PARLIAMENT OF NEW SOUTH WALES

# Committee on the Health Care Complaints Commission

## DISCUSSION PAPER ON THE HEALTH CONCILIATION REGISTRY

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# COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION

## Inquiry into Alternative Dispute Resolution

The Committee has produced a Discussion Paper addressing issues raised during the Inquiry. Copies of the Discussion Paper may be obtained on request from the Secretariat (telephone (02) 9230 3011), or via the Parliamentary website:

www.parliament.nsw.gov.au

The Committee is seeking submissions on the Discussion Paper (in writing, typed or on disk) to further assist the Inquiry.

Submissions should be addressed to:

Committee Manager
Committee on the Health Care Complaints Commission
Parliament House
Macquarie Street
Sydney NSW 2000

Alternately, they can be sent by FAX to (02) 9230 3052

The closing date for submissions is: 15 July 2004.

Jeff Hunter MP
Chairman

# Table of Contents

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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

As part of its current inquiry into Alternative Dispute Resolution this Discussion Paper has been produced to seek comment on where the Health Conciliation Registry should sit within the framework of health care complaint resolution in New South Wales.

I don't believe that it is an exaggeration to say that the Health Conciliation Registry has been the "poor relation" since the inception of the current health care complaint system in 1993. The Registry has never had its functions, powers and operations properly spelt out in the *Health Care Complaints Act* 1993 (NSW). Neither has it ever been given its own dedicated budget.

At the time of the passing of the legislation the Registry was loosely attached to NSW Health for, I suspect, lack of somewhere better to place it. Undoubtedly, a creature of compromise and almost an afterthought.

This situation has always disappointed me. Particularly as over the years the Committee has familiarised itself with the health conciliation agencies in each of the other Australian states. These are all much more robust and independent bodies with their own enabling legislation and clearly spelt out powers and functions. These bodies serve to send a clear message to the public that their government is committed to non adversarial resolution of complaints.

The effectiveness of conciliation as a method of resolving appropriate complaints cannot be over emphasised. If parties can be brought face to face to discuss issues in a non confrontational manner as quickly as possible after the event a great deal of emotional distress can usually be avoided, not to mention possible subsequent litigation.

It is timely in this current environment of review of the way the health system deals with both its mistakes and its complaints that the position of the Health Conciliation Registry be reconsidered. While I believe that the Registry is now working more effectively than it has ever done before thought needs to be given to giving it greater status within the health complaints framework. Whether that is by way of reinventing it as an entirely independent body in line with the other states or by moving it under the umbrella of another agency such as the Health Care Complaints Commission are options discussed in this paper.

The Committee keenly seeks public comment and looks forward to receiving submissions on the Discussion Paper over the next two months.

In conclusion I would like to thank those who have assisted the Committee's Inquiry to date with written and oral submissions. In particular, the Health Care Complaints Commission and the Health Conciliation Registry. Finally, my personal thanks go to my fellow Committee Members and the Committee Secretariat for their assistance in the preparation of this Discussion Paper.

**Mr Jeff Hunter MP**
**Chairman**

# List of Questions

1. Should the Health Conciliation Registry be allowed to seek consents from prospective parties to a conciliation?

2. Should health care providers be allowed direct access to the Health Conciliation Registry?

3. Should the Health Conciliation Registry be required to undertake regular external performance reviews?

4. Should the Health Conciliation Registry be required to produce its own annual report?

5. Should the Health Conciliation Registry be required to provide more detailed information concerning conciliation outcomes to the Health Care Complaints Commission and the health professional registration boards?

6. Should the *Health Care Complaints Act* 1993 make provision for complaints to be split to allow part of a complaint to proceed to conciliation, where appropriate?

7. Should the Health Conciliation Registry allow for significant financial settlements to be included in conciliation agreements, where appropriate?

8. Should the Health Conciliation Registry remain under the jurisdiction of NSW Health?

9. Should the Health Conciliation Registry become an entirely independent body?

10 Should the Health Conciliation Registry be moved into the Health Care Complaints Commission?

11. Should the Health Conciliation Registry be moved into another relevant agency?

# 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

One point of confusion about the terminology for the method used by the New South Wales' Health Conciliation Registry needs to be addressed. The conciliation model it uses is based upon *The Mediator's Handbook: Skills and Strategies for Practitioners*. This is 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. This process is not currently used by the New South Wales Health Conciliation Registry.

## 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 communications 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 data base 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* 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 report outlined recommendations to address these and other concerns. These matters are discussed in more detail in a section below.

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.

