noted that the draft Bill tries to achieve this independence while still placing the Registry within the Commission.

In its *Discussion Paper on the Health Conciliation Registry* the Committee acknowledged that a transferral of the Registry to the Commission would offer some financial and administrative benefits.

The Committee also accepted that it can be both confusing and frustrating for parties to have their complaint handed over to another agency partway through the complaint handling process.

Placing the Registry within the Commission would allow for more streamlining of complaint processes.

The Committee acknowledged in its *Discussion Paper* that *in its current form the Registry is a very small agency to make entirely independent* as a stand-alone agency.

There is also a clear lack of other possible relevant agencies into which the Registry can be feasibly placed. It must be noted that none of the submissions suggested or identified a suitable agency for it to be placed.

However, if the Registry is to be moved into the Commission the Committee believes that there is a need for clear legislative safeguards to protect its independence and its functions.

The Committee has noted that the draft *Health Legislation Amendment (Complaints) Bill 2004* contains a number of provisions to protect the independence of the Registrar and independent conciliators. However, the Committee does not believe that these provisions are extensive enough.

The Committee believes that the Registrar must be given greater independence than is anticipated by the draft legislation if there is to be a public and professional perception of impartiality in the conciliation process.

Therefore the Committee has made a number of recommendations aimed at ensuring that this greater independence is achieved if the Registry is placed within the Commission. The Committee has made recommendations that would see improved resolution of complaints within the Commission.

The Committee also made recommendations which anticipate the contingency that Parliament may decide that the Registry should remain a separate entity.

In addition the Committee noted that the draft legislation has proposed a number of changes to the operations of both the Registry and the Commission in line with recommendations made previously by the Committee.

Finally, I would like to take this opportunity to compliment the Registrar, her staff and the conciliators for the good work that they are doing. The Registry has improved its performance considerably over the past few years. It is held in high regard by all relevant stakeholders that the Committee spoke with during the course of this inquiry. Also I thank the Committee members and the secretariat for their assistance in preparing this report.

JEFF HUNTER MP
Chairman

RECOMMENDATIONS

If the Registry remains a separate body

1 The Health Conciliation Registry should be given the legislative power to obtain the consent of the parties to participate in conciliation.

2 All Area Health Services should be allowed direct access to the Health Conciliation Registry for resolution of any complaints they receive which they would not normally refer to the Health Care Complaints Commission under the existing guidelines and legislation.

3 The Health Conciliation Registry should be required to produce its own annual report in accordance with the annual reporting legislation and Treasury Guidelines.

4 The *Health Care Complaints Act 1993* should be amended to allow for the splitting of complaints, where possible, between investigation and conciliation.

If the Registry is amalgamated with the Commission

5 The Health Conciliation Registrar position should be given equivalency to the proposed Director of Prosecutions position in terms of its importance within the organisation and its fiscal remuneration.

6 The Health Conciliation Registrar should not be subject to the direction of the Health Care Complaints Commissioner in performing his or her functions but should be responsible to the Commissioner for the efficient, effective and economical management in the carrying out of the Registry's functions.

7 All forms of complaint resolution within the Commission other than investigations should come under the functions of the Health Conciliation Registrar.

8 The Commission should adequately resource the Registry to enable it to effectively carry out all its functions.

9 The Health Conciliation Registrar should be given a separate budget which will be allocated by the Commissioner each year and separately accounted for in each annual report of the Health Care Complaints Commission.

10 The activities of the Health Conciliation Registrar and the proposed Director of Prosecutions should be reported in their own separate sections of each annual report of the Health Care Complaints Commission.

11 The Health Conciliation Registrar should be responsible for the appointment of his or her staff, including conciliators.

12 The Health Conciliation Registrar should meet on an annual basis with the Joint Parliamentary Committee independently of the Health Care Complaints Commissioner to discuss issues arising from each Health Care Complaints Commission annual report which relate to his or her functions.

13 The Minister for Health should fund an external performance review of the Registry's operations within the first three years of its amalgamation with the Commission. The Review should be overseen by the Joint Parliamentary Committee.

14 The Health Conciliation Registry should be required to conduct regular external performance reviews.

15 The Registry's premises should be separate from those of the Commission, if feasible.

Chapter One - Background

The role of conciliation in dealing with health care complaints

Conciliation enables the parties in a health care complaint to discuss the matter and agree on possible options for an outcome. A professional conciliator assists the process in a setting which is designed to be neutral and non-threatening. Conciliation, as it is defined in the *Health Care Complaints Act* 1993, is the only method of dispute resolution sanctioned in the New South Wales' health care complaints process, for complaints received by the Health Care Complaints Commission.

