

COMPETITION POLICY REVIEW TEAM
DEPARTMENT OF HUMAN SERVICES
NATIONAL COMPETITION POLICY

LEGISLATION REVIEW
CHIROPODISTS ACT 1950

REPORT OF THE REVIEW PANEL

January 1999

The views expressed in the issues paper are the views of the Review Panel and do not represent the views of the South Australian Government. Any action taken in anticipation of the outcomes of the review process is at the risk of persons taking such action.

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INTRODUCTION

The following report concerns the review of the Chiropractists Act 1950. The review is conducted in compliance with an obligation upon the South Australian Government under clause 5 of the Competition Principles Agreement. The Competition Principles Agreement is one of three agreements signed by the Commonwealth, State and Territory Governments in April 1995. These three agreements give effect to the National Competition Policy.

The obligation contained in clause 5 of the Competition Principles Agreement concerns the review, and where appropriate reform, of legislation which restricts competition. The guiding principle in undertaking this review is that the Chiropractists Act should not restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.

The Terms of Reference for this review reflect the requirements of the Competition Principles Agreement. In addition, the review Panel has considered whether administrative procedures required by the Chiropractists Act are unnecessary or impose an unwarranted burden on any person.

References to sections are references to sections of the Chiropractists Act 1950 unless indicated otherwise. References to regulations are references to regulations contained in the Chiropractists Regulations 1989.

SUBMISSIONS

Before preparing this report, the Panel circulated an 'Issues Paper', identifying those aspects of the Act where matters of competition arise. Submissions and comments were invited from any interested persons and organisations, especially consumers, practitioners, employers and training providers, and written submissions received are listed in the appendices.

This report is being circulated to all those individuals and organisations who responded to the Issues Paper, to a number of other possibly interested parties, and on request. The Review Team will accept verbal or written submissions, by telephone, fax, postage or e-mail, and can also consult in person, by arrangement.

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The closing date for submissions is Monday, February 1st, 1999

Part 1: Central issues

1.1 Purpose of Act

The object of the Act as stated is to register chiropodists 'and for other matters incidental thereto'. The usual aim of such registration acts are to protect the public, in this case principally by ensuring chiropody practice is of a high standard, and is provided by persons who are identifiable within the community as possessing the necessary qualifications and/or experience to provide such services. One obvious issue is the term 'chiropodist', which has not been in common usage for more than twenty years, having been replaced with 'podiatrist'.

All submissions endorsed the need to highlight protection of the public in the purposes of the Act, and to use the term 'podiatry' and its derivatives from now on.

The Panel recommends that the purpose of the Act begin with a phrase such as 'An Act to protect the public, by--'.

The Panel also recommends that the name of the Act be changed to 'The Podiatrists Act' and all references to 'chiropodist' or its derivatives be replaced in the Act with the term 'podiatrist' and its derivatives.

The Act establishes systems of registration of chiropodists, procedures for addressing unprofessional conduct, and for the licensing and inspection of chiropody clinics. The Act establishes the Chiropody Board of South Australia to manage these matters, and empowers it to enforce the provisions of the Act.

1.2 Markets

The purpose of competition policy review is to analyse the effect of legislative restrictions upon competition in markets. This means competition in the broad sense of the ability of competitors to enter and participate in a market, not specifically in the sense of individual rights to participate in a market. Competition policy, therefore, is not concerned with marginal behaviour, but concerned with broader competitive outcomes. This distinction is important in the context of reviewing legislation which empowers a body to take disciplinary action against individuals in a profession. The ability to restrict or prevent an individual's participation in a profession is only relevant to legislation review if criteria for imposing such restrictions generally distort competitive conduct in a market.

Chiropody practice markets

The provision of chiropody services is undertaken mainly by chiropodists as regulated by the the system of registration established by the Act. Medical practitioners and physiotherapists are exempted from the provisions of the Act.

The extent, if any, to which provisions of the Chiropodists Act restrict competition from other providers of similar practices is relevant to this review. Professional conduct and advertising restrictions also affect this market

Training markets

A requirement of registration is that the applicant has prescribed qualifications. The market of providing chiropodist training, therefore, may be affected by decisions of the Board, and, therefore, is also a market relevant to this review of the Chiropodists Act.

1.3 Restrictions

Restrictions upon competition are of three types:

- a) barriers to entering (or re-entering) markets;
- b) restrictions on competition within markets; and
- c) discrimination between market participants.

Each of the restrictions identified in the course of this review has been identified in terms of these theoretical types of restrictions. Such categorisation is useful for determining the impact of the restriction upon competition in the relevant market.

For the purposes of this review restrictive provisions have been assessed as trivial, intermediate or serious. This assessment is provisional until the consultation process is complete. A trivial restriction is defined as having only a minimal effect within a market, while an intermediate restriction imposes a substantial cost upon competition. A serious restriction effectively prohibits entry or re-entry into a market, or prohibits certain conduct within a market.

Categories of Restriction

Five broad categories of restriction have been identified in the course of reviewing the Chiropractors Act:

- title protection;
- practice protection;
- professional misconduct;
- licensing of premises, and
- advertising by chiropractors

Title Protection

The Act provides for restrictions which achieve title protection. Restrictions on competition concerned with title protection restrict the use of a designated professional title by prescribing qualifications and/or experience required to register as a practitioner in that profession, professional standards and requirements of persons returning to, or seeking reinstatement in, the profession. The 'holding out' provisions of the Act make it illegal for any person other than a duly registered chiropractor to call themselves a chiropractor.

Practice protection

The Act provides for restrictions which achieve practice protection, sometimes referred to as *reservation of practice*, where legislation reserves an area of activity exclusively to a defined group of practitioners. It makes it unlawful for any person other than a registered chiropractor to practise or claiming to be skilled in the practice of chiropractic. The Act specifies the area restricted as 'chiropractic' and provides for additional restrictions by proclamation.

