

CONCILIATION UNDER THE HEALTH SERVICES (CONCILIATION & REVIEW) ACT 1987

This outline is a general guide to the conciliation procedure followed by conciliators in the Office of the Health Services Commissioner (HSC). However, conciliation is extremely flexible and the procedure will vary from case to case. Conciliation is governed by the provisions of the *Health Services (Conciliation & Review) Act 1987*.

Conciliation Waiting List

When a complaint is referred to conciliation it is placed on a Conciliation Waiting List. It will be assigned to a conciliator as soon as workloads permit. While a complaint is on the waiting list, both parties are welcome to provide more information or make any suggestions for how the complaint might be resolved.

Conciliator's role

The conciliator is independent and impartial. The conciliator is *not* an advocate for either party. Their role is to encourage settlement of the complaint and assist the health service provider and the complainant to reach agreement. The conciliator does this by helping to clarify the issues, gathering information, and arranging confidential discussions between the parties.

It is *not* the conciliator's role to make a decision about the outcome or impose a settlement.

The conciliation process

The process varies, depending on the circumstances of the complaint and the desired outcome. The conciliator first speaks to both parties to clarify their views on the complaint and identify what outcome the complainant is seeking. The conciliator will discuss options for how the

complaint may be dealt with in conciliation. This may involve the conciliator:

- convening and chairing a conciliation meeting between the parties,
- obtaining medical records and reports from treating doctors,
- obtaining an independent medical opinion,
- obtaining an independent impairment assessment.

In general, *outcomes* sought through conciliation fall into three categories:

- An explanation as to what happened and why. This may also include an apology or an acknowledgement of harm suffered.
- A change in systems, policies or protocols.
- A claim for refund of fees, compensation, or remedial treatment.

Complaints often contain a combination of these elements and they may be handled separately. For example, the conciliator may convene a conciliation meeting to enable the parties to have a face-to-face discussion so that an explanation or information about treatment may be given. On the other hand, a claim for a financial settlement can often be negotiated between the parties or their advisers without a meeting.

It is not possible to give an estimate of how long conciliation will take as it varies from case to case.

Medical reports and records

The conciliator may need to obtain medical reports from the complainant's treating doctors. If so, the complainant will be asked to sign a medical authority authorising release of the complainant's medical information. The reports are confidential and will be used only for the purposes of conciliation. Any medical records obtained will be destroyed at the end of the conciliation.

Expert opinions

Where there is a dispute about a health service provider's liability, the conciliator may seek an

independent medical opinion to provide more information. This will only be done with the agreement of both parties.

The opinion is *not* a conclusive decision on the complaint – it is obtained for the purpose of assisting the negotiation. Opinions obtained in conciliation by the HSC are confidential and cannot be used in any other legal proceedings.

The conciliator may also organise an independent impairment assessment to determine the extent of any injury suffered by the complainant.

The conciliator will send the independent specialist all relevant medical reports and written information provided by the parties. The specialist may also need to examine the complainant in order to assess their medical condition.

The HSC will pay for reports, opinions and assessments that are requested for the purposes of conciliation. Copies will be sent to both parties.

Voluntary process

The conciliation process is entirely voluntary. At any stage in the negotiation either party can decide not to proceed any further in conciliation, and this ends the matter.

Confidentiality and privilege

Conciliation proceedings are confidential and privileged. This means that nothing said or disclosed during conciliation may be admitted in any court action or used by the Commissioner as a basis for investigation. The conciliators must not disclose anything they learn in conciliation to any other person, except for the purposes of reporting to the Commissioner and seeking advice from other conciliators.

Legal representation

Under the *Health Services (Conciliation & Review) Act 1987* it is up to the HSC whether the parties may be legally represented in conciliation – it is allowed if the HSC considers it necessary for

the process to work effectively. Where there is a claim for a refund of fees or compensation, health service providers usually need to seek advice from their medical insurers or solicitors. The complainant may also need to get legal advice about how much to claim. However, it is not essential to have legal representation.

Usually parties are not legally represented during conciliation meetings.

Financial settlement

If there is a settlement involving payment for refund of fees or compensation, the complainant will usually be asked to sign a Release document, waiving any right to take further action, in return for receiving a financial settlement.

Where there is a settlement above \$5,000 providers are required by Commonwealth legislation to notify Medicare. They should discuss this matter with their insurers. The complainant will be required to repay any relevant Medicare benefits out of the settlement money.

The complainant may also be required to repay their private health insurer and Centrelink, as applicable.

The conciliator will discuss this further with the complainant.

Legal proceedings

If conciliation does not resolve the complaint, the complainant has the right to take legal action. Conciliation can continue, even when legal proceedings have been issued. However, the HSC must stop dealing with a complaint once a court commences hearing the matter.

Report to the Commissioner

At the end of conciliation, the conciliator reports to the Commissioner on the conciliation proceedings and the outcome. Copies of the report are sent to both parties.