Conciliation is not part of the investigative process. It can be an effective mechanism for the parties to resolve the complaint through facilitated discussion and negotiation. Conciliation allows for a full exploration of the issues prior to proposing any agreement. The conciliator assists this process by, for example, outlining the role of conciliation, ensuring parties have an equal say, easing communication and encouraging parties to address problem-solving questions. The conciliator is impartial and cannot report anything discussed in the conciliation meeting to external parties. However, agreement reached at conciliation can be produced in evidence.

The conciliation process is used by a range of other organisations as a means of resolving complaints about issues, including, for example, Relationships Australia and the Family Court.

The success of conciliation as a means of resolving health care complaints in New South Wales is indicated by the number of parties that have negotiated a resolution to a complaint via this approach. In recent years, some 79 per cent of complaints referred for conciliation have been successfully resolved.

Conciliation versus mediation

The Registry has traditionally used a classic mediation model where a neutral third party established the 'ground rules of engagement' which enable two parties in dispute to discuss their differences and the terms (if any) of agreement to resolve a complaint. Within this model, the mediator has no advisory or determinative role regarding the content of the dispute or the outcome of the resolution, but they can advise upon or determine the process by which resolution is attempted. The mediator helps with the identification of issues, the development of options and the consideration of alternatives for and with the parties.

In a true conciliation process, the conciliator may undertake all of the above but in addition, where resolution is attempted, may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively

encourage the parties to reach an agreement. The Registry now takes a flexible approach to complaint resolution on a case-by-case basis.

When is conciliation appropriate?

Conciliation (or mediation) provides an effective and less formal alternative for parties than seeking dispute resolution through court systems. Some 80 per cent of complaints received by the Health Care Complaints Commission involve communication issues. There is, therefore, a strong imperative to engage processes that involve communication's methodologies, seek understanding of the disputed issues and bring closure for the parties. There are clear advantages for the parties in terms of costs and personal stresses if dispute resolution can be achieved via conciliation.

What happens in other jurisdictions?

While New South Wales has the Health Care Complaints Commission undertaking investigations and prosecutions of health care complaints, in other Australian States and Territories, the comparable body has been established primarily to undertake conciliations. Investigations and prosecutions are undertaken by the health registration bodies except in the Australian Capital Territory, which performs all three roles of investigator, prosecutor and conciliator. It should be noted that some of the interstate Commissions such as Queensland and Victoria also perform systemic investigations.

In Victoria, the legislation anticipates that consumers will attempt to resolve issues themselves wherever possible and Health Services Commission (HSC) staff convey this advice in the first instance. All potential complaints are entered into a database and complaints not confirmed in writing are closed. Once a complaint is confirmed, it is sent to the health service provider with a request for a response within 28 days. The HSC notes that the majority of complaints are resolved at this stage. Of complaints referred into conciliation, the HSC experiences a high level of cooperation among parties and a recognition that the processes are impartial and fair. In 2001/2002 the HSC reported that ninety-two per cent of matters referred for conciliation were resolved and one per cent were referred to registration boards. Seven per cent were noted as 'non-conciliable'. In Victoria, two conciliators are required to attend conciliation meetings as a means of establishing impartiality.

As mentioned above, the Community and Health Services Commission in the Australian Capital Territory investigates, prosecutes and conciliates complaints. Its legislation allows it to 'split' complaints – that is, refer one part for conciliation while another part is being investigated. Conciliation agreements may also include settlement claims for damages. The Victorian HSC also allows for the splitting of complaints.

All jurisdictions address provisions for 'representation' at conciliation meetings. In the Australian Capital Territory, Northern Territory, Tasmania and Western Australia, representatives may only be appointed with the permission of the Commissioner, and then only if a party can demonstrate that their presence and knowledge will facilitate the process. Further, in the Northern Territory and Tasmania, the party seeking representation must give the other party at least 48 hours notice of their intention.

In all jurisdictions, what is said in a conciliation is confidential and cannot be used by the Commissioner to take further action under the Act or before any court, tribunal or body.

The Queensland Act states that such information cannot be used to enforce an agreement reached by parties at conciliation. (In New South Wales, any document prepared for the purpose of, or during the course of the conciliation is not admissible in a court, tribunal or body unless the parties consent. Conciliators now clearly explain this implication to parties at the outset of the conciliation meeting.)

While information obtained from conciliation in the Northern Territory is not admissible in any court, tribunal or body, prosecution of a person for penalties relating to the disclosure of information still apply to a conciliator, mentor or other person. The same applies in the Australian Capital Territory. In Tasmania, disclosure provisions apply only to conciliators. The Victorian Act specifies penalties for disclosure of confidential information by a conciliator.

While all Acts refer to the nature of agreements between parties, only the Australian Capital Territory, the Northern Territory and Tasmania indicate that agreements must be in a form that is binding upon parties.

Conciliators in all jurisdictions are required to prepare a report upon completion of the conciliation process.

It is worth noting that in many jurisdictions, the shortcomings of the legislation under which Commissions operate have precipitated recent reviews. These have occurred in Queensland, the Australian Capital Territory, the Northern Territory, Victoria and Western Australia.