Professional Misconduct

Restrictions upon conduct in the chiropractic profession contained within the Chiropractors Act are relevant to this review. Central to these restrictions is the way in which the concept of 'unprofessional conduct', and overall compliance with the 'Chiropractic Code' is applied by the Chiropractic Board

Licensing of premises

The Act regulates chiropractic clinics and premises, to ensure that they are 'clean and suitable for use as a clinic, and (have) proper equipment for the practice of chiropractic' This applies to any premises used for chiropractic, whether solely (as in a private practice) or occasionally (as, eg, in a nursing home or retirement village) 'Clinics' are those owned by persons other than chiropractors, and are subject to an annual licensing fee, but the the Act also empowers the Board to inspect any 'premises' in which a chiropractor is operating. The Regulations under the Act set out the required standards. These provisions are relevant to this review, in that they restrict registered and unregistered persons seeking to operate a chiropractic practice.

Approval of training courses

The ability of the Board to control qualifications through the recommendation of training courses may restrict the market for such training services, and/or to control the numbers of people entering such training. As both of these relate to the legislated functions of the Board, the criteria employed by the Board in determining whether or not to recommend a training course require consideration by this review

1.4 Costs

Two categories of cost arise from the training restrictions contained in the Chiropody Act. Firstly, the restrictions upon registration and re-entry to the profession, and protection of practice, may cause the supply of persons providing chiropody services to be less than the demand. Restricting numbers of practitioners could cause the cost of chiropody services to rise. This therefore, would be a cost upon the community.

The second category is compliance costs for practitioners and owners. These are the costs of registration, and of complying with standards of competency, professional conduct and maintenance of premises. These costs impact upon competition if they are sufficient to dissuade participation in the market for chiropody services, or are substantial and passed on to consumers as an element of the price charged for chiropody services.

1.5 Public Benefits

The professional regime established under the Chiropodists Act may achieve significant public benefits. Restrictions upon entry to, and participation in the chiropodist profession (practice protection and title reservation) serve to ensure that registered persons possess the prescribed qualifications and experience and competence deemed necessary to safely fulfil those roles.

They also restrict the entry into this area by persons whose practice may pose a risk to members of the public. Given the many elderly and infirm persons seeking care and treatment for their feet, there may be a stronger case than usual for minimising the risk of misinformation, mis-diagnosis and inappropriate treatment.

Restrictions on conduct and on the standard of premises may also reinforce public confidence in the standards of professional care provided by registered chiropodists.

Part 2: Analysis of Restrictions

2.1 *Part 111 of the Act--Sections 22-34--Registration of chiropodists - title protection and approval of training providers*

Section 30 outlines the prerequisites for registration as a chiropodist. A person must have attained prescribed qualifications, (at the SA Institute of Technology, now known as the University of SA, or a course the Chiropody Board agrees to be of equivalent standard) and be 'of good character' to be placed on the register.

Nature of the Restriction

The requirement of registration restricts entry into the profession. This is an intermediate/serious restriction upon competition, particularly the extensive tertiary training required.

The degree of restriction depends partly on how the Board interprets the phrase 'of good character'. Like other Registration Boards, it is guided by a body of legal precedent, summarised in a Crown Law opinion obtained by the Psychological Board in 1985 which states that:

'The Board must consider matters affecting the moral standards, attitudes and qualities of the applicant, insofar as they relate to the applicant's proposed practice--.'

On the matter of training, the Act specifically identifies the South Australian Institute of Technology, now the University of SA, which effectively means that the Board can withhold approval of chiropody training offered by any provider except that University. This may constitute an intermediate restriction on other potential providers, because without Board approval they cannot hold out to potential students that successful completion of their course of instruction will lead to registration and subsequent employment opportunities in the profession. Currently, there are no recognised providers in South Australia other than the University of SA.

Section 30 (c) (ii) defines qualifications deemed equivalent to the offerings of the University of SA very broadly, ('certificate, degree or diploma of any other society, institute or association') which could tend to lessen the restriction, depending on how the Board responds to requests for recognition.

The wording of this provision in the Act reflects the situation in higher education at the time it was introduced. In the current de-regulated training market, there may well be new providers seeking to offer the required courses, so the way in which the Board implements Section 30 (c) (ii) will have an important bearing on competition in that market.

Regulation 21 prescribes the additional qualifications that may be entered on the Register. There may be a relative advantage to practitioners in advertising such qualifications. These are very broadly defined, ('--any health qualification--membership of any association affiliated with the Australian Podiatry Council,--') so there there appears to be only a trivial restriction imposed by this provision. Currently, Podiatry Surgery and Podiatric Sports Medicine are the only two recognised additional qualifications.

The *Mutual Recognition Act 1992 (Commonwealth)* has the effect of freeing up movement of professionals between jurisdictions. In professions where the prerequisites for title and/or practice protection vary greatly between states and territories, competition may be markedly increased, but this is not the case with chiropody practice, so the Act has little impact.

Public Benefit

A system of registration of chiropodists aims to protect the public, particularly potential consumers, by ensuring that persons with the title 'chiropodist' have achieved the competencies required to conduct practices which could be harmful if poorly performed. The requirement for tertiary training will reduce the likelihood of inappropriate or incompetent practices occurring, and reinforce the work of the Board in minimising professional misconduct. The effectiveness of this system as a way of informing the public is likely to be reduced by contemporary unfamiliarity with the term 'chiropody'

Costs

The costs of these restrictions depend on whether the prerequisites for registration are what is reasonably required to ensure the public has confidence in the skills and character of registered chiropodists. The cost of registration itself is minor, but the full cost (ie, direct tuition costs and lost income costs) of obtaining the educational pre-requisites is major. Such costs very likely reduce the number of persons who might otherwise become registered, which may have the effect of increasing the cost of services.