## Separate reporting

The Registry currently reports to the New South Wales' Department of Health. Reporting data such as financial statements and performance information are not necessarily provided separately. The Committee is of the view that while the Registry remains attached to the Department, its independence would be reinforced if it were required to report separately within the Department's Annual Report. A section on the Health Conciliation Registry is included in the Annual Report of the Health Care Complaints Commission, which is not necessarily an appropriate place for a report on its performance.

## 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 ACT *Community and Health Services Commission 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 - Possible future models

## Option A: Retain the Status Quo

*Arguments for:*

The Health Conciliation Registry is currently administered by NSW Health. As the Registry's budget is not separated out by the Department it is not possible to determine what exactly are its present operating costs. However, it is known to be around $200,000 excluding rent and telecommunication costs.

This makes the Registry an extremely fiscally "lean" operation. Particularly if it is contrasted with the Victorian Health Services Commission, the body whose primary purpose is to conciliate health care complaints within Victoria which has a budget of around $1.5m. The Victorian Health Services Commission does approximately the same amount of conciliations each year as the NSW Health Conciliation Registry. The Committee has also been pleased with the improvements in the Conciliation Registry in recent years and believes that it is now working much more effectively than it has in the past.

While the Registry stands outside NSW Health its Legal Section does also maintain oversight of the Registry.

However it can be argued that running a Health Conciliation Registry is not a "core business" function of NSW Health and, as such, the Registry would be best placed either on its own or within a more appropriate agency.

*Arguments against:*

The Registry's lack of a separate budget and exclusion from the annual reporting regime make its administration and finances less transparent and therefore less publicly accountable than most public sector organisations.

The Registry lacks autonomy and security over its budget which makes forward planning and further expansion difficult.

There may also be a perception of a conflict of interest in NSW Health's involvement with the Registry given that in most instances the subject of a complaint in conciliation matters are employees of NSW Health.

The current system also requires that the Registry have a large degree of dependence on the Health Care Complaints Commission, given that all complaints it receives must come through the Commission. The Committee has

previously recommended legislative change which would allow that health providers be able to access the Registry directly.

## Option B: A Completely Independent Body

As outlined in the Background section of this paper, all the other states of Australia have dedicated independent health complaint conciliation bodies.

*Arguments for:*

To make the Health Conciliation Registry a completely independent body such as a statutory authority would give it greater independence, autonomy, and financial and administrative transparency.

The Registry would have a dedicated budget which would allow it to adequately forward plan its activities. It would also be brought under the annual reporting regime which means that it would be required to publicly report on its activities and expenditure and be accountable for its performance outcomes.

If the Registry was reconstructed as an independent body it should serve to reinforce the perception that it is a completely neutral agency, standing well outside the NSW health system or the system of investigating health complaints.

The Registry's reliance upon the Health Care Complaints Commission would also be reduced as providers approached the Registry directly to ask its assistance with conciliating complaints at the local level.

Oversight of the Registry could be assigned to the same Joint Parliamentary Committee which oversees the Health Care Complaints Commission. In addition, an Advisory Committee could also be established.

*Arguments against:*

The establishment of a completely independent body would require greater financial and administrative resourcing than is currently required while the Registry remains administratively under NSW Health.

In its current form the Registry is a very small agency to make entirely independent and off-budget. It has only two full time staff and extremely limited finances. However, there are many examples of small independent government bodies. The Tasmanian Health Complaints Commission, which is established under its own piece of legislation, for example, runs on an annual budget of little more than $200,000. Further, it is possible to make the Registry an independent body but still bring it administratively under NSW Health to avoid duplicating activities such as human resources. The NSW Protective

Commissioner and Public Guardian, for example, is an independent body which comes administratively under the NSW Attorney General's Department.

## Option C: Transfer the Registry to the HCCC

As outlined in previous reports of this Committee the Health Care Complaints Commission has long been an advocate of the idea that the Registry would be better placed within the Commission.

*Arguments for:*

The transferral of the Registry to the Commission would arguably offer both financial and administrative benefits. However, given that the Registry's budget is already small by public sector agency standards and mostly devoted to the hiring of external conciliators, any savings would not be expected to be substantial.

The Commission considers that it can be confusing and frustrating for complainants to be handed over to another agency partway through the process. In a submission to a previous inquiry concluded by this Committee in April 2002: *Seeking Closure: improving conciliation of health care complaints in New South Wales* the Commission argued that *complainants want the Commission itself to be involved in resolving issues due to the Commission's independence, authority and expert knowledge of the health system.*

Further, from the Commission's perspective placing the Registry within the Commission would allow its complaints to be streamlined through its system. Staff development and peer support would be far greater. The Registry is currently isolated. Registry staff lack the peer support and opportunities for career advancement and development offered within a larger agency.

