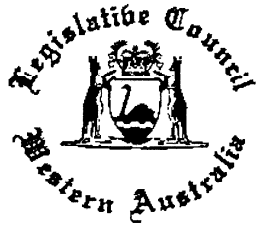

PARLIAMENT OF WESTERN AUSTRALIA

TWENTY- NINTH REPORT

OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

WORKERS' COMPENSATION AND REHABILITATION AMENDMENT ACT 1993

Presented by the Hon Derrick Tomlinson (Chairman)

29
NOVEMBER 1994

Members of the Committee

Hon Derrick Tomlinson, MLC (Chairman)
Hon Bill Stretch, MLC
Hon Ross Lightfoot, MLC
Hon Cheryl Davenport, MLC
Hon John Cowdell, MLC

Staff of the Committee

Ms Jan Paniperis (Committee Clerk)

Address

Parliament House, Perth, WA 6000 Telephone 222 7222

CONTENTS

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

WORKERS' COMPENSATION AND REHABILITATION AMENDMENT ACT 1993

1. Introduction

On Wednesday December 15, 1993, following the passage of the *Workers' Compensation and Rehabilitation Amendment Act 1993* ("Amendment Act"), the Hon George Cash, MLC, moved the following motion, without notice, which was agreed to by the House :-

> **"That the *Workers' Compensation and Rehabilitation Amendment Act 1993* be referred to the Standing Committee on Legislation for consideration and report."**

In considering this Act, the Committee is mindful that it must have regard to the Government's legislative intent when reviewing provisions of the Amendment Act. The main objectives of the Amendment Act, as pronounced in the Second Reading speech by the Hon Peter Foss, MLC[1], being to address escalating common law costs and associated legal expenses by permitting only workers who have a serious disability to access common law; to provide for significantly improved statutory benefits for injured workers, including an increase in the maximum amount payable in weekly benefits; to simplify the dispute resolution procedure by introducing a conciliation and review process; to provide for the appointment of a workers' compensation magistrate; to establish a medical assessment panel which will be empowered to make determinations on the medical aspects of disputes; to provide that journey accidents while travelling to or from work will not be compensable under the Act; and to clarify the definition of disability to reinforce the requirement that a workers' employment must be a significant contributing factor to a disability for it to be compensible.

Members of the Committee resolved to conduct a review of the legislation by investigating each separate Part of the Amendment Act and report to the Parliament accordingly. Given the potential impact on the rights of injured workers to compensation, the Committee decided to commence its review with consideration of provisions pertaining to dispute resolution, namely, Part IIIA. At the conclusion of its investigation into this section, the Committee resolved to formulate specific recommendations on conciliation while recommending a more thorough review of the remaining provisions of the Amendment Act.

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[1] Second Reading, Workers' Compensation and Rehabilitation Amendment Bill 1993, Hon Peter Foss, MLC, (9 November 1993).

2. Recommendations

The Standing Committee on Legislation recommends as follows :

A THE CONCILIATION SYSTEM

The Conciliation Phase

1. *That attendance by all parties to the dispute be made compulsory and that the Conciliation Officer have the power of referral to the Compensation Magistrate's Court.*

2. *That Conciliation Officers have appropriate training in the processes of dispute resolution and the laws of evidence.*

3. *That, in circumstances where the employer and employee are country residents and the place of employment is in the country, the dispute resolution conferences be conducted at or near such employee or employer's place of residence.*

The Review Phase

4. *That there be a two tier system of dispute resolution, rather than the current three tier system, and that such tiers comprise non-adversarial conciliation (first tier) followed by adversarial dispute resolution in the Magistrate's Court (second tier).*

If three tier system retained

5. *That Review Officers have appropriate training in the processes associated with dispute resolution and the laws of evidence.*

6. *That a party to the proceedings who is dissatisfied with a decision or order of the Review Officer may, where a question of law or fact is involved, appeal to the Compensation Magistrate's Court against the decision or order.*

Medical Assessment Panels

7. *That the definition of a "medical question" be incorporated in the Act; provisions of section 5(1) of the Accident Compensation Act 1985 (Vic) as amended may be a useful guide.*

8. *That the Director be given appropriate discretionary powers, subject to subsection 145C(1) of the Amendment Act, to appoint members to the medical assessment panel as he/she thinks fit.*

B *MATTERS FOR FURTHER CONSIDERATION*

9. *That the Government commission an independent review of the Workers' Compensation and Rehabilitation Act 1981 as amended by the Amendment Act at the expiration of 12 months from the date upon which Part IIIA was proclaimed and that the report be tabled in the Parliament no later than 15 months after such proclamation date ("Review").*

10. *That membership of the Review body be comprised of, but not limited to, representatives of the following :*

    (a) *WorkCover Western Australia;*

    (b) *Insurance Council of Australia;*

    (c) *Trades & Labour Council of Western Australia; and*

    (d) *Chamber of Commerce and Industry of Western Australia.*

11. *That the Review shall consider the effectiveness of non-adversarial dispute resolution and take into consideration the following matters:*

    (a) *the role of advocates during the conciliation phase;*

    (b) *a comparison of costs and time delays associated with dispute resolution under the old and new systems; and*

    (c) *the operation of medical assessment panels.*

12. *That the Review give further consideration to:*

    (a) **the insurance premiums system; and**

    (b) **the fostering of a return to work culture.**

3. Committee Meetings

The Standing Committee on Legislation met on the following occasions to examine Part IIIA of the *Workers' Compensation and Rehabilitation Amendment Act 1993* :-

Western Australia

Wednesday, December 22, 1993 from 11.14 am to 11.53 am
Thursday, February 3, 1994 from 10.12 am to 12.05 pm
Monday, February 21, 1994 from 10.14 am to 12.20 pm
Thursday, March 10, 1994 from 10.05 am to 11.20 am
Monday, March 14, 1994 from 8.57 am to 12.41 pm
Thursday, March 17, 1994 from 9.30 am to 13.05 pm
Thursday, April 7, 1994 from 10.10 am to 11.29 am
Thursday, April 14 ,1994 from 10.09 am to 12.07 pm
Friday, May 13, 1994 - Conciliation/Review conferences; WorkCover
Monday, May 16, 1994 from 10.40 am to 12.22 pm
Thurday, June 9, 1994 from 10.15 am to 11.27 am
Thursday, June 16, 1994 from 10.19 am to 10.42 am
Tuesday, August 2, 1994, from 2.08 pm to 3.17 pm
Thursday, August 11, 1994 from 10.20 am to 11.30 am
Thursday, August 18, 1994 from 10.10 am to 12.05 pm
Thursday, September 15, 1994 from 10.10 am to 11.28 am
Thursday, September 29, 1994 from 10.04 am to 11.20 am
Thursday, October 20, 1994 from 10.10 am to 12.02 pm
Thursday, November 3, 1994 from 10.05 am to 12.20 pm
Thursday, November 17, 1994 from 10.03 am to 12.45 pm

Victoria

Monday, May 23, 1994 from 10.00 am to 4.00 pm
Tuesday, May 24, 1994 from 10.00 am to 2.00 pm
Wednesday, May 25, 1994 from 9.00 am to 4.00 pm
Thursday, May 26, 1994 from 12.00 pm to 5.30 pm

4. Submissions

The Committee received written submissions from the following people and organisations :

Mr T. Carter, Insurance Council of Australia
Dr K. Woollard, President, Australian Medical Association, Western Australia
Mr S. Singh, Convenor, Association of Injured Lawyers for Injured Persons
Mr P. Durack, QC, Consultant, Dwyer Durack
Mr R. Guthrie, Lecturer, School of Business Law, Curtin University of Technology
Mr P. Marshall

Mr P. Fitzpatrick, Executive Director, The Law Society of Western Australia
Mr I. Hennessy, Partner, Clayton Utz
Mr S. French, Partner, Dwyer Durack
Ms P. Nilon, President, Injured Persons Action & Support Association of WA (Inc)
Mr I. Viner, QC

5. Witnesses

The following witnesses appeared before the Committee and gave oral testimony :

Western Australia

Mr Harry Neesham, Executive Director, WorkCover, Western Australia
Mr Nick Blain, Chief Policy Adviser, Minister for Labour Relations
Mr Ian Viner, QC
Mr Peter Durack, QC
Mr Michael McPhee, President, The Law Society of Western Australia
Mr Peter Fitzpatrick, Executive Director, The Law Society of Western Australia
Mr Norm Srdarov, Personal Injury Committee Member, The Law Society of Western Australia
Mr John Fiocco, Convenor, Personal Injuries Council, The Law Society of Western Australia
Mr Tony Carter, Group Manager, Insurance Council of Australia
Mr Phil Burgess, Manager, HIH Casualty & General Insurance Ltd
Mr Tony Cooke, Assistant Secretary, Trades & Labour Council of Western Australia
Mr Neil Byrne, Education Officer, Metals & Engineering Workers Union
Ms Jacqueline Woodland, President, Textile, Clothing & Footwear Union of Australia
Mr Warren Swain, Legal Officer, Australian Builders Labourers Federated Union of Workers
Mr Brendan McCarthy, Director Labour Relations, Chamber of Commerce & Industry of Western Australia
Mrs Anne Bellamy, Manager Occupational Health & Safety, Chamber of Commerce & Industry of Western Australia
Mr Rob Guthrie, Lecturer (Industrial Law), Curtin University
Mr Richard Karpin, Chairman, Workers' Compensation Committee, National Insurance Brokers Association
Mr John Rogers, Workers' Compensation Spokesperson, National Insurance Brokers Association

Victoria

Mr Andrew Lindberg, Chief Executive, Victorian WorkCover Authority
Mr Greg Tweedy, Director, Scheme Regulation, Victorian WorkCover Authority
Mr Paul Madden, Director, Scheme Development, Victorian WorkCover Authority