Discussion

In the Issues Paper, the Panel asked *'Is registration (title protection) necessary to protect the public, and/or are there other less restrictive ways in which the objectives of the Act could be achieved?'*

The concept of Government-regulated title protection obviously restricts use of a title by unregistered persons. This is usually justified by the need to inform consumers which practitioners have 'Government guaranteed' standards of training and accountability. The alternatives to such regulation are;

- self-regulation, where the profession may or may not organise to set its own standards and advertise these to the public;
- co-regulation, where the Government works together with accredited professional organisations to encourage all practitioners to meet standards for membership of those bodies;
- voluntary registration, where practitioners can choose to meet Government standards in return for the 'Government-approved' status that may deliver other benefits to their practice.

Chiropody practice includes procedures where skin penetration is likely or necessary, often with consumers where the risk of infection and other adverse outcomes is high. All submissions emphasised that the potential for irreversible harm makes it essential that anyone practising chiropody is readily identified by a title which guarantees that they are adequately trained to provide safe care. This cannot be achieved by any of the alternatives to regulation. In the words of the Australian Podiatry Association, *'registration is essential to protect the public from the risk of misinformation, mis-diagnosis and inappropriate treatment'*¹

The Panel recommends no change to title protection as set out in Section 27, except for principal references to 'chiropody' and 'chiropodist' being replaced by 'podiatry' and 'podiatrist'. However, the term 'chiropodist' should remain restricted to avoid public confusion

¹ Australian Podiatry Association SA Inc, page 2 (received 25/11/98)

The Panel asked '*Is there a net public benefit in government regulation of educational requirements for registration as a chiropodist?*' and '*Are the restrictions on training providers justified in terms of public benefit?*'

The same arguments apply as above, but the current provisions of the Act (Section 30, (c) (i) and (ii)) are restrictive to the extent that the Board is required to recognise the course provided by the University of South Australia. This is also a restriction in the market for current and potential training providers, The Board is well placed to judge which courses and training providers are adequate at any given time, and these clauses should be amended to reflect that.

The Panel recommends that Section 30 (c) (i) and (ii) be deleted and replaced by words to the effect that the person must hold podiatry qualifications acceptable to the Board.

The Panel asked '*is the use of the criterion 'of good character' a necessary and appropriate restriction on entry to the profession?*'

Most submissions addressed this question, and with one exception² endorsed the need for the Board to consider matters such as past criminal offences and professional misconduct. However several respondents wanted inclusion of concepts of competency and mental and physical capacity, which may be highly relevant but subject to more subjective judgements that need a legal mandate. The Panel believes that these are better covered by the term 'fit and proper person', as used in a number of similar acts.

The Panel recommends that Section 30 (b) be replaced with the words 'is a fit and proper person'

2.2 Section 27 of the Act, and Regulation 11--practice of chiropody by unregistered persons

It is an offence for any person other than a registered medical practitioner, physiotherapist or chiropodist to '*for fee or reward, practise chiropody*'. Chiropody is defined in Section 4 of the Act as;

'the diagnosis and treatment by medical, surgical, electrical, mechanical or manual methods, or by any proclaimed treatment of ailments or abnormal conditions of the parts of the human body below the knee'

Nature of the restriction

This broad definition creates a serious restriction on provision of various forms of foot care. For example, any offer of treatment for the relief of pain in the feet by a masseur, or the fitting of an insert to a sports shoe by a retailer, could be deemed unlawful. Beauticians, pedicurists, personal care attendants and others may seek to provide services within the definition. As such, they would place themselves and/or their employers at risk of prosecution.

Registered chiropodists are not able to employ unregistered persons to carry out any aspects of chiropody practice, even, for example, in supervised practice which may be leading to registration. This is a restriction on the rights of an employer to engage staff with the competencies they believe are necessary for the task, and may increase the cost of chiropody services

Public benefit

The combination of title protection and these provisions is intended to assure the public that any professional service offered within the definition of chiropody will be carried out by a qualified person who is fully accountable to the Board. Given the prevalence of 'close substitution' practitioners, the public benefit sought is obviously not fully achieved, so the continuation of the restriction in its current form has to be examined. It may be that the effectiveness of the practice protection should be improved, or it may be argued that there is insufficient evidence of public harm, and that protection should be abandoned.

² Sally and Trevor Gadd, page 2 (received 19/11/98)

Costs

Restricting supply of labour is usually held to increase the cost of labour. This cost may be passed on to the consumer of chiropody services. It may be that there are aspects of practice that could be competently and less expensively performed by other persons in the employ of a registered chiropodist, with redress against any negligence being available through other common law provisions applying to any business. Costs may also include lost income by 'close substitution' practitioners

Discussion

The Issues Paper posed the question, '*Is the Act's objective of restricting (reserving) practice justified in the public interest?*', and, '*Given the difficulties in minimising closely related practice by un-registered persons, should the restriction be reinforced or removed?*'

The approach to definition of chiropody/podiatry and practice protection interstate is varied. In Victoria no definition is attempted, which results in a situation where it is an offence to '*claim to to be qualified to practise as a podiatrist*'³ without stating what that entails. This appears to protect the title 'podiatrist' without restricting the practice of unregistered persons. Because the Panel accepts that some procedures involve the risk of serious and even irreversible harm, it cannot recommend unrestricted practice.

There are many consumers at elevated risk when receiving care of their feet. These include;

- diabetics, often un-diagnosed, with sensory loss, poor circulation (and therefore poor healing) where injuries can result in infection, ulceration and gangrene
- persons with peripheral vascular disease, and especially persons with cardiac disease who are unaware of the effects on the lower extremities
- older persons with complex medication regimes for arthritis which increase the risk of bleeding
- older persons with reduced circulation who are more prone to trauma and infection, both from bacteria and fungi
- persons with hepatitis B, C or D, and HIV, often undiagnosed, increasing the risks of secondary and cross infection.