Legislative safeguards could be put in place. The Community and Health Services Complaints Commission in the Australian Capital Territory investigates, prosecutes and conciliates health care complaints. Section 39(3) of the *Community and Health Services Complaints Act* 1993 (ACT) provides substantial penalties for divulging information acquired during conciliation. Section 39(4) provides that evidence of anything said or admitted during a conciliation process is not admissible in proceedings before a court, tribunal or board and may not be used by the Commissioner as a ground for taking investigative or disciplinary action.

*Arguments against:*

Lack of autonomy and independence are concerns here. The Registry would arguably become a smaller part of a much larger organisation and may find it difficult to maintain control of its own focus and activities.

It must also be noted that there has never been widespread stakeholder support for the Registry moving into the Commission. There is a general view that it would be a conflict for the "disciplinary policeman" to administer a process such as conciliation which depends on absolute trust in confidentiality. In the April 2002 report NSW Health argued that: *any move to amalgamate the existing Registry would raise problems not only in relation to the actual independence of the process, but also in relation to the perception of independence.*

It is understandable that subjects of a complaint would be more wary of attending a conciliation administered by an agency which both investigates and prosecutes them.
The Committee has also been critical in the past that the Commission has tended to get distracted by various extraneous activities at the expense of its investigations and prosecutions. This has contributed to the significant delays in investigations.

These concerns have been shared by the government. In a press release of 8 March 2004 the Premier announced major reforms to the Health Care Complaints Commission which he said *would refocus the HCCC on its core business of investigating complaints by health staff and members of the public.*

There is therefore a valid concern that by taking in the Registry the Commission may be distracted from what it has really been set up to do: receive, assess, investigate and prosecute complaints about the NSW health system. There is also a significant backlog of complaints which must be cleared as a priority.

## Option D: Transfer the Registry to another relevant agency

Another option would be place the Registry within another relevant agency aside from the Commission. This would allow the Registry independence from the Commission and yet still overcome most of the problems associated with making the Registry a completely independent body.

There are a number of possible options. If the health professional disciplinary tribunals were to be transferred to the Administrative Decisions Tribunal, for example, as has been mooted in the past, it may be possible to attach the Registry to the Tribunal in some way.

Similarly the Registry may be able to be attached to the Ombudsman's Office as is done in other jurisdictions such as the Northern Territory.

# Chapter Five - The Patient Support Office

In 1997 the Health Care Complaints Commission received funding to appoint seven patient support officers which it placed within various area health services. Currently the Commission has eleven of these officers. Ten are based within area health services and one within the Commission's office.

The role of Patient Support Officers is to assist complainants resolve their complaints at the hospital or area health service level. Patient Support Officers are not advocates who act on behalf of patients. Similarly they are not conciliators. They are there merely to assist patients with the complaint process.

The Committee's April 2002 Report: *Seeking Closure: improving conciliation of health care complaints in New South Wales* found that Patient Support Officers were generally well received and played a very useful role. However, some concern was expressed that Patient Support Officers seemed to be of varying quality and that individual officers needed to be more accountable for their performance.

The Committee was provided with examples of some Patient Support Officers acting as quasi investigators by a number of area health services. The Committee is also aware of instances where Patient Support Officers have been promoted to the position of an investigator within the Commission.

The Committee over time also became concerned about the blurring between the role of patient assistor and patient advocate. It understands that the Commission is now concentrating on redefining the role more clearly.

However, there is an argument to be made that Patient Support Officers may sit more comfortably within the Health Conciliation Registry than the Health Care Complaints Commission.

*Arguments for:*

Placing the Patient Support Officers within the Health Conciliation Registry would serve to reinforce their main role as assistors rather than advocates.

It can also be argued that the work done by the Patient Support Officers is slightly at odds with the Commission's core business of assessment, investigation and prosecution of health care complaints and is better suited to the work done by the Registry.

Bringing Patient Support Officers into the Registry would make them available to act as support persons for complainants, where required, in conciliation conferences.

The addition of the Patient Support Office to the Registry would make for a more robust organisation. Particularly if the Registry was to become an independent statutory body.

*Arguments against:*

The Patient Support Office presently provides a method by which the Commission can send non serious complaints back to the local level to be resolved. Privacy and administrative problems may arise if the Commission had to rely on officers of another agency to do this work.

# Appendix 1 – Committee Report on improving conciliation of health care complaints in New South Wales, April 2002