Mr Alan Mahoney, Director, Finance and Corporate Services, Victorian WorkCover Authority
Mr Max Vickery, Agency and Insurance, Victorian WorkCover Authority
Dr Tim Matthews, Manager, Analysis and Review, Victorian WorkCover Authority
Mr Leo Doyle, Director, Conciliation Service, Victorian WorkCover Authority
Mr David Lipton, Conciliation Officer, Team Leader, Victorian WorkCover Authority
Mr John O'Brien, Conciliation Officer, Team Leader, Victorian WorkCover Authority
Mr Richard Green, Conciliation Officer, Team Leader, Victorian WorkCover Authority
Mr Jim Weatherill, Conciliation Officer, Team Leader, Victorian WorkCover Authority
Mr Terry Cleal, Conciliation Officer, Team Leader, Victorian WorkCover Authority
Mr Greg Endacott, Conciliation Officer, Team Leader, Victorian WorkCover Authority
Ms Patricia Carpay, Conciliation Officer, Victorian WorkCover Authority
Ms Annamalia Chimenton, Conciliation Officer, Victorian WorkCover Authority
Mr Angelo Moretti, Conciliation Officer, Victorian WorkCover Authority
Mr Barry Ellis, Director, CE Health Casualty and General Insurance Ltd
Mr Tony Newlands, WorkCover, Manager, Sun Alliance and Royal Insurance
Mr Lyle Wilson, General Manager, CIC Workers' Compensation (VIC) Limited
Mr Bruce Bowlby, Victorian WorkCover Manager, MMI–Switzerland Workers' Compensation (Victoria) Limited
Mr Peter Davidson, Chief WorkCover and Health and Safety Officer, Metal Trades Industry Association
Dr Deborah Vallance, Occupational Health and Safety Officer, Automotive Metals and Engineering Union
Mr Peter Kelly, President, National Union of Workers
Mr Leigh Hubbard, Research and Policy Officer, Victorian Trades Hall Council
Mr Mark Towler, Victorian Trades Hall Council
Mr Seyram Tawia, Principal Consultant, Workers Compensation, Victorian Employers' Chamber of Commerce and Industry
Mrs Angela Emslie, Manager, Safety Health and Environment, Victorian Employers' Chamber of Commerce and Industry
Dr Bill McCubbery, Convenor of Medical Panels

THE CONCILIATION PHASE

6. Dispute Resolution

In the Second Reading speech[2], the Hon Peter Foss MLC stated that the new dispute resolution system, based on conciliation, medical assessment panels and operating with minimum formality, will reduce costs and speed up the dispute resolution process to the

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2 Second Reading, Workers' Compensation and Rehabilitation Amendment Bill 1993, Hon Peter Foss, MLC, (9 November 1993).

benefit of workers and employers. However, such reforms must be balanced with a worker's legal entitlement to workers' compensation. Accordingly, this Committee is mindful of comments made by Mr Peter Durack, QC[3], that the workers' compensation system is a no-fault scheme, designed to compensate a worker injured at work, a legal right which should not be compromised on the basis of cost savings or time management. That is, people's rights are at stake and as such should not be compromised by expediting the matter through an administrative system of dispute resolution.

The reforms in the Amendment Act are based on major recommendations of three reviews initiated by the Government, namely, Mr Max Trenorden, MLA, who reviewed the interface between common law and workers' compensation benefits[4]; the Chapman Inquiry[5], which made recommendations on dispute resolution; and a general review of statutory benefits and other issues was carried out by the Workers' Compensation and Rehabilitation Commission.

Mr Chapman criticised the workers' compensation system in Western Australia on the grounds that it was adversarial, formal and legalistic and therefore conflict orientated. Accordingly, he recommended, inter alia, that a new system be designed which is informal and non-adversarial with a strong commitment to conciliation for the resolution of disputes[6]. However, it is important to remember that workers' compensation disputes are disputes between private citizens, be they individuals or corporations. When the right of a worker to receive no fault compensation is disputed, for whatever reason, the dispute as to compensation is termed a justiciable issue. Historically and intrinsic to our system of jurisprudence is that such disputes are determined judicially and not administratively[7].

Modern theories of dispute resolution emphasise the inadequacies of adversarial approaches to dispute resolution in situations where disputants are required to maintain an ongoing relationship[8]. This fact was alluded to by Mr Guthrie[9] in a paper delivered to the Australian Law Teachers' Association Conference where he contrasted the Workers' Compensation Board with the Commercial Tribunal and the Administrative Appeals Tribunal. Frequently, the Administrative Appeals Tribunal and the Commercial Tribunal are dealing with parties who are in an enduring relationship. That is, regardless of the outcome of the dispute they are likely to have something to do with each other in the future. By contrast, in the workers' compensation jurisdiction frequently the parties will have nothing to do with each other after

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3 P. Durack QC, Transcript 14/3/94, page 25.

4 M. Trenorden, MLA : Recommendations on the Review of the Impact of Common Law Claims and Associated Legal Costs on the Workers' Compensation Systems in Western Australia (15 June 1993).

5 R.J. Chapman : Inquiry into Workers' Compensation Dispute Resolution System, Western Australia ("Chapman Report").

6 Ibid. page 3.

7 I. Viner QC, Transcript 15/3/94, page 7.

8 WorkCover Review Division Study, South Australia (July 1990) page 4.

9 R. Guthrie : In Search of the Ideal Tribunal, Australian Law Teachers' Association Conference, (1993), New Zealand, page 9.

the dispute is resolved. Perhaps this is indicative of the "compensation culture" which existed, and unfortunately still exists, in the community during the operation of the Workers' Compensation Board system. In many cases the dispute is as to payment of a lump sum which when paid, will end the relationship or, alternatively, the worker who is seeking an ongoing weekly payment has been dismissed from his/her employment and the employer has no relationship with the worker.

It should not be inferred necessarily that legal adversarial models of dispute resolution are invariably ineffective. There are many situations in which such approaches are of considerable worth, particularly where the substance of the dispute is highly complex and the amounts involved warrant the high per capita cost involved. For example, alternative dispute resolution is used quite extensively within the judicial process. In Western Australia it is used by the Supreme and Federal Courts as an aid to settling the claims of a plaintiff without having to proceed through the adversarial process of the court. However, this process of conciliation or mediation is not exclusive of the right of legal representation[10]; such is generally not the case with a first line administrative review system where a more summary approach is required in order to achieve the competing needs of equity, access, speed and economy[11].

The mandate of any non-adversarial based system of dispute resolution is to endeavour to effect the just and equitable resolution of disputes by agreement between the parties, without recourse to legal representation during mediation. Conciliation does not force the parties into agreement, it is merely useful in reaching such agreement. By its very nature, the success or failure of conciliation is determined by the willingness of parties to ensure resolution of the dispute. In circumstances where conciliation is unattainable, consequential upon there being disparity as to points of law or fact, there is provision for access to legal dispute resolution. That is, if parties cannot reach a just and equitable resolution to the dispute they are entitled to proceed by way of review to a Review Officer, and then to the Compensation Magistrate's Court.

The very notion of a conciliation conference is to absent any real degree of formality which might impinge upon the parties coming to a just and equitable resolution of the dispute. This is to be contrasted with the previous situation under the Workers' Compensation Board where representation of injured workers was contemplated by the Act at all stages of litigation, including representation at interlocutory chambers matters, hearings and for negotiation at pre-trial conferences.

Illustrative of the misunderstanding concerning the concept of conciliation are several comments made by witnesses who appeared before this Committee. It was submitted that Conciliation Officers would be unable to make a determination on the facts if evidence was not properly represented at conciliation. Whether or not the Conciliation Officer reaches a

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[10] I. Viner QC, Transcript 15/3/94, page 7.

[11] WorkCover Review Division Study, South Australia (July 1990) page 4.

determination in his/her own mind about the facts surrounding an injury to the worker is not the point; it is whether the opposing parties can equitably resolve the dispute as to the facts surrounding the injury. As previously stated, conciliation does not force the parties into agreement. Accordingly, a Conciliation Officer acts fairly, economically, informally and quickly in making all reasonable efforts to bring the parties to the dispute to agreement. The resultant determination being in accordance with the substantial merits of the case[12]. Such officer acts as a facilitator, a role quite different from a Compensation Magistrate or Review Officer. Consequently, if any party to the dispute disagrees with a Conciliation Officer's determination of the evidence they are entitled to proceed by way of review.

Before proclamation of Part IIIA of the Amendment Act, if there was a dispute as to a worker's entitlement to compensation the matter could be referred for resolution to the Workers' Compensation Board. In circumstances where there was a genuine dispute as to the worker's entitlement such worker was required to proceed by way of substantive application. When a substantive application was filed with the Workers' Compensation Board it was listed for a pre-trial conference, a dispute resolution mechanism which endeavoured to provide an environment conducive to resolving the dispute before proceeding to trial[13].

It was submitted to this Committee that dispute resolution under the Workers' Compensation Board was "passive" rather than "active" conciliation[14]. Inherent delays in bringing the parties together to resolve their differences were destructive of the process for which the system was designed. In effect, the pre-trial conference was an "after the event" process of dispute resolution, too removed in time from the date of injury to the worker. In a paper delivered to the inaugural seminar of the Australian Institute of Judicial Administration, Mr Justice Mahoney identified five stages of the litigation process where delay arises[15]. The first stage was identified as commencing from the cause of action and continuing up to commencement of proceedings in court. In the workers' compensation system this stage would extend to and include a pre-trial conference. Mr Justice Mahoney commented that this stage of litigation has generally been beyond the control of courts and tribunals and that responsibility for commencement of proceedings has been in the hands of the litigant and his/her legal advisers.

It was suggested by Mr Guthrie that the time period for disposal of the average substantive application should be as follows :

(a) the time for service - 3 weeks;
(b) the time between service and pre-trial conference - 10 to 12 weeks;

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12 Subsections 84P (2) and (3).

13 The callover system provided all parties with a further opportunity to settle the claim prior to the formality of a full trial.

14 T. Cooke, Transcript 17/3/94, page 14.

15 Mr Justice Mahoney : Delay A Judge's Perspective (1983) 57 Australian Law Journal, page 30.

(c) the time between pre-trial conference and hearing date - 12 to 16 weeks[16].

The first stage of delay identified by Mr Justice Mahoney would include the time periods (a) and (b) above, being a total of 13 to 15 weeks duration. It is this delay in dispute resolution which has been termed "passive" rather than "active" conciliation. The new, non-adversarial dispute resolution process provides for the initiation of conciliation within 14 days of the dispute being referred to the Director for conciliation. This being "active" conciliation, a system of resolving disputes closer in time to the date of injury.

It might also be argued that inordinate delays between pre-trial conference and trial served only to reinforce the passive nature of conciliation. An inquiry into delays in the civil jurisdiction of the District Court in South Australia found that it is critical to the effectiveness of the pre-trial conference in reaching a proper settlement that it be convened for a date as near as practicable to the date upon which the action will proceed to trial if a settlement is not reached[17]. One of the major incentives to settlement of a workers' compensation claim is the fact that a hearing date is close at hand. In these circumstances, the intransigent client is more likely to be convinced that the claim should be settled; an insurer is more likely to make their best offer; and a legal practitioner is more likely to be better prepared if they know that they are likely to proceed to a hearing within a short space of time should the matter not be settled[18]. Mr Guthrie informed the Committee that many matters are placed in the workers' compensation system as a means of bringing the matter to a head. That is, the parties know that the system will require them to conciliate, so they utilise this mechanism as a bargaining tool. However, it only works as a bargaining tool if the parties know that unless they achieve success they will have to proceed quickly to trial[19]. At the time of writing his report, Mr Guthrie indicated that the lead time from a failed pre-trial conference to hearing date was seven or eight months[20], but could be anything from nine months to a year[21].