With all of these groups, the cause of concern is the use of sharp instruments which may penetrate the skin. This is the only aspect of practice by unregistered persons, especially in relation to the cutting of toe nails, that the Panel believes needs some form of coverage by the Act. The Panel's main objective is to maximise access to foot care, by removing from the Act restrictions on practices that involve little danger, and arriving at a workable system to minimise the risks posed by sharp instruments.

There is clearly a need for cutting of toe nails, and removal of dead skin, especially among elderly persons, which is not currently or likely to be met by chiropodists/podiatrists. The Council on the Ageing for example, submitted that '*--aides to assist with uncomplicated toe nail cutting--could perhaps reduce the long waiting lists for older people at day therapy centres*'⁴ There is anecdotal evidence that unregistered and untrained persons are providing such services for fee or reward, but the Panel had no ready way to estimate the extent of this.

The Panel believes that training programs could be established, subject to Board approval, which would allow unregistered persons to perform these tasks. This would need to be complemented by prior assessment of each consumer by a chiropodist/podiatrist, to ensure that referral is appropriate.

³ Victorian Podiatrists Registration Act 1997, Section 58

⁴ Council on the Ageing Page 1 (received 26/11/98)

The panel envisages a situation where some periodic re-appraisal by a chiropodist/podiatrist would also be required. This could be as prescribed by the individual making the referral, and/or after a maximum period established by the Board, and promulgated in a code of practice.

The training could accredit existing public sector health workers, such as personal care attendants, to include these tasks in their range of duties. In the private sector, podiatrists may seek to employ such persons for the sole purpose of work in this field. Such an arrangement would require deletion of Section 39 of the Act, which prohibits employment in a chiropody clinic of an unregistered person who is ‘--assisting in the practice of chiropody--’.

In New South Wales, the definition used for podiatry is ‘ *diagnosis, treatment and prevention of ailments or disorders of the foot*⁵, which is practice restricted to podiatrists. This is differentiated from ‘basic foot care’, defined as ‘*fundamental attention given to normal toe nails and skin surfaces of the foot, including the cutting of toe nails the removal of superficial dead skin material interdigitally and the application to the skin of emollients or rehydrating agents--*⁶’.

However, it is important to note here that the Skin Penetration Act in New South Wales separately regulates the use of sharp instruments, especially with regard to sterilisation, so their Chiropody/podiatry legislation does not have to deal with the issues raised by unregistered persons cutting toe nails. The New South Wales definition of podiatry, like that in the South Australian Act, also restricts practice in aspects of foot care which are not likely to cause harm. As one respondent puts it, regarding the SA Act;

‘-- a massage practitioner or foot reflexologist who can offer temporary relief of pain by massage, may risk prosecution--clearly this is too ambiguous to be regulated.’⁷

However, a more exact definition of the specific practices in chiropody/podiatry which should be restricted to protect the public would be complex and require regular updating. One approach to limit the problem would be to leave something like the current definition in the Act, and also define what is not chiropody/podiatry, thereby reducing unintended restrictive effects. Inserting the New South Wales definition of ‘basic foot care’ into the Act would achieve this, although a reference to massage should be added, and cutting of toe nails removed. Unregistered persons practising within such a definition would then be unrestricted.

This could then be complemented by a simpler, less technical definition of chiropody/podiatry than the one in the current Act. The net result of the panel’s conclusions would be three classes of persons in this field; viz;

registered podiatrists,

unregistered persons able to provide basic foot care not including the use of sharp instruments, and,

trained persons able to offer basic foot care including the use of sharp instruments, subject to prior assessment and periodic re-assessment of every consumer by a podiatrist.

The Panel recommends inclusion of a section to the effect that ‘*nothing in this Act restricts unregistered persons from providing basic foot care for fee or reward, including fundamental attention given to normal toe nails and skin surfaces of the foot, including the care of toe nails, the removal of superficial dead skin material interdigitally, massage and the application to the skin of emollients or rehydrating agents. This does not include any procedure involving the use of sharp instruments capable of penetrating the skin.*’

The Panel recommends replacement of the current definition of chiropody/podiatry in Section 4 of the Act with the words ‘*the diagnosis, treatment and prevention of disorders of the foot and related structures, including surgery and the prescription of orthoses*’

⁵ New South Wales Podiatrists Act 1989, Section 3(i)

⁶ *ibid*, Regulation 21

⁷ Australian College of Tactile Therapies (received 5/11/98)

The Panel recommends deletion of Section 39 of the Act, to allow for unregistered persons to provide basic foot care including use of sharp instruments, provided they have completed a program of training approved by the Board, and provide such care only to persons previously assessed, referred, and periodically re-assessed by a registered podiatrist.

2.3 Section 32 of the Act, ‘De-registration and Suspension’

The Act provides grounds for disciplinary action if a chiroprapist:

- a) improperly obtains registration
- b) is found to be mentally incapacitated
- c) is found guilty of unprofessional conduct
- d) is convicted of an offence against the Act, or any indictable offence

Nature of the Restriction

The concept of “unprofessional conduct” may create a serious restriction depending upon the manner in which the Board interprets the term. Most Boards are guided by the finding of Chief Justice Bray, in 1975, who summarises thus:

‘Unprofessional conduct is not necessarily limited to conduct which is ‘disgraceful or dishonourable’, in the ordinary sense of those terms. It includes conduct which may be reasonably held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency.’

The Board can also turn to the ‘Chiropody Code’, which is in the Second Schedule of the Regulations, and is therefore legally enforceable Clause 18 reads thus;

‘Every chiroprapist must--

- (a) do his or her utmost to uphold the honour and status of the chiropody profession, and,*
- (b) refrain from any conduct that is or may be detrimental to the honour or interests of the chiropody profession or is calculated to bring the profession into disrepute’*

The Chiropody Code includes very little guidance on the specific competencies that the Board measures against when considering complaints of unprofessional conduct. This may tend to reduce the transparency and therefore the predictability of the Board’s decisions on such matters.

