

## The Goudge Report on Complaints and Discipline

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Harvard Professor Malcolm Sparrow acknowledges the competing pressures on regulators when he said they are told to “process things quicker – and be more careful next time”. Many recent studies, media articles, court decisions and amendments to statutes have emphasized the need for regulators to investigate thoroughly, provide fairness to and demonstrate sensitivity toward both complainants and practitioners and to provide due process in discipline hearings including providing fully explanatory reasons and abundantly justified sanctions.

However, the recently released Report by former Justice Stephen Goudge on Streamlining the Physician Complaints Process in Ontario moves in the other direction. Justice Goudge is perhaps best known for his Inquiry and Report ten years ago into Pediatric Forensic Pathology in Ontario. The government released this subsequent report, written more than two years ago, on April 30, 2018. Justice Goudge concluded that the current complaints and discipline process costs too much, especially compared to the costs of other Canadian regulators of physicians, mostly because it takes too long (para. 52).

He made a number of recommendations to the complaints process including the following:

- There should be a process for a staff person to review complaints early in the process, approve the withdrawal of a complaint where the complainant agrees (see below), or dismiss

it if there is no reasonable prospect of action being taken on the complaint. There would be a right of appeal to the screening committee (para. 85).

- There should be a staff person designated as a patient’s advocate for each complaint who will contact the complainant to explain the process and options and ensure that the complainant’s perspective is presented to the investigative team (para. 87). Some complainants might withdraw their complaint or seek other options (e.g., the civil courts) once they better understand the process.
- The alternate dispute resolution process should be modified to make the regulator a full participant to reflect the public interest (para. 104). Resolutions should be possible even if the complainant does not agree.
- Where representative chart reviews are conducted to see how widespread a concern might be, the number of charts selected should be reduced from 25 to 10 (para. 123). In most cases any patterns should be noticeable by then. Where uncertainty remains, more charts can then be selected.
- Where a Registrar’s investigation is commenced, its scope should be specified so that the investigation is not open ended (para. 132). If additional concerns are identified, a new Registrar’s investigation can be initiated.
- In appropriate cases the screening committee can make a conditional referral to discipline subject to a proposed undertaking that the committee would accept (para. 170). A conditional referral would signal to the member that they are on the cusp of a discipline hearing unless the member agrees to the proposed terms of the undertaking.

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# Grey Areas

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

- The independent review of complaints decisions by an independent tribunal should presumptively be in writing rather than by oral submissions (para. 185).

Justice Goudge also recommended some changes to the discipline process including the following:

- The member would have an obligation to disclose all documents and evidence upon which they intend to rely (para. 195). While defence disclosure would only need to be provided after disclosure by the regulator, it should still be completed before the pre-hearing conference.
- A number of changes were recommended to the pre-hearing conference process including providing special training in mediation to the presiding officer, using shuttle diplomacy strategies and employing individuals who are not members of the discipline tribunal in some cases (e.g., credibility cases) (para. 201).
- Legally trained persons with litigation experience should be appointed as public members so that they can chair hearings (para. 211).

Justice Goudge also recommended a number of changes to the Rules of Procedure for discipline hearings, including the following (para. 215):

- a) Where there are competing experts (as is frequently the case where standards of practice are an issue) the experts should be required to meet beforehand to discuss and refine the differences between them. They should then testify on the same panel;
- b) Presumptively evidence in-chief should be tendered in writing;
- c) Presumptively cross-examination should be subjected to time limits as agreed to by counsel or as determined by the hearing panel;
- d) Presumptively witnesses should be able to testify by videoconference in lieu of personal attendance;
- e) Presumptively, where authenticity is not in dispute, contemporaneous documentary evidence should be admitted for all purposes; and
- f) Relief from these presumptive provisions should require a showing that without relief a material unfairness will result.

Some of the recommendations in the Goudge Report have already been implemented through amendments to the legislation, changes to the Rules of Procedure and administrative modifications. The full report can be found at:

[http://health.gov.on.ca/en/common/ministry/publications/reports/physician\\_complaints/docs/physician\\_complaints\\_process\\_en.pdf](http://health.gov.on.ca/en/common/ministry/publications/reports/physician_complaints/docs/physician_complaints_process_en.pdf).

This report should not be confused with the Goudge Report on Medical Liability, which was also released recently:

[http://www.health.gov.on.ca/en/common/ministry/publications/reports/medical\\_liability/docs/medical\\_liability\\_review\\_en.pdf](http://www.health.gov.on.ca/en/common/ministry/publications/reports/medical_liability/docs/medical_liability_review_en.pdf).