Lengthy time delays adversely affect the worker and the settlement of his/her claim. It was suggested in the Guthrie Report[22] that a case may become more complex by reason of the excessive time between pre-trial conference and hearing, resulting in a circular effect. That is, if there is a long period of time between pre-trial conference and hearing there will be an

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16 R. Guthrie : Enquiry into the Workers' Compensation Dispute Resolution System in Western Australia, pages 4-5 ("Guthrie Report").

17 The First Report of the Committee of Investigation into Delays in the Civil Jurisdiction of the District Court of South Australia, (May 1989), page 32.

18 Guthrie Report, page 94.

19 R. Guthrie, Transcript 14/4/94, page 5.

20 Guthrie Report, page 104.

21 R. Guthrie, Transcript 14/4/94, page 4.

22 Guthrie Report, pages 94-95.

adverse effect on settlement, and if there is an adverse effect on settlements, and fewer matters are being finalised, then the court lists are being clogged with matters which should otherwise be settled. This is reflected in the large numbers of cases which were settled at the court door[23].

The new dispute resolution system provides for the commencement of conciliation within 14 days from the date on which the matter is referred to the Director for conciliation[24] and, as statistics from WorkCover indicate, the time frame between review and trial date is approximately 6 weeks. By expediting the process of non-adversarial dispute resolution it becomes incumbent on the worker, employer and insurer to focus their minds on issues pertaining to compensation, rehabilitation and hopefully, a return to work plan.

Members of the Committee recognise Conciliation conferences may be circumvented by employees choosing to proceed directly to the Review stage and if employers choose not to attend, this subrogates their position entirely to their insurance representative. For the new system of dispute resolution to work effectively and efficiently there must be a positive commitment and subsequent participation by all parties to the dispute and its resolution.

It is of great concern to members of this Committee that the processes of non-adversarial dispute resolution can be by-passed by any or all of the parties concerned, with a view to settling the dispute by adversarial means. Circumvention of the Conciliation phase contravenes the essence of the Amendment Act, namely, to absent any real degree of formality during conciliation which might impinge upon the parties coming to a just and equitable resolution of the dispute. If the process of non-adversarial dispute resolution can readily be circumvented by one or more of the parties to the dispute then attendance at Conciliation conferences must be made compulsory.

Clearly the training and quality of conciliation officers must be assured if conciliation is to make an optimal contribution to compensation dispute resolutions. (The case for the training of conciliation officers is explored jointly with that of Review Officers in Section 9.)

Recommendations:

That attendance by all parties to the dispute be made compulsory and that the Conciliation Officer have the power of referral to the Compensation Magistrate's Court.

That Conciliation Officers have appropriate training in the processes of dispute resolution and the laws of evidence.[25]

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[23] See Appendix.

[24] Subsection 84P(1).

[25] See page 14 for discussion pertaining to qualifications and training of Conciliation Officers.

7. Country Attendance

Country residents are currently required to incur costs associated with travelling to Perth for the purpose of attending conciliation and review conferences in person, a cost not previously incurred under the Workers' Compensation Board system where such persons were entitled to representation. In particular, this problem is accentuated for the owners of small businesses who will be required to attend conciliation and review conferences in person. For business reasons, such employers can ill afford the time, let alone the expense, associated with personal attendance. In Victoria this problem is surmounted by having Conciliation Officers travel to regional centres for conferences.

The Committee supports the principle that employers should attend conciliation and review conferences to facilitate just and equitable resolution of the disputes and especially to negotiate return to work plans with the injured workers. However, country workers and employers will clearly be disadvantaged by compelling their attendance. Therefore, an equitable balance must be reached in these circumstances.

There can be no denying that there will be certain country workers and employers who will be severely disadvantaged if they are compelled to attend conciliation and review conferences in Perth. To ensure that country residents are not disadvantaged by the provisions of the Amendment Act this Committee suggests that where the employee and employer are country residents any dispute resolution conferences be conducted at or near such employee or employer's place of residence.

Recommendation:

That, in circumstances where the employer and employee are country residents and the place of employment is in the country, the dispute resolution conferences be conducted at or near such employee or employer's place of residence.

THE REVIEW PHASE

8. A Two Tier System

Notwithstanding the Committee's approbation of a private citizen's right to independent review of an administrative decision made by a Review Officer[26] it is of the opinion that there is little, justification for the retention of a three tier dispute resolution system incorporating a process of review. The conciliation phase was implemented as a non-adversarial mechanism of bringing opposing parties together for the purpose of resolving the matter in a just and equitable manner. If any or all of the parties are unable or unwilling to resolve the matter at conciliation resolution of the dispute should be by way of judicial process. The current system complicates matters by introducing an intermediary

[26] See discussion on pages 16-17 of this report.

administrative review process which permits a Review Officer, acting in an administrative capacity, to make judicial decisions which are only appealable on questions of law. That is, the review stage attempts to resolve questions of fact and law by an administrative rather than judicial process.

Members of this Committee agree that the system of dispute resolution in Western Australia should comprise two rather than three tiers. The first tier should entail non-adversarial dispute resolution by way of a conciliation conference such as that envisaged by the legislature. Failing resolution of the dispute all parties should be entitled to proceed to the second tier, namely, the Compensation Magistrate's Court. Removal of the second tier will only serve to reinforce the incentive for all parties to settle the matter, save in circumstances when the matter is incapable of resolution by conciliation and therefore should proceed to the Magistrate's Court. The Conciliation Officer should be empowered to refer the matter to the Compensation Magistrate's Court[27] in circumstances where a question of law or fact arises in the proceedings, or the Conciliation Officer believes that it is appropriate to do so because of the complexity of issues, such officer may elect not to make a decision and, in accordance with the rules of court, refer the matter to a Compensation Magistrate's Court for determination.

It has been suggested that removal of the review stage will revert the system to that which was in operation prior to the Amendment Act. However, there is a fundamental difference in the philosophy and operation of the two systems. The proposed two tier system would operate on two distinct levels, the first level being a process of non-adversarial dispute resolution, the second being adversarial dispute resolution before the Compensation Magistrate's Court. The Workers' Compensation Board system was adversarial in nature at all stages and dispute resolution was an "after the event" process too removed from the date of injury. Furthermore, the "compensation culture", which was indicative of the Workers' Compensation Board system, served to reinforce the adversarial nature of dispute resolution. The proposed two tier system is supportive of a "return to work" ethos representative of the new WorkCover system with provision for disputants to resolve their differences in a non-adversarial atmosphere during conciliation, or in an adversarial atmosphere before the Compensation Magistrate's Court.

Recommendation :

That there be a two tier system of dispute resolution, rather than the current three tier system, and that such tiers comprise non-adversarial conciliation (first tier) followed by adversarial dispute resolution in the Magistrate's Court (second tier).

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[27] See recommendation on page 17 of this report.

9. Conciliation and Review Officers - Qualifications

Concerns were raised by a number of witnesses that Conciliation and Review Officers should necessarily be legally trained if parties to the dispute are denied legal representation. The rationale for this submission is based upon the reality that such officers will be called upon to decide matters of fact and law.

In the Amendment Act a "dispute" is defined in terms of liability of an employer[28], that is, it is a dispute between a worker and an employer as to the liability of the employer for the injury suffered to the worker. Liability depends upon a finding of fact and the application of legal principles. The determination of facts by a Conciliation or Review Officer is an administrative decision, a matter which historically has been a judicial decision in circumstances where a persons legal rights are affected. The dispute will involve the determination of basic facts, such as whether the claimant is a worker or an independent contractor or whether the injury occurred in the course of, or arising out of the employment. These are questions of fact controlled by the application of legal principles, that being a judicial rather than administrative process[29].

The Amendment Act provides that a Review Officer is to act according to the substantial merits of the case without having regard to technicalities or legal forms or precedent and shall not be bound by the rules of evidence[30]. Similar legislative provisions pertaining to the operation of tribunals and boards[31] provide for the exemption of the rules governing the admissibility of evidence. However, there have been a number of judicial pronouncements which have stated that while tribunals and boards are not bound by the rules of evidence they are required to act in accordance with equity and good conscience and to be fair and just. In effect the rules of natural justice apply for a tribunal to operate fairly it must have regard to the rules of evidence. For example, not to inform the parties that information has been gathered would be a denial of natural justice. Similarly, the rules of evidence may not be adhered to but where a party is denied the opportunity to cross examine, then almost certainly there is a denial of natural justice where cross examination would allow the fair preparation of a case[32].

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28 "Dispute" means a dispute in connection with a claim for compensation under the Workers' Compensation and Rehabilitation Act 1981 and includes - (a) a dispute as to liability to make or continue to make weekly payments; (b) a dispute between employers as to liability; and (c) a dispute between insurers as to liability to indemnify an employer. (section 84A)

29 I. Viner QC, Transcript 15/3/94, page 8 and P. Durack QC, Transcript 15/3/94, page 19.

30 Subsections 84ZA(3) and 84ZD(1).

31 For example, the Administrative Appeals Tribunal is required to determine matters "according to equity, good conscience and substantial merits of the case without regard to the technicalities or legal forms and not to be bound by legal precedent or its own decisions and rulings in any other matter, nor by any rules or evidence, but it may inform itself on any matter in such a way as it regards just".

32 R. Guthrie, In Search of the Ideal Tribunal, Australian Law Teachers' Association Conference, (1993), New Zealand, page 3.

The fact that a Review Officer is not bound by the rules of evidence and may inform himself or herself on any matter in such manner as he/she thinks fit is a cause of concern by the legal profession. The Review Officer may or may not be legally trained or qualified but nevertheless will still be able to consider and act upon hearsay evidence, opinion evidence of non-experts, or incomplete or untested information or evidence. The concern is that evidence adduced in support of a review may be presented in a rather loose and informal manner, and that the decisions made by the Review Officer are final and binding. That is, if the evidence and submissions were "bungled" at the review stage it would be extremely difficult for any party to appeal against the decision. The right of appeal[33] is confined solely to a question of law[34].

It goes without saying that the rules of natural justice will apply to disputes before Conciliation and Review Officers. However, one should be cognisant of the philosophy pertaining to conciliation as opposed to formal adversarial dispute resolution. Although the philosophy pertaining to conciliation is not directed towards legal dispute resolution it is, by its very nature, a mechanism designed to ascertain facts surrounding the injury to a worker. That is, the determination and substantiation of facts will necessitate observance of rules pertaining to natural justice. Accordingly, the rules of evidence must be adhered to if natural justice is to be observed and not infracted.