Given that the powers of the Board are suspension or cancellation of registration, and costs can be awarded against individuals, there may be a serious restriction upon competition by the individuals concerned, and a trivial to intermediate restriction on the wider market for chiropody practices.

Public benefit

If registration is designed to protect the public by providing an effective means for consumers and employers to choose competent practitioners, then there will also be public benefit if harmful or potentially harmful conduct by registered chiropractors is acted upon to prevent re-occurrence. This is especially true of situations where no demonstrable harm has occurred as yet, or where the conduct cannot be addressed adequately by other means--eg, in public sector agencies by bureaucratic disciplinary procedures, or by action in a court of law.

Costs

If the definitions of professional misconduct and disciplinary procedures of the Board excessively restrict the availability of practitioners, or the scope of practice of any practitioners, there will tend to be increased costs in obtaining chiropractic services. For individual practitioners there may be significant costs in loss or curtailment of practice rights.

Discussion

The Panel asked '*Does the concept of 'professional misconduct' in the Act reflect community and professional expectations?*' and, '*Should the standards used by the Board in such matters be more widely publicised?*'

Many submissions commented on this aspect of the Act, with the only consistent theme being the need to make the Chiropractic Code more widely known ('transparent'). Opinion varied greatly on the standards against which conduct should be judged. Some wanted to limit the Board to intervening '*only when a case is proved in court and found for the plaintiff,*'⁸ while others proposed a more detailed and comprehensive set of enforceable definitions in the Act.⁹ In the Panel's view, the purpose of the Act is to protect the public, and therefore concepts in the Chiropractic code such as chiropractors doing their '*--utmost to uphold the honour and status of the chiropractic profession*' belong more to the objectives of the professional associations than in a legally enforceable appendix to legislation.

More recent pieces of legislation, such as the Medical Practitioners Act 1983, contain definitions that have proved effective bases for handling complaints, both in formal and informal resolutions. That Act (Section 5, with podiatry inserted rather than medicine) states that;

'Unprofessional conduct includes--

(a) improper or unethical conduct in relation to the practice of podiatry; and

(b) incompetence or negligence in relation to the practice of podiatry; and

(c) a contravention of or failure to comply with--

(i) a provision of this Act; or

(ii) a condition imposed by or under this Act, in relation to the registration of a podiatrist under this Act

The Panel believes that this definition, placed in the body of the Act, would make the standards applied by the Board more transparent, and should lead to modification of the terminology used in the Chiropractic Code.

The Panel recommends that Section 4 (*Interpretation*) be amended to include the definition (reworded for chiropractic/podiatry) of unprofessional conduct used in the Medical Practitioners Act 1983

2.4 Section 34 of the Act--Appeals against orders of the Board

⁸ P J Smith (received 19/11/98)

⁹ Australian Podiatry Association SA Inc page 4 (received 26/11/98)

Any order of the Board may be appealed in the Supreme Court, within one month of the order being made.

Nature of the restriction

It is possible that some persons aggrieved by a decision of the Board may find appeal to the Supreme Court too unwieldy and/or expensive to exercise. This could therefore increase the restrictive impact of the original decision.

Several other professional regulatory acts provide for Tribunals, and/or for appeals to the Administrative Appeals Court or the District Court. Essentially, anyone in any jurisdiction can eventually appeal to the Supreme Court, but when this is the only available course, such a mechanism may have a distorting effect on the decisions of all parties involved in a matter.

Public Benefit

There is benefit in practitioner and consumer complainants being able to appeal the decisions of the Board, to reinforce natural justice and greater accountability of the Board for its actions.

Costs

As discussed above.

Discussion

The Panel asked, *Is it reasonable to expect appellants against Board determinations to take up the matter in the Supreme Court? Are there alternative methods of appeal that would be effective and more accessible?*

A number of respondents raised concerns about the possible cost of such an appeal. The only argument put for the current system was that the three tiers of Board then Tribunal then Supreme Court seemed 'a workable arrangement'¹⁰ However, there is clearly a substantial body of experience building up in the Administrative Appeals Court, and proceedings there are likely to be much lower in cost. There is in any case always a further right of appeal to the Supreme Court.

The Panel recommends that Section 34 of the Act be amended to provide for appeals to the Administrative Appeals Court.

2.5 Sections 35 to 39 Licensing of Chiropody Clinics, and, Regulations 22 to 26--Equipment and Facilities

This Act sets out to regulate standards in premises used for the practice of chiropody, which are owned/operated by unregistered persons. Non-compulsory annual licensing, together with regular inspections by officers of the Board, covers such matters as hygiene, equipment, space, lighting and storage of materials.

Nature of the Restriction

These requirements create an intermediate to serious restriction on practice, depending on the current standards and the rigor the Board applies in their implementation. They are unusual requirements for a registration act. More often, such physical standards are achieved through a combination of dependence on the professionalism of registered persons, and general public health legislation. The Regulations specify the requirements for suitable premises which are binding on registered chiropodists, including the standard AS4187 which covers sterilisation and procedure validation.

¹⁰ Michael Jelly, page 3 (received 9/11/98)

The non-compulsory provisions for chiropody clinics may have the dual effect of discouraging unregistered persons from seeking a licence to operate a clinic, and diffusing the accountability of the registered person to ensure an appropriate treatment environment.

Public Benefit

The combined effect of these provisions is that any premises where a chiropody service is provided, and any equipment used by a registered person must by law meet certain standards. This will reduce the risk of harm and discomfort to consumers, and may serve to reinforce the confidence of the public in the standard of chiropody practice in SA.

Costs

Meeting these standards may impose considerable costs on registered and unregistered persons, including maintenance, equipment and licence fees, which may be sufficient to deter provision of chiropody services.

