

COMPETITION POLICY REVIEW TEAM

DEPARTMENT OF HUMAN SERVICES

NATIONAL COMPETITION POLICY

LEGISLATION REVIEW

OPTOMETRY ACT 1920

REPORT OF THE REVIEW PANEL

MARCH 1999

The views expressed in the Report 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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EXECUTIVE SUMMARY

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

The Panel recommends that the object of the Act be changed to include in this and all subsequent relevant sections the inclusion of optical dispensers.

The Panel recommends no change to title protection as set out in Section 20 & 21.

The Panel recommends that Regulation 10 & 11 be deleted and replaced by a section to the effect that the person must hold optometry or optical dispensing qualifications acceptable to the Board.

The Panel recommends that Section 20 & 21 continue to include the words ‘is a fit and proper person’

The Panel recommends: Section 27 undergo review

1) In the matter of Optometrists part (d) of the definition must reflect the likely changes to the use of drugs by optometrists.

2) In the matter of Orthoptists option (c) be supported ie no need to consider a regulatory framework for Orthoptists as there is a self regulatory body in place, South Australia can choose to recognise the scope of practice of orthoptists within the Act and not regulate.

3) In the matter of Optical Dispensers no changes are recommended, although the Panel notes that future training options could well change the competencies of dispensers, such that current restrictions, eg, on fitting of contact lenses, could be re-considered.

The Panel recommends : The Act include an enablement of the ‘Code of Conduct’ to allow it to be used formally as a reference for minimum standards of behaviour, but able to be altered from time to time to reflect contemporary professional practice and community expectations.

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

The Panel recommends: Review of all sections of the Act pertaining to the separate functioning of the Optical Dispensers Registration Committee with a view to amalgamating its functions with the Board.

The Panel further recommends: The membership of the Optometry Board be such that there is appropriate representation of the each of the registrant professions. Consumers, employers and educators may be appointed by the Governor.

The Panel recommends: Regulation 6 & 7 be deleted .The Panel recommends no change to the level of fees, which can be varied from time to time by negotiation between the Board and the Government.

INTRODUCTION

The following report concerns the review of the Optometrists Act 1920. 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 Optometrists 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 Optometrists Act are unnecessary or impose an unwarranted burden on any person.

References to sections are references to sections of the Optometrists Act 1920 unless indicated otherwise. References to regulations are references to regulations contained in the Optometrists Regulations 1996.

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.

Our contact details are:

Competition Policy Review Team
Department of Human Services
Level 4, Citi Centre Building, Hindmarsh Square
Telephone (08) 8226 6313
Fax (08) 8226 7363
e-mail Susan.Golley@health.sa.gov.au

The closing date for submissions is 20 February 1999

Part 1: CENTRAL ISSUES

1.1 Purpose of Act

The purpose of the Act is:

“An Act to provide for the registration of optometrists and optical dispensers; to regulate the practice of optometry; and for other purposes”

The usual aim of such registration acts are to protect the public, in this case principally by ensuring optometry 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 issue is the omission of reference to the Registration of optical dispensers who are registered under this Act.

Submissions endorsed the need to highlight protection of the public in the purposes of the Act, and the review Panel recognised the requirement to include reference to optical dispensers to ensure that the purpose of the Act is accurate.

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 object of the Act be changed to include in this and all subsequent relevant sections the inclusion of optical dispensers.

The Act establishes systems of registration of optometrists and optical dispensers and for addressing unprofessional conduct. The Act establishes the Optometry Board of South Australia and the Optical Dispensers Registration Committee and empowers them 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.

Optometrical practice markets

The provision of optometry services is undertaken by optometrists who assess and prescribe the need for prescription lenses to assist vision as well as provide preventative and continuing ocular health services. Also in the market are optical dispensers who make and provide lenses for glasses and contact lenses but generally do not have a clinical role in ocular care. These groups are regulated by the system of registration established by the Act.

Medical practitioners, and specifically ophthalmologists are exempted from the provisions of the Act but undertake optometrical practices up to and including prescribing lenses. Orthoptists either in the employ of a hospital or ophthalmologist and more rarely self-employed are not mentioned within the act although they are in some measure in the market.