The determination of facts is a crucial legal question, not so much in relation to the facts themselves but the method of ascertaining those facts[35]. How can a Conciliation or Review Officer be sure they have not breached a rule of evidence, or for that matter the rules of natural justice, if they are unfamiliar with the complex laws pertaining to the admissibility of evidence? For example, disputes as to the circumstances surrounding the occurrence of an accident will inevitably involve hearsay evidence, such evidence being crucial to the determination and resolution of the dispute. In many cases it is inescapable in the assessment of hearsay evidence that character evidence will be adduced to test the credibility of witness hearsay evidence. Given the fact that the Review Officer is not required to be legally trained or qualified, there is enormous potential for such officer, and to a much lesser extent a Conciliation Officer, to make an incorrect decision based on his/her determination of the evidence.

Evidentiary questions will, in many instances, necessarily involve questions of law pertaining to the assessment of such evidence. Although the Review Officer is empowered, in circumstances where a question of law is raised or is likely to be raised or argued, to permit legal representation of parties to the dispute,[36] the Review Officer must still assess the

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[33] See section 84ZN.

[34] D. Burton : Commentary on the Workers' Compensation and Rehabilitation Amendment Bill 1993, para 5.5.9, Law Society Seminar, 2 March 1994.

[35] J. Fiocco, Transcript 15/3/94, page 30.

[36] Subsection 84ZE(b).

evidence and make a determination on the facts. If such Review Officer is confronted with two opposing legal interpretations relating to the admissibility of evidence and is unable to make a determination due to his/her inadequate knowledge of the law, then the matter must invariably be referred to the Compensation Magistrate's Court[37]. However, in circumstances where the Review Officer makes a determination of the facts which is subsequently found to be incorrect due to his/her inadequate understanding of the law, and such error was as to the merits rather than a matter of law, then the determination cannot be appealed to the Compensation Magistrate's Court. Consequently, the aggrieved party will have no avenue of redress. There seems to be no logical basis for providing such officers with judicial powers in an administrative system of dispute resolution in circumstances where the officer is not skilled in the law, particularly in the laws of evidence and administrative law.

The substantial basis for opposition to the appointment of lay members as Conciliation or Review Officers is that the legislation requires them to act judicially. Accordingly, it has been contended that it is inappropriate for them to be given such powers.

It has been suggested that the proper selection and training is the most fundamental safeguard against administrative inefficiency and abuse[38]. In other words, if the Conciliation and Review Officers are legally trained or qualified there is less likelihood of there being an administrative appeal against their decision[39]. While both Conciliation and Review Officers should receive training at an appropriate level, it is apparent that the problem may become more acute at the Review Officer level.

Recommendation :

That Review Officers have appropriate training in the processes of dispute resolution and the laws of evidence.

10. Right of Appeal

As previously stated, an appeal from the decision of a Review Officer to the Compensation Magistrate's Court is permitted only on a question of law. It was submitted to the Committee by Mr Viner QC[40], that, at the very least, if the worker's right to legal representation is quashed by the legislation there must be some right of review or appeal of the administrative decision. That is, there must be a right to appeal a decision of the Review Officer, which by its very nature is administrative, on the merits of the case. The Chapman Report

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[37] Section 84ZM.

[38] See S.D. Hotop, Principles of Australian Administrative Law (6th ed.) page 360.

[39] The Committee has been informed by the WorkCover Authority in Victoria that its Conciliation and Review Officers attend a course at Bond University for the purpose of educating such officers in the legalities associated with dispute resolution and the assessment of evidence.

[40] I. Viner, Transcript 15/3/94, page 13.

recommended that an appeals tribunal, namely, the Workers' Compensation Conciliation Tribunal, be established to deal with appeals against determinations made by Review Officers on the following grounds :

- cases referred to the Tribunal by a Review Officer who, due to the complexity of the issues involved, is unable to make a determination; and

- appeals on the basis that the Review Officer has made an error in fact or in law when making the determination[41].

Mr Chapman recognised the right of an injured worker to be granted a right of appeal on both matters of fact and law to an appellate body, a fact not recognised by the legislation.

The right to review administrative decisions was recognised by the Commonwealth when it enacted legislation in recent years to facilitate review of decisions made by Commonwealth Ministers, officers and authorities on their merits[42]. In a report of the Standing Committee on Government Agencies it was stated that decisions adverse to the citizen that result in penalty or deprivation of rights or property will often be contested factually or on legal grounds. It being a mark of a democratic society that the citizen has the right to appeal a decision or subject it to independent review. However, it is not always the case that appeal or review ought to lie to the courts in the first instance. Errors of fact can be corrected by administrative review[43].

Given the fact that decisions of a Review Officer can and will affect the livelihood of parties to a dispute there appears to be no logical justification for depriving an injured worker, employer or insurer the right to appeal a decision of the Review Officer on its merits.

Recommendation :

That a party to the proceedings who is dissatisfied with a decision or order of the Review Officer may, where a question of law or fact is involved, appeal to the Compensation Magistrate's Court against the decision or order.

11. Medical Assessment Panels

Part and parcel of the dispute resolution system is the use of Medical Assessment Panels. A question can only be referred for determination to a Medical Assessment Panel from a

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41 Chapman Report, page 10.

42 Administrative Decisions (Judicial Review) Act 1977; Administrative Appeals Tribunal Act 1975.

43 Thirty-Sixth Report of the Standing Committee on Government Agencies; State Agencies, Their Nature and Function, Parliament of Western Australia, Legislative Council, (April 1994), page 20.

Conciliation Officer, Review Officer or Compensation Magistrate's Court[44] if there is a conflict of medical opinion on the question between a medical practitioner engaged by the worker; and a medical practitioner(s) provided and paid by the employer and one of the parties wishes the proceedings to continue[45]. It has been suggested that the question as to what matters may be properly referred to the medical assessment panel will be a source of much contention and possible appeal litigation[46].

It is important that medical questions referred to a Medical Assessment Panel be questions pertaining to medical issues and not that of causation. The Victorian workers' compensation legislation defines what a medical question is and lists the matters which can be asked of a medical panel.[47]

By defining and limiting the types of questions which can be referred to the Medical Assessment Panel the scope for appeal to the Compensation Magistrate's Court from a decision of a Review Officer, or an appeal from the decision of a Compensation Magistrate's Court to the Supreme Court is minimised.

Under S.145c of the Amendment Act, Medical Assessment Panels are to consist of two or three medical practitioners, at least one is to be a specialist in the particular branch of medicine or surgery that is relevant to the question and at least one is to be a general practitioner. Concerns were raised by some witnesses before this Committee about to the evaluation of complex medical conditions by a member(s) of the panel who is not a specialist in that specific area of medicine. This problem is overcome in the Victorian legislation[48] by empowering the Convenor of Medical Panels with a discretion to appoint members pertinent to the specific injury sustained by the injured worker. The Convenor is not restricted in ensuring that there be at least one general practitioner on the panel where complex medical questions requiring specialist expertise is necessitated.

Members of the Committee can see little, if any, justification or logical explanation for the appointment of a general practitioner on all medical assessment panels.

Recommendations:

That the definition of a "medical question" be incorporated in the Act; provisions of section 5(1) of the Accident Compensation Act 1985 (Vic) as amended may be a useful guide.

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44 See sections 84R, 84ZH and 84ZR.

45 Subsection 145A(1).

46 D. Burton : Commentary on the Workers' Compensation and Rehabilitation Amendment Bill 1993, para 5.8.5, Law Society Seminar, 2 March 1994.

47 Accident Compensation Act 1985, subsection 5(1).

48 Accident Compensation Act 1985 (Vic), subsection 63(4).

That the Director be given appropriate discretionary powers, subject to subsection 145C(1) of the Amendment Act, to appoint members of the medical assessment panel as he/she thinks fit.

MATTERS FOR FURTHER CONSIDERATION

12. Advocates for Injured Workers

The Amendment Act provides that during conciliation, a person is not entitled to be represented by a legal practitioner unless the Conciliation Officer and each other party to the dispute agrees[49]. That is, there is no automatic entitlement to legal representation. At review, a person is entitled to legal representation if all parties to the dispute agree, or in situations where the Review Officer is of the opinion that a question of law is raised or is likely to be raised or argued at the proceedings[50]. However, in both cases the power of veto may be exercised by persons other than the injured worker. That is, the injured worker's right to representation is subservient to the interests of the employer and insurer during conciliation and the employer, insurer and Review Officer during review.

Before attempting to address the issue of legal representation the Committee must point out that legal representation at conciliation is an issue quite different from that of legal advice prior to conciliation. In the majority of cases the injured worker may have sought legal advice as to his/her entitlement to workers' compensation prior to conciliation, the Amendment Act does not preclude such advice. Similarly, legal advice about matters of settlement may be sought following conciliation where consultation would facilitate resolution of the terms and conditions of settlement.

It has been submitted to this Committee that the new dispute resolution system places workers at a distinct and obvious disadvantage in dealing with experienced and trained claims officers of insurance companies, particularly at conciliation level. In the case of employers, by reason of the right of subrogation given under the contract of insurance, the employer will in effect be represented by the insurer, a person experienced in conciliation and review conferences.

The Committee was informed by Conciliation Officers in Victoria that on many occasions the insurer has agreed to the injured worker being represented during the conciliation conference by a legal adviser. If it was in the interest of resolving the dispute as to the facts surrounding the accident, rather than to protract resolution of the dispute, there appeared to be little resistance by the insurer or employer. This stance was confirmed by witnesses representative of the insurance industry in Western Australia who assured this Committee that insurance companies will not be standing in the way of injured workers who feel they need

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[49] Section 84Q.

[50] Section 84ZE.

adequate representation at the conciliation or review conferences[51]. The Committee was also informed of numerous instances in Victoria where the worker was encouraged, by the Conciliation Officer, employer and insurer, to telephone his/her lawyer during the conference for the purpose of obtaining advice, thereby enabling a speedy resolution of the dispute.

It has also been suggested that because the worker will not be legally represented during the conciliation stage the process of reaching some agreement may be extremely time consuming, difficult and arduous, as most workers will be inexperienced and lack the training or understanding of the system to reach an appropriate agreement. Furthermore, if any agreement is reached, there is always the risk that the Conciliation Officer will have to provide some form of legal advice to the worker in order to bring about agreement. The fact that the Conciliation Officer may have to offer some sort of advice which could constitute legal opinion may be a cause of concern and a source of potential legal liability[52].