Discussion

The Panel asked, '*Is the licensing of Chiropody Clinics and setting of minimum standards for other premises a necessary restriction?*', and '*Would it be more appropriate to clarify the accountability of registered Chiropodists to ensure services are always carried out in safely in suitable premises?*'

Submissions on this matter varied. All agreed that safe standards of equipment and hygiene are essential, but some believe that more checking by the Board's inspectors is urgently required, while others saw this area as one for local government to police.

The Panel believes that it is inappropriate and unnecessary to attempt this type of regulation through a professional registration act. The principal purpose of the legislation is public protection through reinforcing the professional standards and accountability of chiropodists/podiatrists. The argument was put that owners who are not registered may pressure chiropodists/podiatrists to provide services in unsafe conditions, particularly where the location is used infrequently, sometimes for a variety of purposes.

The Panel believes that qualified practitioners should be well aware of acceptable standards of hygiene, equipment maintenance etc, and should under no circumstances consent to work in unsafe conditions that put consumers at risk (these standards are currently set out in full in Regulations 22 to 26). If they do, and this comes to the attention of the Board, this should be dealt with as a matter of unprofessional conduct.

In such a case it is possible under the present Act to inspect the premises which are the subject of concern, and effectively render them inoperative by prohibiting any registered person from working there until problems have been rectified. Section 21a allows for inspection of any premises '*used by a registered chiropodist*' without even the prior requirement of a complaint, so there is no question of the Board's authority to act in this way.

The Board should maintain and promulgate standards for premises and equipment, but these will be better located in codes of practice authorised by an appropriate section of the Act. Codes can be updated without having to be gazetted or approved by Executive Council, giving the Board much greater flexibility to adapt to changing circumstances. In that context Regulations 22 to 26 will be superfluous, as will Sections 35 to 39 of the Act (Licensing of chiropody clinics)

The Panel recommends that Regulations 22 to 26 ('Equipment and Facilities') and Sections 35 to 39 ('Licensing of chiropody clinics') be deleted, and that authority for the Board to promulgate codes of practice, including care of premises and equipment, be included in the appropriate Section of the Act.

2.6 Section 7-- Membership of the Chiropody Board

The Act provides for an orthopaedic surgeon (nominated by the AMA), a representative of the University of SA, and four chiropodists, elected by registered chiropodists.

Nature of the Restriction

This section may tend to restrict competition in that it discriminates between competitors by not allowing for membership of persons other than registered chiropodists who may be entitled to practice in a closely related area. It may therefore tend to produce a pattern of decisions which restrict competition from these groups. It might also not adequately reflect the views of employers of chiropodists, which may lead to restrictions on their capacity to provide chiropodist services in a cost-efficient manner. It also excludes representation of consumers, which may result in less emphasis on demonstrated public benefit as the only justification for restrictions.

The section is likely to be a trivial restriction on competition, as long as the operations and decisions of the Board are transparent.

Public Benefits

There may be a public benefit in the majority of members of the Board having a specific knowledge of the profession. There may also be a higher rate of compliance with the policies of the Board from within the ranks of registered chiropodists because of its composition. There may be benefit in representation of the University of SA because that organisation will be kept up to date with new training requirements and possible shortcomings in the current courses. There may also be benefit in the presence of an orthopaedic surgeon, to bring expert knowledge of the muscular-skeletal system to the decision-making processes of the Board.

Costs

Not applicable

Discussion

The Panel asked '*Is the membership of the Board appropriate in view of its functions and the the objectives of the Act?*' Several submissions recommended the inclusion of a consumer representative¹¹

Other issues raised were the need for a medical practitioner, the possible need for a legal practitioner, and the appropriateness of anyone other than chiropodists/podiatrists being on the Board.

The Panel concluded that the interface between chiropody/podiatry and medical practice is significant, and that advice from medical practitioners is often necessary for the Board's deliberations. However, the requirement that this be provided by a standing member (rather than by consultation as required) is less clear, and places unnecessary restrictions on the Government's capacity to appoint other persons with the necessary expertise.

Most recent legislation in this field, both in South Australia and other Australian jurisdictions, provides for Board membership by a consumer and a legal representative. The rationale for a consumer is self-evident, and the usefulness of legal knowledge in a context of complaints, hearings, interpretations and appeals has been well demonstrated on numerous other regulatory boards and similar bodies. However, the Panel believes that the Government needs maximum flexibility to appoint persons other than podiatrists who have appropriate expertise, and proposes to leave this choice up to the Government of the day.

The specific requirement for a representative of the University of South Australia is inappropriate, given the proposed amendments to Section 30 addressed at 2.1 above. In the short term, this is unlikely to lead to change, as the University of SA is the only training provider in this State at present, but it is important that the Government retains the option to appoint a person with the appropriate educational skills and knowledge, regardless of their current employment.

¹¹ eg, Australian Podiatry Association, op cit, page 6, and Council on the Ageing (received 26/11/98)

Concern was expressed by the Board members that the resulting composition would not include enough podiatrists to manage the investigative aspects of the Board's functions. The majority of the Panel believe that the small number of practitioners relative to other regulated professions in this state does not warrant a larger Board.

The majority of the Panel recommends that Section 7 of the Act be amended to provide for membership by:

- three persons who are not podiatrists
- three podiatrists elected as provided in Part 11 of the Regulations.

2.7 Second Schedule, clause 17 of the Chiropody Code--Prohibition on sharing profits with an unregistered person

A registered chiropodist must not enter into an agreement to share profits with an unregistered person, or enable an unregistered person to practice chiropody for fee or reward.

Nature of the restriction

The Act is silent on most matters pertaining to business arrangements; such as who can own chiropody practices, and how many chiropodists they can employ. There is also no provision made for registration of a company as in several other acts. However, the restriction in this clause has the effect of preventing any persons other than a registered chiropodist from being a business partner of a chiropodist.

This would be an intermediate restriction for an unregistered person wishing to own a chiropody practice, but not serious, in that they can employ chiropodists in a licensed or unlicensed clinic. It could be an intermediate restriction on a registered person, in that they cannot choose to go into most forms of business partnership with, eg, a group of health workers from other professions in a joint clinic.