Chapter Two - Current Role and Operations of the Health Conciliation Registry

Legislative framework

The process of conciliation for health care complaints within New South Wales is formal and highly structured. This process is defined within the *Health Care Complaints Act 1993*. A complaint is referred for conciliation following assessment by the Health Care Complaints Commission and the relevant health registration board, once it is decided that the complaint does not warrant investigation. The complaint is referred to the Health Conciliation Registry, a statutory body funded by, and at arms length from, the Department of Health. The Health Conciliation Registry is a separate body independent of the Health Care Complaints Commission and the health professional registration boards. The Registry does not accept complaints from members of the public.

Parties to the health care complaint must consent to conciliation prior to it being referred to the Health Conciliation Registry. The Health Care Complaints Commission is the body which obtains these consents. Upon referral, the Health Conciliation Registry contacts the parties to arrange a suitable time, date and place for the conciliation to occur.

History/structure of the Registry

The Health Conciliation Registry was established under the aegis of the *Health Care Complaints Act 1993* and is responsible to the Legal and Legislative Unit of New South Wales Health. The Registry employs a Registrar and Clerical Officer with responsibility for employing conciliators; arranging conciliation meetings; answering telephone enquiries; representing the Registry; and notifying the Health Care Complaints Commission and health registration bodies of the outcomes of conciliations.

The Committee's 2002 report *Seeking Closure: improving conciliation of health care complaints in New South Wales* identified a number of concerns and areas for potential improvement of the Registry's processes. The report was completed following a survey of parties to the conciliation process, in which both complainants and respondents to complaints had indicated dissatisfaction with the process. These included concerns about the process of referral for conciliation; perceived unfairness on the part of the conciliator and concerns about pressure to achieve an outcome, or that written outcomes failed to reflect discussions.

The Committee's report outlined recommendations to address these and other concerns. These matters are discussed in more detail in Chapter 3.

One important area of reform identified in the report impacts directly upon the structure and operations of the Registry. This concerns the selection of conciliators. The Registry selects its conciliators from a panel and they are employed on a sessional basis. In 2002, there were 18 conciliators on the panel. The Committee's report indicated the need for a broader mix of conciliators to be recruited and for stronger professional development to reflect the specialised level of professionalism required to effectively conciliate health care complaints.

By April 2004, significant changes had been made to the conciliators' panel. New conciliators were recruited, to represent greater community diversity and geographic availability. There is currently a panel of 37 conciliators with extensive training in dispute resolution, conciliation and conflict resolution. Most of these have a legal background, while others come from the fields of medicine, nursing, social sciences, education and administration.

Advantages/restrictions of the current model

The current model offers parties to a complaint a process which is completely separate from the Health Care Complaints Commission and thus any expectations or fears of disciplinary action which may arise from association with this body. The process is designed to encourage parties to resolution in an atmosphere of neutrality. The process also offers the advantage of speedier and less costly resolution than through court systems.

Some potential disadvantages are the Registry's administrative 'attachment' to the Department of Health which, in spite of its arms-length structure, may lead some parties (for example, those in dispute with the health system) to doubt its independence. There is no doubt, however, that the current administrative structure offers a cost-effective alternative to the funding of an autonomous body.

As the Committee's 2002 *Seeking Closure* report indicates, there were also concerns that the comparative isolation of the Registry from the Department of Health in the past had resulted in little proper external scrutiny or feedback, such that the Registry had been unable to examine its strengths and weaknesses. The Committee made a range of recommendations to improve external reporting and to gather client feedback.

These have been in part addressed by an internal review undertaken by the Registry in 2002 and ongoing reforms.

Other restrictions of the current model arise because of the constraints on the process applied by the *Health Care Complaints Act*. For example, the requirement that the Health Care Complaints Commission must obtain the consent of parties, before a complaint assessed as suitable for conciliation can be referred to the Registry, results in inevitable delays. This can in turn lead to frustration among the parties to a complaint which unsettles the conciliation

process. Although the Registry and Commission are now working together to obtain consents it is still too early to evaluate how effective this process may be. Further, the current Section 24 restriction upon referring a complaint or parts of a complaint for conciliation while under investigation similarly adds to delays and prevents closure of issues.

As noted above, conciliators are constrained by the Act in their application of just one model of dispute resolution. They may not, for example, act as advocates nor may they suggest remedial action. The current stated neutral role for conciliators should be advantageous for respective parties provided these have access to advocacy services if they so require. And while neutrality cannot be guaranteed, there is general awareness about the prevention of bias raised by the ongoing discussion of the issue among practitioners.

Chapter Three - Previous Committee Findings and Recommendations

The Committee has produced two previous reports addressing aspects of alternative dispute resolution. These include the *Report on Localised Health Complaint Resolution Procedures* (1997) and *Seeking Closure: improving conciliation of health care complaints in New South Wales* (2002).