As arbitrators, the Conciliation Officers are paramount in diffusing any perceived or actual imbalance of knowledge of the workers' compensation system during the conciliation phase. Members of the Committee witnessed, in several conciliation conferences in Victoria, Conciliation Officers taking the time to explain to the injured worker, for example, the reasons for pursuing a particular line of questioning or perhaps the types of matters which the worker should consider before answering an insurer's questions. The Conciliation Officers ensured that the worker fully appreciated and understood the employer/insurer's case and assisted the worker in articulating his or her case to the employer/insurer. That is not to suggest that the Conciliation Officer presented the worker's case on their behalf, they merely ensured that all the relevant facts were accurately and articulately conveyed to the employer and insurer.

Notwithstanding the philosophy pertaining to conciliation, the Committee is mindful that injured workers' legal entitlement to compensation should not be jeopardised merely by placing them in situations which are clearly disadvantageous. Although the Amendment Act denies the employer, insurer and worker representation during conciliation it fails to take into account the fact that an employer will necessarily be represented by an experienced insurance claims officer pursuant to the insurer's rights of subrogation. This unequivocally places the injured worker at a distinct disadvantage, such disadvantage being discriminatory against the injured worker[53].

It was acknowledged by numerous witnesses that representation, particularly legal representation, is not necessary in every workers' compensation dispute. However, by denying representation, save when there is agreement between the employer, insurer and Conciliation Officer, an injured worker might be disadvantaged.

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51 P. Burgess and T. Carter, Transcript 17/3/94, page 11.

52 D. Burton : Commentary on the Workers' Compensation and Rehabilitation Amendment Bill 1993, para 5.4.23, Law Society Seminar, 2 March 1994.

53 P. Durack QC, Transcript 15/3/94, page 21.

Concerns were raised that workers from non English speaking backgrounds, intellectually disabled people and workers with minimal educational training require some form of representation if the law is to be seen to be just and equitable. They will not only have difficulty in expressing themselves but in understanding the legal concepts involved in establishing the facts pertaining to the accident. This problem is compounded in situations where the injured worker is a part-time or casual worker who would generally know less about their work entitlements than a full-time worker. A large proportion of the non English speaking workforce is employed on a part-time or casual basis and as such may well be disadvantaged if denied representation of some kind. Therefore, it is pertinent to question the need for these workers to be represented by a person competent in extracting the necessary information and presenting their case before a Conciliation Officer.

The whole concept of the use of advocates must also be considered in the light of employers and employees who are disadvantaged by remoteness. It may be impractical either to take the conciliation and review process to these parties or to require their attendance in the capital.

The Committee discussed with Mr Guthrie the concept of permitting representation of workers by lay advocates rather than by lawyers[54]. Mr Guthrie indicated to the Committee that lawyers' conduct, unlike the conduct of a lay advocate, is governed by ethical standards, the breach of which subjects the lawyer to disciplinary procedures by the Legal Practice Board[55]. Furthermore, lawyers are compelled by law[56] to hold professional indemnity insurance, something which, given the limited number of lay advocates currently trained to deal with workers' compensation matters, would be prohibitively expensive, not to mention the problems associated with underwriting such a system. Such matters would have to be addressed if in fact representation by lay advocates was permitted. Mr Guthrie suggested that the problem of ethical standards could be addressed by ensuring that lay advocates were subjected to the disciplinary procedures of WorkCover[57].

A denial of representation, particularly to those sections of the work force mentioned above, will place upon the Conciliation Officer an inordinate burden of maintaining his or her impartiality whilst ensuring that justice is seen to be done. The Conciliation Officer, as arbitrator of the dispute, cannot be seen to transgress the line of impartiality and assist either party in their case.

Committee members were informed, whilst observing conciliation conferences in Victoria, that in situations where the injured worker required representation the employer and insurer

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54 R. Guthrie, Transcript 14/4/94, pages 14-15.

55 Legal Practitioners Act 1893; Legal Practitioner's Disciplinary Tribunal Rules 1993.

56 Legal Practitioners (Professional Indemnity Insurance) Regulations 1988.

57 R. Guthrie, Transcript 14/4/94, page 14.

were approached by the Conciliation Officer and requested that they agree to representation[58]. There were no cases reported to the Committee of employers or insurers denying such representation.

For all of the above reasons it was felt that the issue of advocates for workers at both the conciliation and review stages needed to be addressed. A minority of committee members felt that this should be addressed by an immediate amendment to the Act to allow for lay advocacy at the conciliation and review stages. A majority were of the opinion that this question should be foremost among the matters addressed in a formal review of the Act.

13. Cost Comparisons

Concern was expressed by several witnesses that the new system, in replacing the old Workers' Compensation Board with a new three tiered structure, may prove considerably more expensive. Such witnesses referred to the fact that reference the Workers' Compensation Board cost $1.6 million compared with $24 million for the reformed Victorian system. Even on a comparative case volume basis the estimated cost of implementing in Western Australia the reformed Victorian system would be $6 million.

It was suggested further that a "blow out" in staff expenditure for conciliation and review may be expected from initial departmental estimates. The Committee recognises the need for an independent inquiry to analyse, evaluate and compare costs associated with the old and new systems, thereby verifying whether or not the new system is in fact less expensive.

14. Medical Assessment

The Committee has, as a result of observation of the Victorian system, recommended immediate changes to the operation of medical assessment panels.

It is apparent that these panels will need to be examined further in the light of Western Australian experience to assess the fairness of their semi-judicial role in association with cost implications for the system as a whole.

15. Insurance Premiums

As a result of the investigation into Part IIIA of the Amendment Act, it has become apparent to the Committee that a thorough evaluation of the Western Australian premium system needs to be made in light of the New South Wales and Victorian experiences.

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[58] See page 13 of this report.

In Western Australia there are three distinct levels of workers' compensation insurance clients for insurance companies. Essentially, the levels are reflective of premiums paid by the clients, namely, clients who have premiums up to approximately $5,000; premiums between approximately $5,000 and $150,000; and premiums in excess of approximately $150,000.

Premium rates up to approximately $5,000 are characteristic of predominantly small businesses and are gazetted rates struck by the Premium Rates Committee. There is very little discount or claims experience rebates for these policies, being basically low administration, straight fee policies. Discounts off the Premiums Rates Committee's gazetted rates are provided for middle sized businesses whose premium rates are between $5,000 and $150,000. For these clients rebates are offered for satisfactory claims experience at the conclusion of the insured period. The larger businesses with premium rates in excess of $150,000 have what is termed a retroadjustable policy whereby the premium is struck entirely on the claims performance, irrespective of the gazetted premium rate[59].

The claim ratio benchmark set by the Premium Rates Committee is 72%. The remaining 28% is taken up by acquisition costs, operating administrative expenses and a modest profit margin. Investment income is taken into account by the Actuary in arriving at the claim ratio of 72%.

The 1992/93 Annual Report of the Workers' Compensation and Rehabilitation Commission showed that on a "premium written/claims paid" basis in 1990/91 the actual claim ratio was 92% in 1991/92, 94.2% and in 1992/93, 101%. This means that an insurer with a claim ratio of, say, in excess of 80%, would in theory be paying out more in claims and associated costs than receiving in premium.

However, a more accurate way of assessing an insurance company's financial position is comparing earned premium to claims incurred. This is the basis on which the Federal Insurance and Superannuation Commissioner assesses the financial position of general insurers. The "premium written/claims paid" basis adopted by the Workers' Compensation and Rehabilitation Commission does not take into account the insurance company's reserve for future liability.

Looking at the "earned premium/claims incurred" experience information provided by the Insurance Council of Australia, it shows that in 1991/92 the claim ratio was 78.6%, in 1992/93 118.6% and in 1992/94 it was 125.5%. These figures on WA workers' compensation experience relate to private sector insurers only and exclude SGIC and SGIO.

The Committee was informed that, as a result of heavy discounting during the period 1990/91 to 1993, the fact that claims payments are exceeding premiums, and the unanticipated increase in the number of common law claims resultant upon the introduction of the Amendment Act, there will be an increase in premiums in 1994-95 of approximately 25%. However, this increase is not of the gazetted rate but in the level of discounting and will only

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[59] T. Carter, Transcript 16/5/94 pages 2-3.

occur for a period of 12 months. That is, there will be a 25% reduction in the level of discounting for those businesses whose premiums exceed approximately $5,000. According to uncorroborated information from the insurance industry the level of discounting is only expected to be in the order of 5 to 15%.

Of particular concern to the Committee is a failure to write at market rates, lack of cost control, unfunded liability and the basis of cross-subsidisation. Claims of a lack of reliable information pertaining to the Western Australian system and the high cost of premiums as a percentage of payroll were made by a number of witnesses, again a matter of concern to the Committee. Consequently, the Committee suggests that a revised experience rating premium system be investigated.

The Committee was particularly impressed by the way in which the Victorian WorkCover insurance package contributed to a return to work ethos. Generally speaking, larger workplaces have more weight placed on their own experience and small employers pay a premium rate closer to their industry rate. A sizing or experience adjustment factor is incorporated into the premium calculation formula. The maximum value of 0.9 is attributed to the very large employers which means that 90% of that employer's claims costs and 10% of the industry rate would be used in the calculation of the premium rate. Under this system, larger employers can expect to have more responsive premiums because of their size. For a small employer, an experience adjustment factor of 0.1 may be applied which means that 10% of that employer's claims costs and 90% of the industry rate would be used in the calculation of the premium.

The best method for an employer to keep claims costs, and therefore the premiums down is to actively manage the workplace to prevent injuries happening. However, when a worker is injured the authorised insurer[60] can advise the employer immediately on the possible cost outcome of the claim and how it could affect the employers premium. For example, through case estimates an employer can ascertain the savings to be made by making a suitable job offer and helping the injured worker remain a productive part of the business; or how $1000 spent on occupational rehabilitation for a faster return to work could save thousands of dollars off the premium.

The Committee noted that in Victoria the employer is liable for an excess, that is, the payment of the first 10 days of an employee's wages, when that worker is injured. This incentive facilitates the focusing of an employer's attention towards matters of workplace safety, and is a contributing factor to a developing work culture. Such factors need to be considered and evaluated in a review of the Western Australian system.

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[60] There are 16 authorised insurers in Victoria.