Public Benefit

There may be benefit in ensuring that a group practice is made up entirely of persons who are directly accountable to the Board, so that any handling of complaints will not be confused by the presence of partners who are not accountable.

Costs

There may be less incentive to enter the marketplace for chiropody service provision because of the restricted forms of business partnership available, which may reduce the opportunities to expand business, or to structure taxation arrangements to best advantage.

Discussion

The Panel asked *'Is the restriction on sharing profits with unregistered persons justified in the public interest?'*

Several submissions addressed this point. One¹² referred to the potential for *'conflict between pragmatism and professional practice'* a concern echoed by several others. The Australian Podiatry Association¹³ disagreed, stating that *'--the podiatrist is liable to ensure that the provision of podiatry services is not compromised by a business agreement.'*

A number of South Australian Acts regulating professions have restrictions on ownership of practices. Some do not, but have provisions which are designed to give Board control of owners not registered in the relevant profession, including care of their premises and equipment, advertising and employment of appropriately qualified persons

The underlying concern that has led to these restrictions is that unregistered persons in control of a business providing professional services may not be subject to an adequate level of accountability to protect the public interest. This could lead to such problems as the following:

- attempts to influence registered persons to provide inadequate services which might put consumers at risk
- attempts to influence registered persons to over-service
- undermining of the registered person's accountability to the Board and/or consumers--eg, by claiming the responsibility is with the unregistered owner, who is not accountable to the Board
- inappropriate use of confidential consumer information

The Victorian Government has included a general provision in several of their professional regulation acts, which makes it an offence;

'--for an employer, registered person or company practitioner to exert undue influence over a health practitioner (chiropodist/podiatrist in this case) to provide a service in a manner detrimental to the safety of the consumer'.

The objective is to ensure that unregistered proprietors are also accountable to the Board, where there is any confusion as to final responsibility. This concept requires further examination, as it is very recent and is not adequately 'field tested' for ease of interpretation and implementation. If it turns out to be effective, such a clause could well be inserted in a number of South Australian Acts.

For the time being, the Panel believes that the professional accountability of podiatrists/chiropodists, and the power of the Board to inspect and effectively put premises 'off limits' for practice by registered persons, are sufficient safeguards against unsafe practice.

¹² Dr J Pickering (verbal submission, received 19/11/98)

¹³ op cit page 6

2.8 Second Schedule, The Chiropody Code, clauses 3 to 15--restrictions on advertising

The Chiropody Code, which has legal force pursuant to Section 47 (db) of the Act, contains extensive restrictions on advertising by registered chiropodists. The Schedule states (clause 3)

'A chiropodist must not advertise his or her services or professional practice other than in accordance with this code'

The Schedule then details the required (and prohibited) forms of content, layout, size and location of newspaper advertisements, use of signs, appointment cards, directory entries and other matters.

Nature of the Restriction

The limitations and prohibitions of the Schedule go well beyond the requirements of consumer protection and trade practices legislation, and would constitute an intermediate restriction on registered chiropodists wishing to use advertising as a means of increasing their market share. The restrictions may also make it more difficult for consumers of chiropody services to compare the effectiveness and cost of treatment from different chiropodists.

Public Benefit

The restrictions minimise the risk of misleading advertising, which could lead to unnecessary treatment, and may lead to lower costs of service overall through restricting the size and therefore cost of various forms of advertising.

Costs

Consumers face increased costs of identifying the most appropriate chiropody service provider, as chiropodists are largely prevented from competing to draw attention to the relative merits of their practice.

Discussion

The Panel asked, *'Are the restrictions on advertising necessary to protect the public?'*

Most submissions favoured less restrictive provisions than currently in place. Some felt that innovative and/or younger practitioners were disadvantaged, with one respondent speaking of the need for a *'--level playing field for the development of innovation'*.

The Australian Podiatry Association favours a clause which addresses false, misleading or deceptive advertising, but also seeks to prohibit discounts and other inducements, the use of testimonials, attempts to contrast other podiatrists' services unfavourably, and a clause to make any person connected with such advertising guilty of an offence¹⁴.

¹⁴ op cit page 7

The Panel believes that the Trade Practices Act restrictions on 'false, misleading or deceptive' advertising are generally sufficient, as long as they are explicitly repeated in the Act, giving the Board the power to take immediate action when necessary. The prohibition of discounts, testimonials and detailed descriptions of services available may well be requirements for membership of professional associations, but it is difficult to see how they relate to the protection of the public, and therefore they do not belong in legislation.

The Panel recommends that clauses 3 to 15 of the Chiropractic Code be deleted.

3: Administrative Requirements

The Review Panel is required during the course of this review to examine the provisions of the Act which impose administrative obligations upon persons and determine whether these obligations are unnecessary or impose an unwarranted burden. The provisions of the Act which impose such administrative requirements are:

Regulation 17--Application for Registration (including application fee of \$150, and annual subscription of \$150)

Regulations 22-26 Equipment and Facilities

Discussion

The Panel asked, 'Do any of these administrative requirements impose unnecessary expense or other burden on any persons affected by the Act?'

As the Panel has recommended deletion of Regulations 22 to 26, any restrictive effects will not be considered further.

The application and annual registration fees (Regulation 17) did attract comment, with two respondents¹⁵ stating that they were too high. They were seen as unjustified (because the respondent believes the cost of records administration should have reduced with computerisation), and also too expensive for young graduates in their first year of practice. New graduates pay a full year registration fee when it is most likely that they will not register until January, consequently receiving only six months registration.

The Panel recommends :The Board allow new graduates registering after January 1st registration for the subsequent portion of that financial year for half the annual fee.