While a good many of the recommendations have been addressed, particularly in the operations of the Health Conciliation Registry following the 2002 Committee Report, significant recommendations remain outstanding, largely because they require changes to the *Health Care Complaints Act* 1993. These are addressed as follows:

Consents

The Committee has previously recommended that Section 24 of the Act be amended to nominate the Health Conciliation Registry, not the Health Care Complaints Commission, as the body which seeks parties' consents to conciliation. This would both help to speed up the process and provide a transition point and clearer indication to the parties of the status of the complaint (that is, assessed as suitable for conciliation, not investigation). The Committee believes that this remains a critically important recommendation for consideration.

Direct access from the local level

In its 1997 report, the Committee discussed the under utilisation of the Health Conciliation Registry, and recommended expansion of its role and powers in order to provide direct access from the local level by bodies other than the Health Care Complaints Commission. This would require amendments to Part 6 and Section 57 of the Act. However, the Committee did not pursue these recommendations believing there was a real danger that the Registry may be swamped with complaints from the local level. In 2002 the Committee was still of the view that the Registry did not have either the expertise or the resources to deal with such cases. The Committee therefore felt that until these issues were addressed it was most appropriate for the Commission to remain the channel by which these cases proceed to the Registry.

In 2004 there may be a case for arguing a change of process. The Registry now, arguably, has additional expertise and with attention to resourcing may be able to take on the function of addressing complaints referred from local level health services for conciliation.

External performance review

The Registry indicated to the Committee in correspondence in May 2002 that it had begun to address many of the issues raised by the Committee's report through an internal review. Through this process, it developed a workplan with a framework and timeframe for actions. An external consultant examined the process and criteria for employing conciliators. The Committee felt in 2002 that employment of an external agency to collect feedback from clients on a regular basis was a vital part of a transparent quality assurance process. This remains the Committee's view. It further believes that the results of this feedback should be reported in the Registry's annual report.

More detailed feedback to the Health Care Complaints Commission and Registration Boards

The 1997 and 2002 Reports identified the concern that periodic reports provided by the Registry to the Health Care Complaints Commission and to the registration authorities on conciliated complaints provided insufficient meaningful information for analysis or action. Accordingly, the Committee recommended that Sections 53 (2) and 55(1) of the Act be amended to require the Registry, on a confidential basis to provide these authorities with more detailed information concerning the outcomes of conciliation and issues arising. The Committee continues to believe that this is a vital legislative change which will assist 'lessons learned' for all parties.

Splitting complaints

Under the current provisions of the Act, a complaint cannot be conciliated while it is under investigation by the Health Care Complaints Commission. The *Community and Health Services Commission Act (ACT)* enables the splitting of complaints so that one part may proceed for conciliation of questions of apology and compensation while the Commission continues with an investigation into possible professional misconduct. The Committee previously recommended this as a useful approach to quickly resolve complainant issues while enabling the separate investigation of substantive public interest issues. Section 24 of the *Health Care Complaints Act* 1993 would need to be either amended or deleted to allow the Commission to refer the whole or parts of complaints to the Registry at any stage.

Financial settlements

Other conciliation authorities in the Australian jurisdiction currently have the capacity to settle amounts of compensation as a result of conciliated agreements. There is no current provision for a binding agreement in this regard within New South Wales. There is a case suggesting that while many complainants are

primarily interested in seeking an apology, some flexibility in addressing financial settlements may similarly help to resolve less serious complaints. The major medical indemnity insurer in New South Wales, United Medical Protection, has agreed to trial settlements in conciliation although this has yet to occur.

Linkages with interstate bodies

The Committee has previously recommended that development of informal and formal linkages with similar authorities in other States and within New South Wales would assist the Health Conciliation Registry in both professional development and operational matters. The Registry has already commenced strategic partnerships with some of these bodies. The Committee would like to ensure that as they conduct similar roles, the Registrar is included as a participant in the regular six monthly meetings of Health Care Complaints Commissioners in Australia and New Zealand. This has yet to occur.

Training for Area Health Service staff in alternative dispute resolution

The Registry planned a mediation pilot with South Eastern Sydney Area Health Service, but this did not proceed. The Registrar recently commented that while resourcing had been an issue at the time, the fact that a number of Area Health Services are now facilitating the handling of local complaints at a senior level has dismissed the need for such training.

Chapter Four – The Way Ahead

In its *Discussion Paper on the Health Conciliation Registry* the Committee proposed a number of possible options for the future of the Health Conciliation Registry.

- **Retain the Status Quo**

  The Registry would remain within the budget and administration of New South Wales Health.

- **A Completely Independent Body**

  The Health Conciliation Registry would be made a completely independent autonomous body in line with the other states.

- **Transfer the Registry to the HCCC**

  The Registry would be relocated within the Health Care Complaints Commission.