16. A Return To Work Culture

The Committee was very impressed by the comprehensive return to work culture that was being developed in Victoria. This strong emphasis on return to work was evident in statements made by the responsible Minister the Hon Roger Hallam MLC in introducing that State's revised Workers' Compensation legislation in 1992. Mr Hallam stated :

> *"The return to work policy is stated as an expression of the commitment by both an employer and worker that, following an injury to a worker :*
>
> - *treatment, return to work activities and any necessary occupational rehabilitation services will begin immediately or, if not required immediately, then as soon as is necessary to achieve an early return to pre-injury employment wherever possible;*
> - *return to suitable employment occurs as soon as medical opinion agrees it is possible;*
> - *appropriate modifications to equipment, work practices or duties will be made to allow a worker to remain at work or return to suitable work while recovering following an injury;*
> - *suitable employment opportunities will be made available wherever possible, where a worker's injury precludes an immediate return to pre-injury duties;*
> - *a return to work plan will be developed jointly by the employer and the injured worker within 10 days of any worker having 20 or more days of total incapacity for work; and*
> - *the return to suitable employment of a worker following injury will be appropriately monitored and reviewed and the return to work plan will be adjusted to reflect any changes in the worker's condition and capacity to work.*
>
> *Under WorkCover, occupational rehabilitation is a co-operative model of return to work. Occupational rehabilitation refers to workplace based policies, initiatives and procedures designed to maximise an injured worker's employment opportunities following injury. Depending on the nature of the injury, this may mean assistance to remain at work in suitable employment or assistance to enable the worker to return to work following a period of total incapacity."*

While it is apparent that Western Australia has utilised some advertising material from WorkCover Victoria, such material may have little impact without a fully integrated return to work program.

The Committee noted features of the Victorian system that included conciliation at the workplace, which emphasised "on the job" rehabilitation, an education program aimed at doctors and compulsory return to work plans.

It is also apparent that features of the Victorian insurance system significantly contributed to the development of a return to work culture. The initiatives of WorkCover must also be carefully coordinated with those of the Department of Occupational Health, Safety and Welfare to gain maximum benefits. This is an area that the Committee believes should be thoroughly investigated by the proposed independent review.

17. Conclusion

It is almost impossible to compare the merits of the various dispute resolution systems under the workers' compensation legislation of Australia. The reason for this is the systems vary so widely and the benefits differ so markedly that there is no statistical basis for comparison. In addition, there are other factors which make statistical comparisons difficult, such as the varying rules of legal practice in each state, the variation in population and the variation in industry base[61].

It was put to this Committee that the question to be decided is not one of abandoning or not abandoning the system, but of being able to make changes in relation to the operation of the system where fundamental rights are preserved[62]. Consequently, the philosophical changes to workers' compensation dispute resolution, encapsulated in the Amendment Act, warrant a period of probation, such period culminating in a comprehensive review of the changes. Accordingly, for reasons set out in this report, the Committee make the following recommendation :

Recommendations :

That the Government commission an independent review of the Workers' Compensation and Rehabilitation Act 1981 as amended by the Amendment Act at the expiration of 12 months from the date upon which Part IIIA was proclaimed and that the report be tabled in the Parliament no later than 15 months after such proclamation date ("Review").

That membership of the Review body be comprised of, but not limited to, representatives of the following :

(a) WorkCover Western Australia;

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61 Guthrie Report, page 159.

62 J. Fiocco, Transcript 17/3/94. This comment was directed towards a discussion concerning the preservation of an individual's rights to legal representation. However, it serves to illustrate the fact that the Committee's inquiry is not fundamentally concerned with the abolition or retention of the new system of workers' compensation per se.

(b) Insurance Council of Australia;

(c) Trades & Labour Council of Western Australia; and

(d) Chamber of Commerce and Industry of Western Australia

That the Review shall consider the effectiveness of non-adversarial dispute resolution and take into consideration the following matters :

(a) the role of advocates during the conciliation phase;

(b) a comparison of costs and time delays associated with dispute resolution under the old and new systems; and

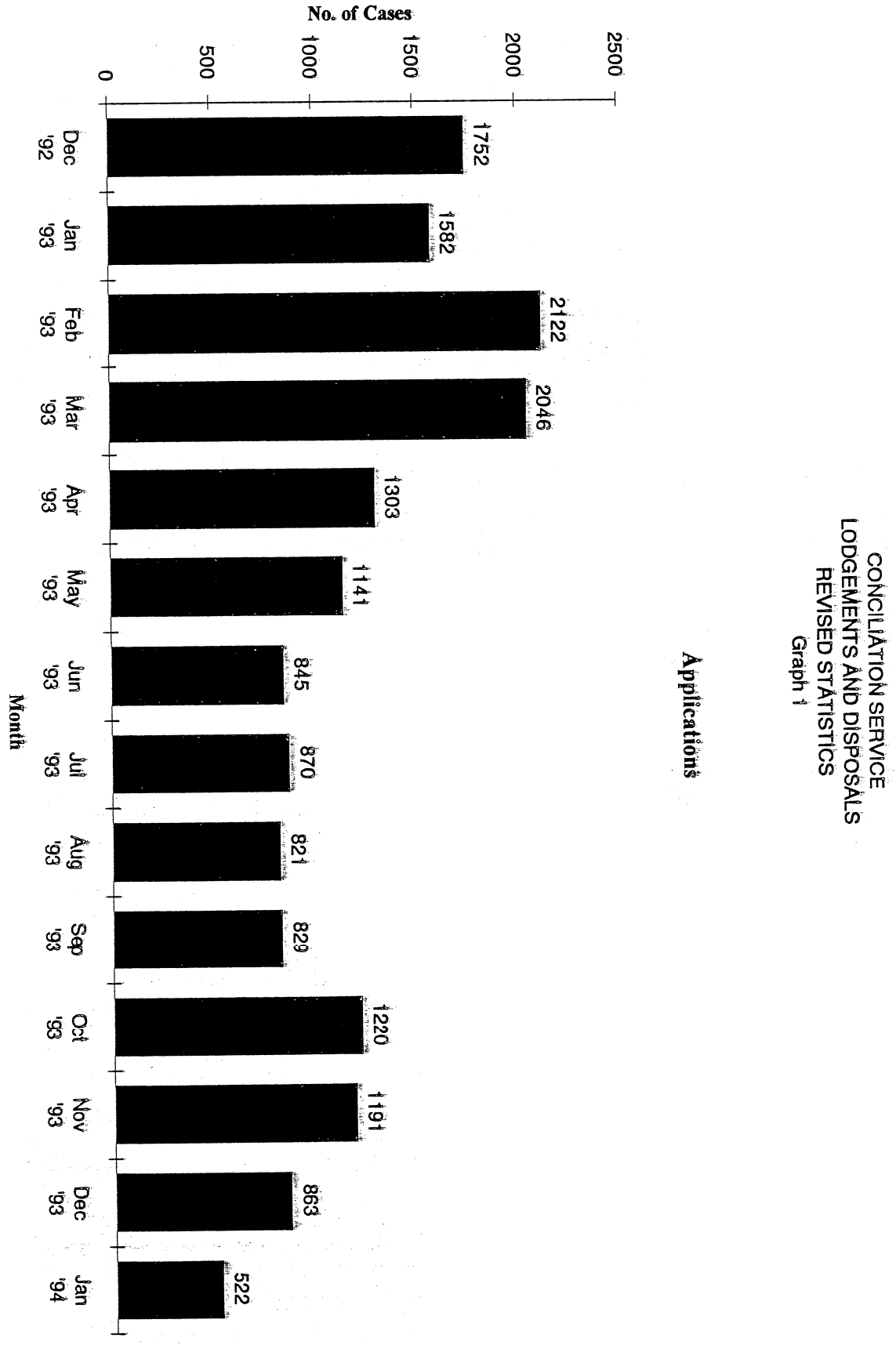
(c) the operation of medical assessment panels;

That the Review give further consideration to :