The fees are much the same as for other jurisdictions, except for Tasmania being much lower (\$50) and Western Australia the most expensive (\$200). It is possible that costs will reduce slightly as a result of removing the need to inspect premises except where a complaint has been received. The current financial situation of the Board is sound (equity of \$59,000 at the end of the last financial year), but the Panel recognises the potential costs of legal actions, and sees this as an appropriate level of reserves.

Additionally, the Panel's recommendations, if implemented, will result in the need to develop and promulgate new codes of practice to all registered persons, and some sections of the wider community. It is likely that this will take up a significant proportion of the surplus generated by registration fees in each of the past few years, so the Panel prefers to leave this matter to the current system of annual discussions between the Board and the Government.

appendix 1

COMPETITION POLICY REVIEW TEAM LEGISLATION REVIEW

TERMS OF REFERENCE

¹⁵ Gadd, op cit, and Australian Podiatry Association op cit.

SUMMARY

Under the Competition Principles Agreement ('the Agreement') the Government of South Australia is required to include in proposals for new legislation that contain restrictions upon competition evidence that:

- (a) the benefits of any restriction to the community outweigh the costs
- (b) the objectives of the legislation can only be achieved by restricting competition

The will be examined during the legislative review in accordance with the obligations contained in Clause 5 of the Agreement. Regulations enacted under the Chiropractors Act 1950 will be examined concurrently.

REVIEW PANEL

Dr David Filby Department of Human Services (chairing)

Ms Geraldine Treloar Chiropractic Board

Mr David Meldrum Department of Human Services

Executive officer to the Review Panel, Ms Susan Golley, Department of Human Services

OBJECTIVES OF THE REVIEW

When considering the appropriate form of regulation, the Review Panel will attempt to achieve the following objectives:

1. Regulation should only be retained where the benefits to the community as a whole outweigh the costs: and if the objectives of the Chiropractors Act cannot be achieved more efficiently through other means, including non-legislative approaches.
2. Pursuant to Clause 1 (3) of the Agreement, in assessing the benefits of the Chiropractors Act, regard shall be had, where relevant, to:
 - effects on the environment
 - social welfare and equity
 - occupational health and safety
 - economic & regional development
 - consumer interests, the competitiveness of business including small business
 - efficient resource allocation

Compliance costs and the administrative burden on small business should be reduced where feasible.

TERMS OF REFERENCE

ISSUES TO BE ADDRESSED

1. Clarify the objectives of the Chiropractors Act 1950, including the identification of the public benefit of the Act, and provide assessment of the importance of these objectives to the community.
2. Identify restrictions to competition contained in the Act, regulations made under the Act, Codes of Practice and other relevant documents
 - 2.1 describe the theoretical nature of each restriction (eg: barrier to entry, restriction to competitive conduct within the market, discrimination between market participants)
 - 2.2 identify the markets upon which each restriction impacts
 - 2.3 provide initial categorisation of each restriction (ie: trivial, intermediate or serious)
3. Analyse and describe the likely effects of these restrictions on competition in the relevant markets and on the economy generally:
 - 3.1 what are the practical effects of each restriction on the market ?
 - 3.2 assign a weighting to the effect of each restriction in the market
 - 3.3 assess what is the relative importance of each restriction in a particular market to the economy as a whole
4. Assess and balance the costs and the benefits of the restriction.
5. Where the restriction is justifiable on the basis of public benefit, consider whether there are practical alternative means for achieving the objectives of the the Chiropractors Act 1950, including non-legislative approaches.
6. Consider whether any licensing, reporting or other administrative procedures are unnecessary or impose a burden on any person.

CONSULTATION

The Review Panel reviewed submissions received in the consultation process undertaken within the prescribed period. A list of Key Interest Groups was compiled and provided with a copy of the Draft Review Panel Report for comment.

REPORT

The Report to the Minister will contain:

Terms of reference for the Review
 Persons and groups consulted
 Analysis and recommendations

appendix 2**Documents Consulted**

Crown Solicitors Office Re 'good fame and character' and undertakings
(October 1995)

South Australian Chiropody Board 'Proposed Legislation--Podiatrists Act 1998

Australian Podiatry Council Competency Standards and Related Assessment Methods June 1994

South Australian Chiropody Board Annual Report for year ended 30 June 1998

INITIAL CONSULTATION LIST
appendix 3

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 ADELAIDE SA **5001**

Australian Podiatry Association
 315 Payneham Road
 ROYSTON PARK SA **5070**

Australian Nursing Homes & Extended Care Assoc
 SA Inc
 11/71-73 Fullarton Road
 KENT TOWN SA **5067**

Australian Podiatry Association, Public Sector
 Interest Group
 315 Payneham Road
 ROYSTON PARK SA **5070**

Mr J Price
 Australian Podiatry Council
 41 Darby Street
 COLLINGWOOD VIC **3066**

Ms G Jackson
 Council of the Ageing
 43 Flinders Street
 ADELAIDE SA **5000**

Disability Complaints Service
 3/ 178 Henley Beach Road
 TORRENSVILLE SA **5031**

Carers Association of SA Inc
 93 King William Road
 UNLEY SA **5061**

University of South Australia Faculty of Health &
 Biomedical Science
 City East Campus North Terrace
 ADELAIDE SA **5000**

Orthopaedic Rehabilitation Products
 51 Drake Avenue
 FLINDERS PARK SA **5025**

The Orthotic Factory
 219 The Parade
 NORWOOD SA **5067**

Acute Ankle Guard
 32 Edmund Street
 NORWOOD SA **5067**

Australian College of Massage Therapies
Floor 3, 47 South Terrace
ADELAIDE SA **5000**

SA Health Education Centre Pty Ltd
Floor 6, 38 Currie Street
ADELAIDE SA **5000**

ISSUES PAPERS RESPONDENTS**appendix 4**

Australian College of Podiatric Surgeons

Australian College of Tactile Therapies

Australian Podiatry Association

Australian Podiatry Council

Council on the Ageing

University of South Australia

P J Smith

S & T Gadd

Dr J Pickering

Dr M Jelly