- **Transfer the Registry to another relevant agency**

  The Registry would be placed within another relevant agency.

Current operations of the Registry

The Committee is of the view that the Health Conciliation is currently working very effectively within its legislative constraints.

There is significant focus on pre and post conference preparation.

The Registry estimates that it would spend 25 per cent of its time on preparation for conferences and around 15 per cent on post conference work.

The Committee believes that the following statistics on the Registry's operations during the last financial year illustrate its effectiveness.

Health Conciliation Registry Statistics
1 July 2003-30 June 2004

Number of providers referred	187
Number of complainants referred	158
Number of Agreements reached [1]	108 (79%)
Number of Agreements not reached[2]	28 (20%)
Number of complainants resolved prior to conciliation	1 (< 1%)
Total Number of conciliations reported	**137**
Conciliations undertaken at the Registry	62
Conciliations undertaken by telephone conference	6
Conciliations undertaken off site[3]	59
Total Number of conciliations undertaken (by complainant)	**127**
Number of providers who withdrew consent prior to conciliation	11
Number of complainants who withdrew consent prior to conciliation	27
Total Number of complaints referred not conciliated	**38**
Number of complainants that had preparation prior to conciliation	76
Number of providers that had preparation prior to conciliation	49[4]
Number of complainants who had a support person in attendance	44[5]
Number of providers who had a support person in attendance[6]	20[7]
Number of conciliations undertaken with an interpreter[8]	5

Number of conciliations by provider (profession/service/facility)

Medical Practitioner	82
Area Health Service, Ambulance Service, Justice Health, Dept Health	67
Private Facility[9]	22
Other health professionals[10]	16

[1] Includes Partial Agreements Reached
[2] Includes Agreement not Reached – complainants does not wish to pursue the complaint further.
[3] Includes: Wollongong, Dubbo, Tamworth, Newcastle, Gosford, Bankstown, Port Macquarie, Hay, Murwillumbah, Tweed Heads/Coolangatta, Wagga, Campbelltown, Mona Vale, Coffs Harbour, Windsor, Shellharbour, Rosemeadow, Penrith, Albury
[4] AHS may not participate in preparation as their staff may have previously attended a conciliation meeting
[5] 2 support people were linked in to the conciliation by telephone conference
[6] This does not include Area Health Services where more than one representative is present
[7] Nearly all AHS had more than one representative, these are not reported as support people
[8] Interpreters are not categorised as support people
[9] Private Facility includes: hospital, nursing homes, clinic and company
[10] Includes: nurses, dentists, pharmacists, optometrists, chiropractors, dental technicians.

Stakeholder views

Part 6 of the draft *Health Legislation Amendment (Complaints) Bill 2004* which is currently out for consultation places the Health Conciliation Registry within the Health Care Complaints Commission.

In its *Discussion Paper on the Health Conciliation Registry* the Committee acknowledged the following arguments both for and against moving the Registry within the Commission:

Arguments for:

- Financial and administrative savings;
- A "one stop shop" for health care complaints;
- Streamlining of complaints.

Arguments against:

- Lack of autonomy and independence for the Registry;
- Lack of stakeholder support;
- Perceived potential conflict of interest between the investigation and conciliation functions;
- Concerns about confidentiality;
- Concerns about the Commission's previous record of delays in complaint handling.

In the submissions the Committee received to the inquiry most stakeholders argued strongly for a totally independent Registry. The Committee noted that the draft Bill tries to achieve this independence while still placing the Registry within the Commission.

United Medical Protection, while acknowledging that it would have to work with the Registry regardless of where it was placed, believed that the current Registry was now working well and there had been a very positive change in the attitude of doctors towards the conciliation process in the last two years. It was pointed out that any evidence of cross information between the conciliation and investigation processes would taint the entire conciliation process and cause doctors to lose faith in attending conciliation.

The point was also made that, while the Australian Capital Territory combined the conciliation and investigation functions into one agency, the Community and Health Services Commission, this model had existed from the agency's inception. In New South Wales the Health Care Complaints Commission has developed a reputation for being over zealous and excessively punitive towards health practitioners.

The New South Wales Medical Board agreed with the Committee Chairman's observations in the *Discussion Paper* that the Health Conciliation Registry had been *the poor relation, lacking clear definition of its functions, powers and operations as well as a dedicated budget.*

The Board believed that this was largely due to last minute legislative amendments made at the time of the passing of the *Health Care Complaints Act 1993* which the Board believed seriously affected the role and structure of the Health Conciliation Registry, *which in the Board's view compromised its ability to function as effectively as it could have.*

The Board went onto note that:

> *In the Board's submission to the 1997 Review of the Health Care Complaints Act it argued that the role and function of the Health Conciliation Registry needed clarification, and that a much broader spectrum of alternative dispute resolution mechanisms needed to be made available rather than what the Board considered to be the single high level conciliation pathway available to the Registry.*

It went on to argue that:

> *While there have been administrative and philosophical changes in recent years which have improved the effectiveness of the Registry, the Board considers that it has not still realised the full potential for an effective broadly based alternate dispute resolution mechanism as part of the overall complaints handling system in New South Wales.*

The Board believed that:

> *The most critical consideration is that the Health Conciliation Registry is clearly distinct from the investigatory process. The question of how this is structured is a political and financial one which the Board will not comment on, other than to express its view that it should remain within the Health portfolio, possibly reporting to Parliament through the Joint Parliamentary Committee.*

The Nurses Registration Board believed that the current system should remain in place but that there should be a further review in three years.