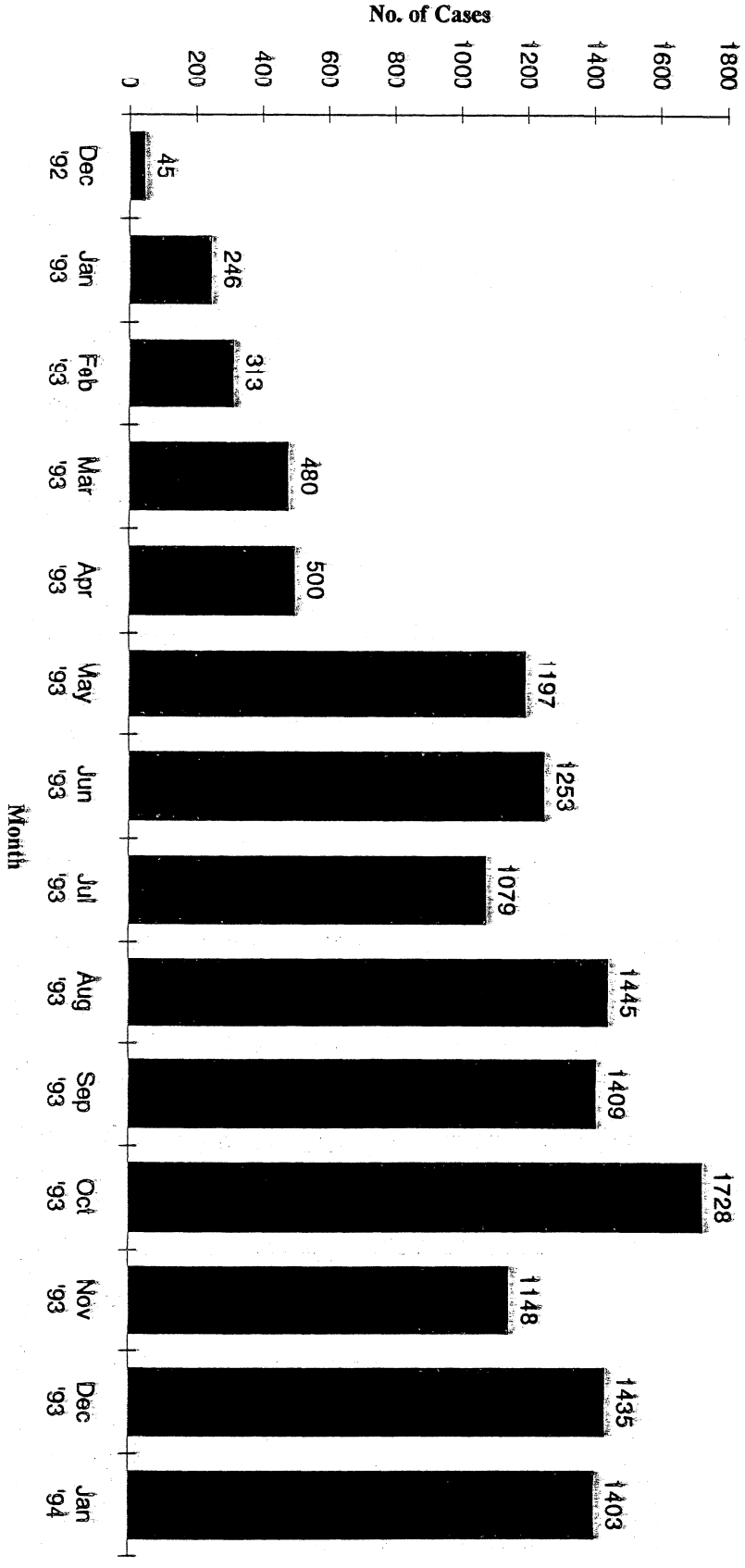
(a) the insurance premiums system; and

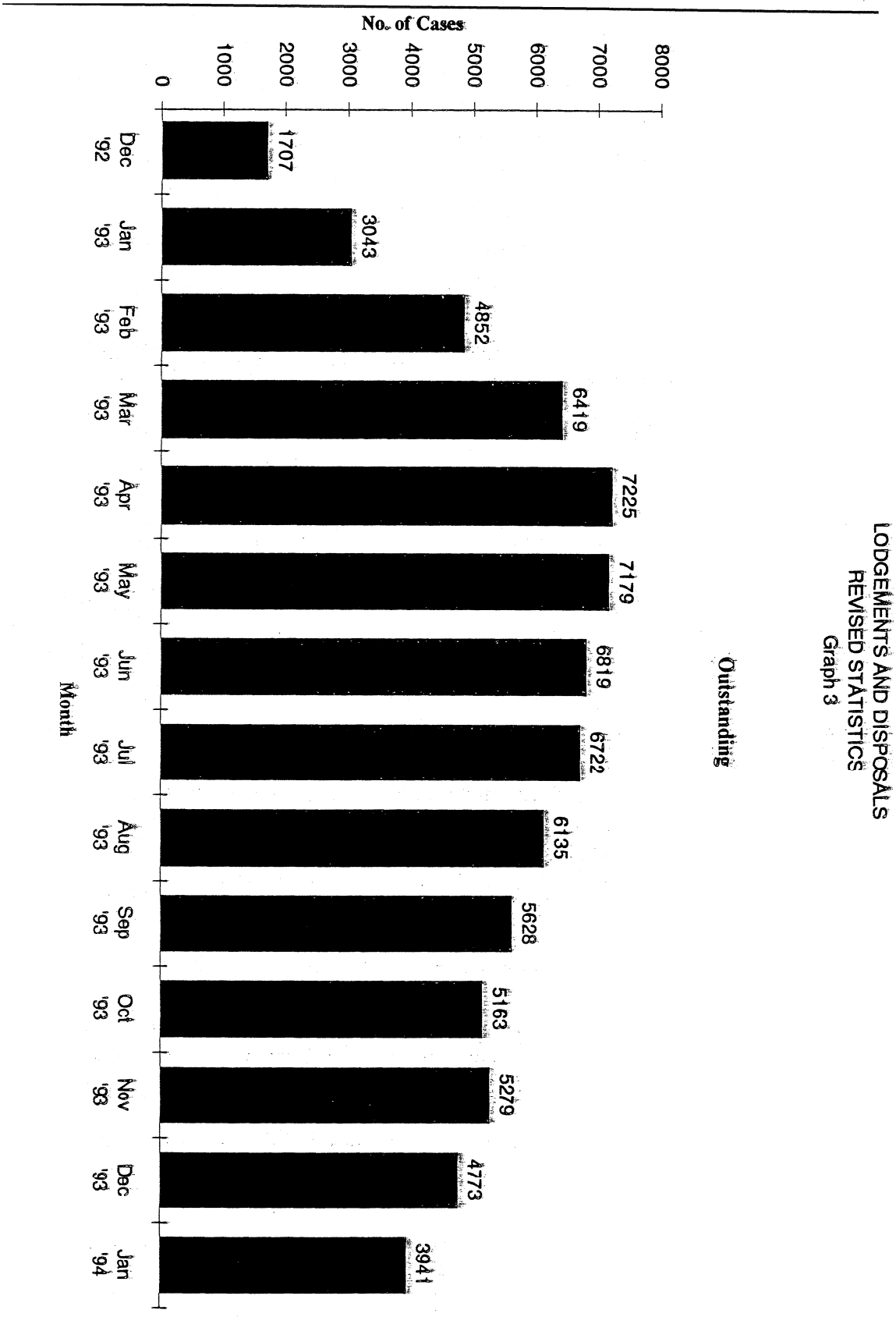
(b) the fostering of a return to work culture.

Appendix

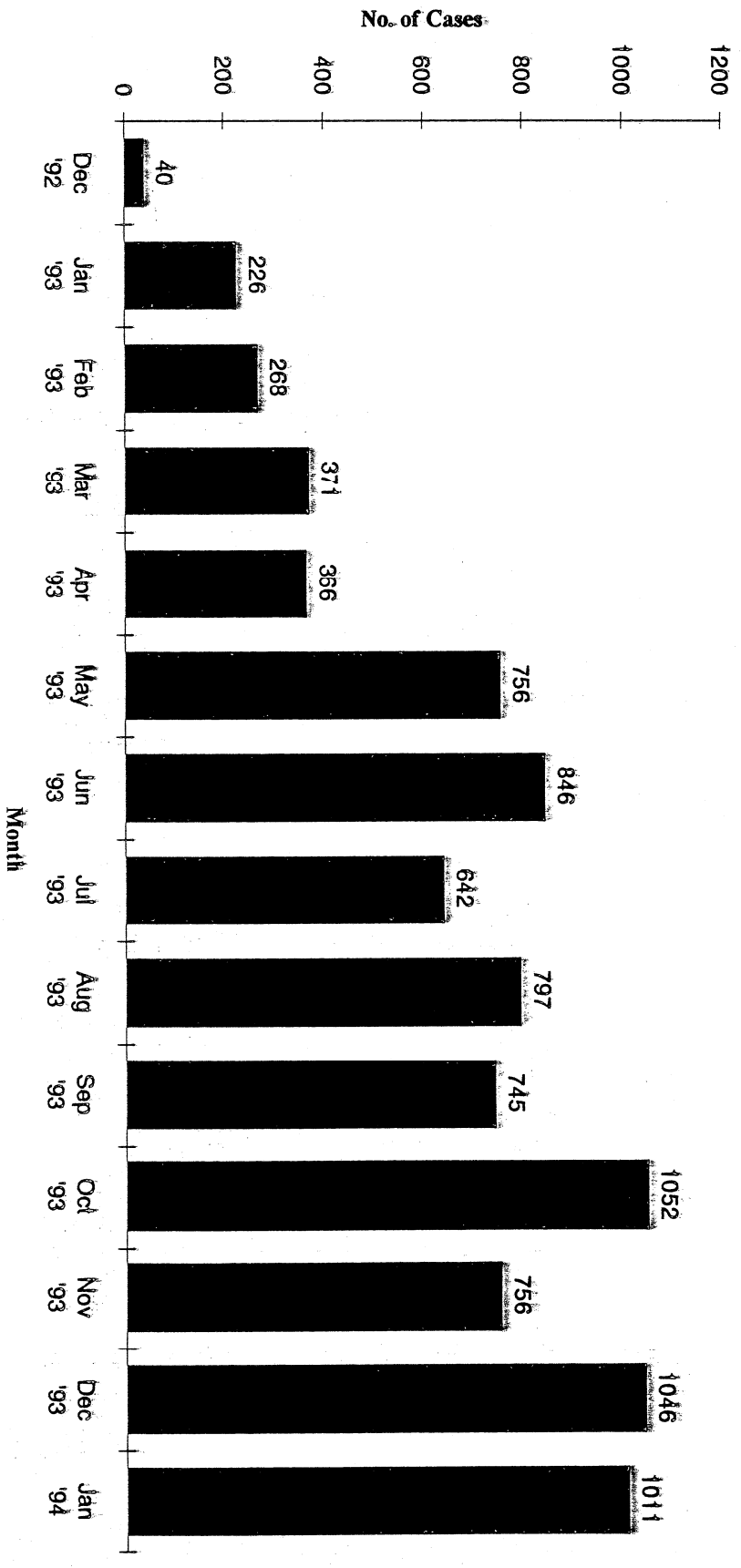

CONCILIATION SERVICE
LODGEMENTS AND DISPOSALS
REVISED STATISTICS
Graph 1
Applications
No. of Cases
0
500
1000
1500
2000
2500
Dec '92
1752
Jan '93
1582
Feb '93
2122
Mar '93
2046
Apr '93
1303
May '93
1141
Jun '93
845
Jul '93
870
Aug '93
821
Sep '93
829
Oct '93
1220
Nov '93
1191
Dec '93
863
Jan '94
522
Month