RECOMMENDATION 1: The Health Conciliation Registry should be given the legislative power to obtain the consent of the parties to participate in conciliation.

RECOMMENDATION 2: All Area Health Services should be allowed direct access to the Health Conciliation Registry for resolution of any complaints they receive which they would not normally refer to the Health Care Complaints Commission under the existing guidelines and legislation.

RECOMMENDATION 3: The Health Conciliation Registry should be required to produce its own annual report in accordance with the annual reporting legislation and Treasury Guidelines.

RECOMMENDATION 4: The *Health Care Complaints Act 1993* should be amended to allow for the splitting of complaints, where possible, between investigation and conciliation.

Separate bodies for complaint resolution and investigation

The New South Wales Medical Board proposed an alternative model which separated out investigations completely from other types of complaint resolution. It was proposed that an investigatory body be created which it referred to as the Health Investigation Unit (HIU). Another body would be responsible for the balance of complaints handling and regulatory functions which it referred to as the Complaint Resolution Services (CRS). It believed that both these bodies could substantially evolve out of existing resources and personnel.

The Board suggested that the current Health Conciliation Registry *should be part of (if not the central core of) the Complaints Resolution Service (CRS) dealing withal the non-investigative aspects of complaint handling. It would have at its disposal the complete spectrum of ADR mechanisms, rather than being limited to the formal conciliation model currently mandated under the Health Care Complaints Act 1993.*

The Board proposed the following principles would apply:

1. All complaints should be initially assessed jointly by the relevant health professional registration board, the HIU and the CRS to determine how they are to be handled;

2. Complaints that warrant investigation in accordance with the current criteria should be the HIU's core business, and its staffing profile and training should reflect this focus on investigation at both operational and management levels;

3. There should be enhanced medical input into the planning and conduct of investigations, with medical staff having a higher profile in the organisation;

4. Complaints which do not meet the threshold for investigation, but which raise issues of substandard professional performance or impairment should continue to be handled by the relevant health professional registration board;

5. The CRS should be responsible for dealing with all other complaints, employing the full spectrum of dispute resolution mechanisms available. It should also be responsible for educational activities, informing members of the community about their rights, and influencing overall standards of care;

6. The HIU should consult with the relevant health professional registration board to determine the appropriate course of action at the conclusion of an investigation.

The Board's proposal has some similarity to the system which currently operates in Queensland. The Committee has recently studied this system in detail.

While Queensland, like the other states of Australia, still leaves the investigation and disciplinary processes in the hands of the professional registration boards it has created one body which acts as a secretariat for all the boards.

The Office of Health Practitioner Registration Boards is a statutory authority which is the combined secretariat for thirteen health practitioner registration boards. The only board excluded from its jurisdiction is the Queensland Nursing Council. The Office conducts all investigations into health professionals. The relevant boards fund the Office.

The Health Rights Commission is a government funded statutory authority whose role is to resolve all complaints which do not go to investigation.

All health consumer complaints received go at first instance to a joint meeting between the Health Rights Commission and the Office of Health Practitioner Registration Boards where it is then determined whether the complaint will go into an investigation or conciliation pathway.

The Committee considers that the New South Wales Medical Board's proposal that the current resources of the Health Care Complaints Commission should be split into two separate government bodies, one to conduct investigations and one to conduct a variety of other dispute resolution procedures, to be the optimum model in the interests of impartiality and transparency.

The Health Conciliation Registry within the Health Care Complaints Commission

However, the Committee acknowledges the draft *Health Legislation Amendment Bill 2004* which has currently been distributed for public comment.

This legislation proposes to place the Health Conciliation Registry within the Health Care Complaints Commission.

In its *Discussion Paper on the Health Conciliation Registry,* the Committee acknowledged that a transferral of the Registry to the Commission would offer some financial and administrative benefits.

The Committee also accepted that it can be both confusing and frustrating for parties to have their complaint handed over to another agency partway through the complaint handling process.

Placing the Registry within the Commission would allow for more streamlining of complaint processes.

In its submission to the inquiry the Health Care Complaints Commission argued strongly that the Registry would be best paced within the Commission.