CONCILIATION SERVICE
LODGEMENTS AND DISPOSALS
REVISED STATISTICS
Graph 2

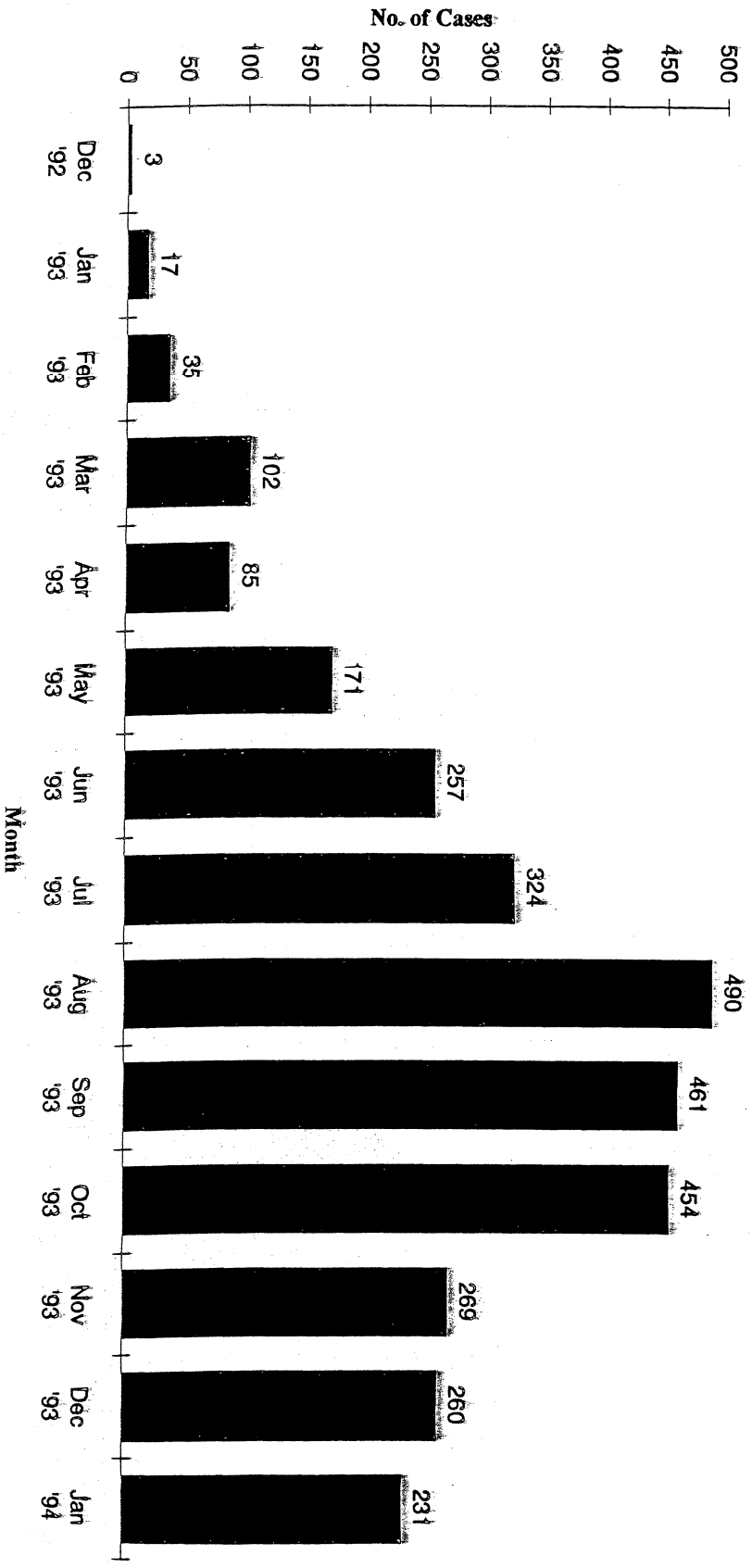



CONCILIATION SERVICE
LODGEMENTS AND DISPOSALS
REVISED STATISTICS
Graph 3
Outstanding
No. of Cases
0
1000
2000
3000
4000
5000
6000
7000
8000
1707
3043
4852
6419
7225
7179
6819
6722
6135
5628
5163
5279
4773
3941
Dec '92
Jan '93
Feb '93
Mar '93
Apr '93
May '93
Jun '93
Jul '93
Aug '93
Sep '93
Oct '93
Nov '93
Dec '93
Jan '94
Month

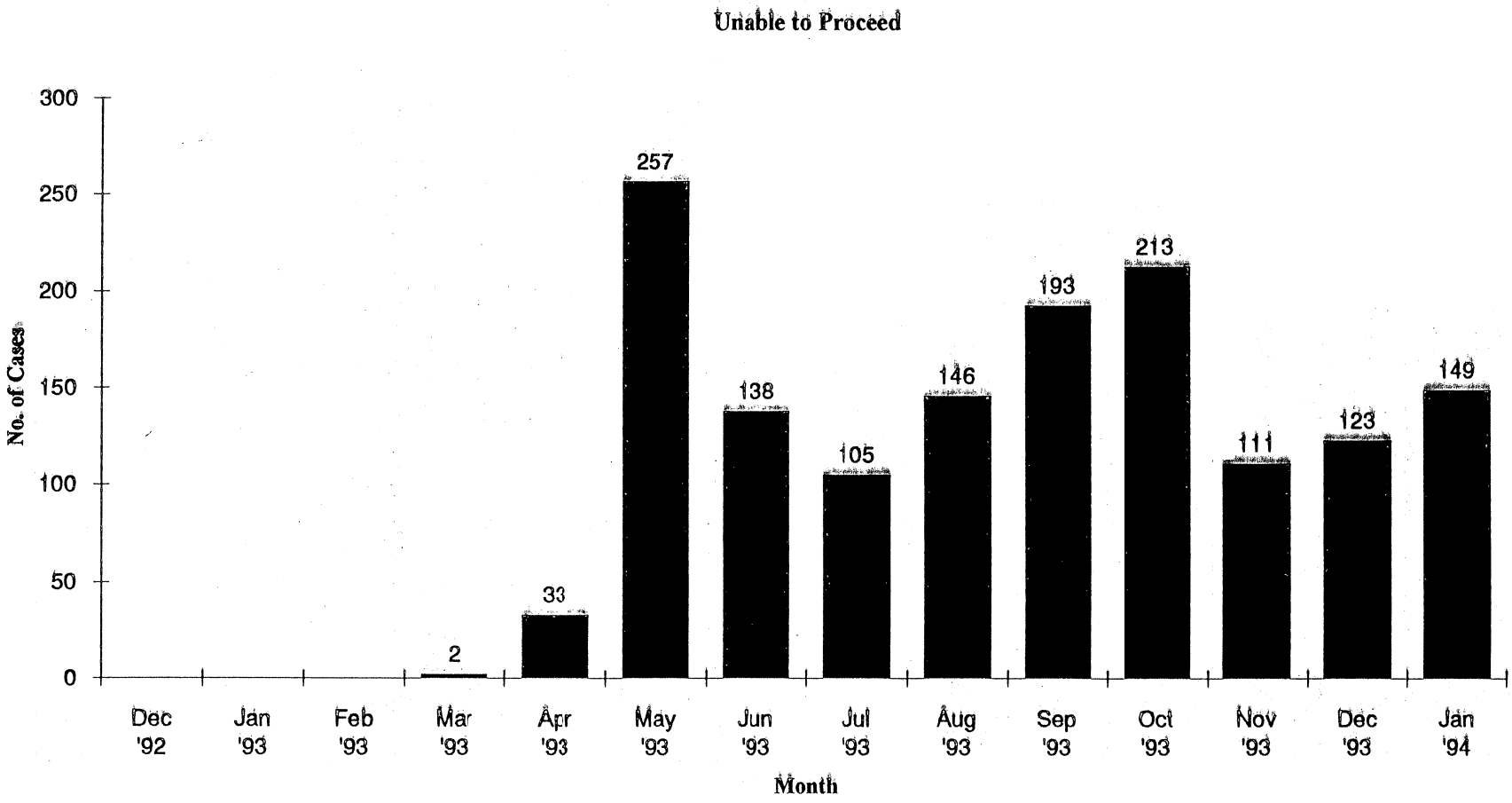
CONCILIATION SERVICE
CONCILIATION OUTCOMES
Graph 1



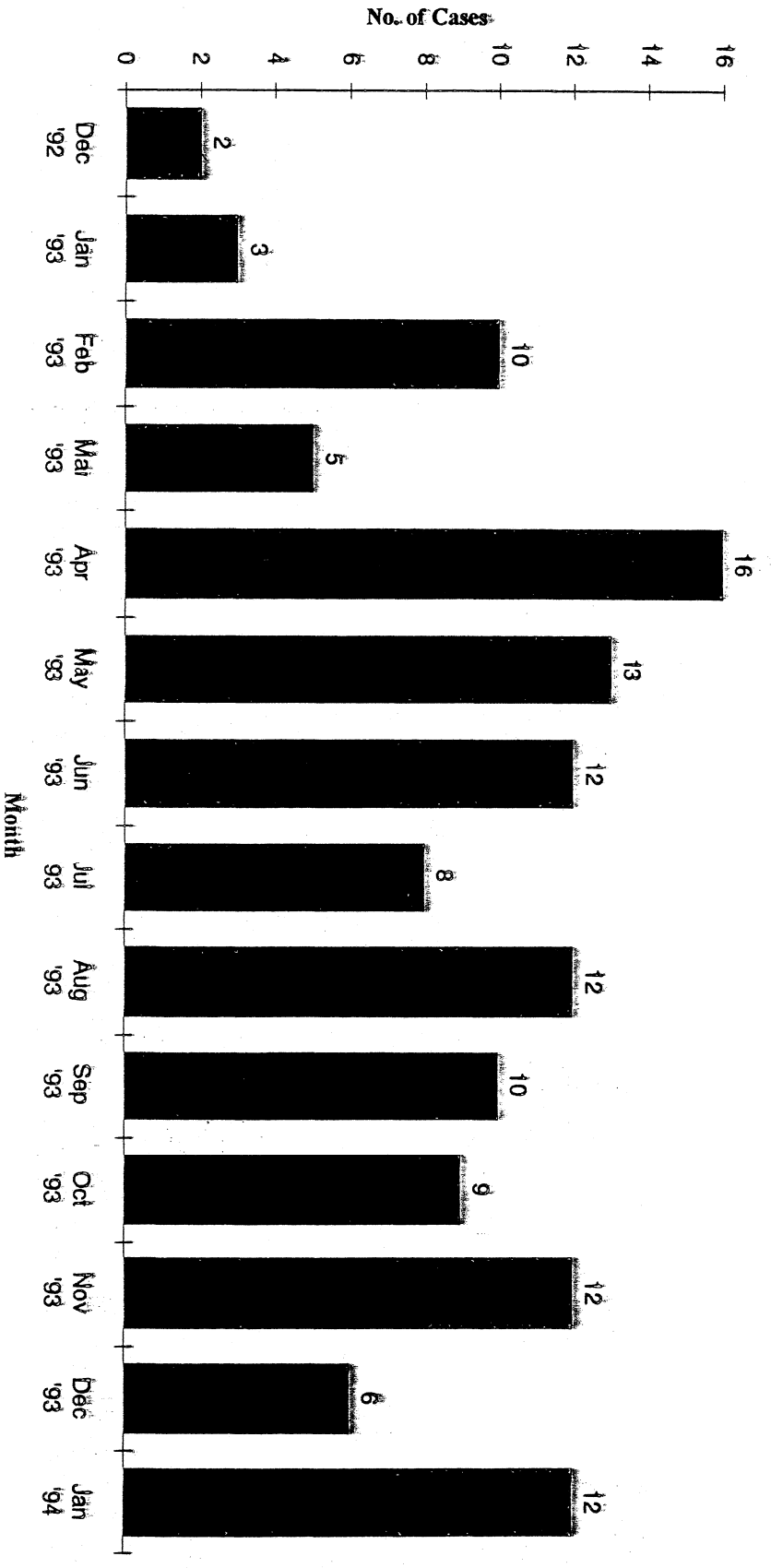
CONCILIATION SERVICE
CONCILIATION OUTCOMES
Graph 2



CONCILIATION SERVICE
CONCILIATION OUTCOMES
Graph 3



CONCILIATION SERVICE
CONCILIATION OUTCOMES
Graph 4



No Jurisdiction