> *The Commission is firmly of the view that it should provide a "one stop shop" for dealing with all complaints about health care services in New South Wales.*

The benefits of the Commission's proposal are summarised as follows:

- *providing a "one stop shop" for dealing with all complaints about health care services;*
- *providing consumers and carers, who make up the majority of complainants, with a single point of contact for dealing with their complaint;*
- *providing a coherent and comprehensive approach to assessment, investigation and resolution of all complaints;*
- *facilitating timely and cost effective resolution;*
- *providing statutory independence from New South Wales Health and health care services;*

- *providing the gravities of being part of the Commission, and avoiding the perception that some complaints are not "important";*
- *improved performance assessment of conciliation and mediation services;*
- *bringing conciliation staff into the Commission brings membership and interaction with the Australasian Council of Health Care Complaints Commissioners;*
- *facilitating more effective collection of information on trends about issues raised and outcomes of complaints to help improve standards of health care.*

The Committee acknowledged in its *Discussion Paper* that *in its current form the Registry is a very small agency to make entirely independent stand-alone agency.*

There is also a clear lack of other possible relevant agencies into which the Registry can be feasibly placed. It must be noted that not one of the submissions attempted to suggest or identify a suitable agency for it to be placed.

Further, New South Wales Health has made it clear that it does not consider it appropriate to keep the agency under its jurisdiction given that it administers both staff and organisations that are often the subject of the complaint being conciliated.

Legislative Safeguards

The Committee, in common with the majority of other stakeholders who submitted to the inquiry, does not consider that placing the Registry within the Commission to be the best alternative in terms of transparency and independence. However, it acknowledges that from an administrative and financial perspective the amalgamation of the agencies is a logical one.

However, if the Registry is to be moved into the Commission, the Committee believes that there is a need for clear legislative safeguards to protect the independence of the Registry and its functions.

The Committee has noted that the draft *Health Legislation Amendment (Complaints) Bill 2004* contains a number of provisions to protect the independence of the Registrar and independent conciliators.

For example, Sections 51 and 56 protect the confidentiality of admissions made or documents prepared which relate directly to the conciliation process.

Section 57 provides that a member of the Registry staff or a conciliator *is not subject to the direction or control of the Commissioner in relation to dealing with any particular complaint that has been referred to the Health Conciliation Registry for conciliation.*

However, the Committee does not believe that these independence provisions are extensive enough. It has witnessed the health complaints process go awry previously due to lack of effective legislative safeguards. This has lead to the present distrust of the Commission's impartiality by the health professions. The Committee has outlined many of these issues in its *Report into Investigations and Prosecutions undertaken by the Health Care Complaints Commission.*

The Committee believes that the Registrar must be given greater independence than is anticipated by the draft legislation if there is to be a public and professional perception of impartiality in the conciliation process. Therefore the Committee has made a number of recommendations aimed at ensuring that this greater independence is achieved if the Registry is placed within the Commission. In addition, the Committee has made recommendations that it believes would see improved resolution of complaints within the Commission.

The Commission has long been a body which has been identified as primarily an investigative body and a somewhat overzealous and excessively punitive one at that. The Committee accepts that the new senior management of the Commission are trying hard to change both the external perception and internal culture of the agency.

The Committee does not believed that this can be achieved, however, without a greater emphasis on the importance of the agency as not just an investigator but also an agency which attempts to resolve most of the complaints it receives in a non-adversarial way.

The Committee understands that the Commission is requesting that the draft legislation be further amended to create a new position within the Commission called a Director of Prosecutions. It is understood that this position would be similar to the Director of Proceedings within the New Zealand Health and Disability Commissioner.

Under the New Zealand model, a Director of Proceedings is appointed by the Health and Disability Commissioner. Section 15 of the *Health and Disability Commissioner Act 1994 (New Zealand)* provides that the Director of Proceedings shall not be responsible to the Commissioner but shall act independently in exercising or performing the powers, duties, and functions of the position. The function of the Director of Proceedings is to decide, on referral from the Commissioner, whether to institute proceedings under the Act against a person whom a complaint has been made [s.49].

Section 15 also provides that the Director of Proceedings is responsible to the Commissioner for the efficient, effective and economical management of their activities.

The *Health and Disability Commissioner Act 1994 (New Zealand)* [s.24] also provides for the appointment and functions of a Director of Health and Disability Services Consumer Advocacy (the Director of Advocacy). The Director of Advocacy deals with the resolution of all complaints which do not go to investigation through the Commission's Advocacy Service. As with the Director of Proceedings, the Director of Advocacy is not responsible to the Commissioner. The Director is, however, responsible to the Commissioner for the efficient, effective, and economical management of the activities of the Director of Advocacy.

The functions of the Directory of Advocacy are as follows:

a) To administer advocacy services agreements;

b) To promote, by education and publicity, advocacy services;

c) To oversee the training of advocates;

d) To monitor the operation of advocacy services, and to report to the Minister from time to time on the results of that monitoring.

The Committee believes that, in order to retain parity with the Director of Prosecutions, the position of Conciliation Registrar should be staffed at an identical senior level, with equal fiscal remuneration and administrative and decision-making independence. This would make the Health Conciliation Registrar similar to the position of Director of Advocacy within the New Zealand model.

As with the Director of Prosecutions, the Conciliation Registrar should be independent from the Commissioner, in terms of exercising or performing the powers, duties, and functions of the positions. The position should be statutory, and include the provision for delegation of functions, where appropriate.

The Registrar should be assigned his or her own distinct annual budget by the Commissioner which must be accounted for in the Commission's annual report.

The Committee further believes that the activities of the Registrar and the proposed Director of Prosecutions should be reported in their own separate sections of the Commission's annual report.

RECOMMENDATION 5: The Health Conciliation Registrar position should be given equivalency to the proposed Director of Prosecutions position in terms of its importance within the organisation and its fiscal remuneration.

RECOMMENDATION 6: The Health Conciliation Registrar should not be subject to the direction of the Health Care Complaints Commissioner in performing his or her functions but should be responsible to the Commissioner for the efficient, effective and economical management in the carrying out of the Registry's functions.

RECOMMENDATION 7: All forms of complaint resolution within the Commission other than investigations should come under the functions of the Health Conciliation Registrar.

RECOMMENDATION 8:The Commission should adequately resource the Registry to enable it to effectively carry out all its functions.

RECOMMENDATION 9: The Health Conciliation Registrar should be given a separate budget which will be allocated by the Commissioner each year and separately accounted for in each annual report of the Health Care Complaints Commission.

RECOMMENDATION 10: The activities of the Health Conciliation Registrar and the proposed Director of Prosecutions should be reported in their own separate sections of each annual report of the Health Care Complaints Commission.

RECOMMENDATION 11: The Health Conciliation Registrar should be responsible for the appointment of his or her staff, including conciliators.

RECOMMENDATION 12: The Health Conciliation Registrar should meet on an annual basis with the Joint Parliamentary Committee independently of the Health Care Complaints Commissioner to discuss issues arising from each Health Care Complaints Commission annual report which relate to his or her functions.

Patient Support Service

The Committee considers that it is logical that, if the Registry is dealing with all alternative dispute resolution procedures within the Commission, the Patient Support Service would come under the Registrar's jurisdiction.

In its submission to the inquiry, the Commission emphasised how it was shifting the advocacy focus of the Patient Support Service towards alternative dispute resolution:

> *To the extent that the Patient Support Service saw itself as "advocates" for complainants, the Commission is redefining the role of the Patient Support Officers so that they become more explicitly impartial in the dispute resolution process. The central change is that the Patient Support Service no longer use advocacy as a tool of dispute resolution. It would use the ADR process of "facilitated" or "assisted" negotiation, consistent with a definition of a "facilitative process" in the draft Australian Standard. In this approach the Patient Support Officer works with both parties to identify the issues and facilitate a negotiated agreement and consensual resolution.*

The Patient Support Service therefore appears to be a natural fit for the Registry.

Financial Settlements

All stakeholders who participated in the inquiry believed that there should be provision in the legislation for the Registry to negotiate financial settlements as part of a conciliation agreement.

While there have been some small individual reimbursements to date, medical indemnifiers have yet to make a payment as a result of a conciliation conference, although United Medical Protection has agreed to participate in a trial process.

However, this should only remain one of the many settlement tools available to the Registry. The Committee found during discussions with other jurisdictions that, in one of these, a health complaints conciliation body is considered to be a forum in which patients routinely expect to walk out of conciliation with a financial benefit. The New South Wales model was praised for not pursuing this path.

Performance Reviews

All stakeholders consulted believed that the Registry should regularly conduct both internal and external performance reviews.

The Committee believes that there would be benefit in the Minister funding an external performance review after three years of the Registry's operations as part of the Commission.

The Committee would welcome the opportunity to oversee the process.

In its *Seeking Closure* Report, the Committee noted that individual Patient Support Officers needed to be more accountable for their performance and accordingly recommended tighter performance review and other accountability mechanisms. The Committee believes that a code of conduct for patient support officers and regular performance reviews of their performance is essential.

RECOMMENDATION 13: The Minister for Health should fund an external performance review of the Registry's operations within the first three years of its amalgamation with the Commission. The Review should be overseen by the Joint Parliamentary Committee.

RECOMMENDATION 14: The Health Conciliation Registry should be required to conduct regular external performance reviews.

Separate Premises

Most stakeholders believed that it was important to physically separate the Registry from the Commission in order to reinforce its independent status to respondents attending a conciliation process.

The Registry currently occupies premises well equipped for the holding of conciliation conferences. It would be good for these to be retained.

The Committee agrees that this is important and urges the Commission to do this if it is feasible.

RECOMMENDATION 15: The Registry's premises should be separate from those of the Commission, if feasible.