The extent, if any, to which provisions of the Optometry Act restrict competition from other providers of similar practices such as orthoptists is relevant to this review. Professional conduct and advertising restrictions also affect this market, as does the sale of non-prescription glasses.

Training markets

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

Six broad categories of restriction have been identified in the course of reviewing the Optometrists Act:

- title protection;
- practice protection;
- professional misconduct
- approval of training
- advertising by optometrists
- the sale of non-prescription glasses

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 optometrist or optical dispenser to practice optometry or optical dispensing.

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.

The practice of optometry is defined in the Act Section 1 (3)¹

- (a) the measurement of the power of vision;
- (b) the prescription of optical appliances;
- (c) the dispensing of prescriptions for optical appliances
- (d) the use of drugs for the purpose of detecting abnormalities of the eye or in connection with the fitting of optical appliances;
- (e) any related services of a prescribed kind;

Professional Misconduct

Restrictions upon conduct in the optometry or optical dispensing professions contained within the Optometrists 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 Codes of Conduct and other standards are applied by the Optometry Board and the Optical Dispensers Registration Committee.

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

Advertising by optometrists

Advertising as restricted by the Act, is in general in line with Trade Practices Act with the exception of the restriction on the comparison of practices and the use of testimonials. As these are not in line with TPA guides they are possibly restrictions on competition in advertising.

Sale of non prescription glasses

The sale of non-prescription glasses is a trivial restriction in the market of optometry, but may be an intermediate restriction in the retail forum. the current position is unresolved and described.

1.4 Costs

Two categories of cost arise from the training restrictions contained in the Optometrist Act.

Firstly, the restrictions upon registration and re-entry to the profession and protection of practice may cause the supply of persons providing optometry services to be less than the demand. Restricting numbers of practitioners could cause the cost of optometry services to rise. This therefore, would be a cost upon the community. Current workforce information does not reflect an under or over-supply of optometrists or optical dispensers, and therefore relative costs to the consumer are limited.

The second category is compliance costs for practitioners. ¹These are the costs of registration, and of complying with standards of competency. These costs impact upon competition if they are sufficient to dissuade participation in the market for optometry services, or are substantial and passed on to consumers as an element of the price charged for optometry services. The cost of registration as a part of the potential earning capacity of the registered person is minimal and is in line with the cost of registration in other states. Optical dispensers in Victoria are not registered and therefore are not effected by this cost.

1.5 Public Benefits

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

The protection of the public in the market of ocular services is important due to the irreversible nature of some procedures and the use of prescription medication.

Given that many consumers may be elderly or infirm persons seeking advice and treatment for vision disorders, there is a strong case for minimising their exposure to misinformation, misdiagnosis and inappropriate treatment. There is an element of trust in the performance of the practitioner, especially in the prescription and fitting of lenses which may offer only comparative improvement in vision.

Restrictions on conduct and on supervision of premises where optometry occurs may also reinforce public confidence in the standards of professional care provided by registered optometrist or optical dispenser.

¹ Optometrists Act 1920 , Section 1 (3)

Public benefit issues of restriction of practice in the Optometry market:

- inappropriate or inaccurate prescriptions for lenses may cause serious harm to the wearer or they may come to harm due to a change in their vision that is not assessed, monitored or evaluated correctly. There is significant public benefit in ensuring that this does not occur and that assessments and evaluations are undertaken by persons who are responsible and accountable for their practice.
- the ability of an optometrist to introduce drugs into the eye must be monitored to ensure that only appropriately trained person undertake the procedure. This is of greater importance with the concurrent drive to increase the range of drugs, of a therapeutic nature that optometrists will have direct access to. There is no professional group who undertake the use of prescription medication without a system of registration and regulation of practice that aims to protect the public.
- the prescription, fitting and aftercare of the patient wearing contact lenses requires a level of knowledge and experience that must be monitored. Eye damage from improperly or poorly fitted contact lenses that is potentially catastrophic in outcome. ie permanent eye damage or vision loss.
- information asymmetry exists in the market and consumers require access to information about the range and types of services that may be available. Until this is at least partly addressed the consumer is reliant on the advice of participants in the market place for advice.

1.6 Other States and Territories

New South Wales

NSW has two pieces of legislation, an Optometrists and separate Optical Dispensers Act. The restrictions on the practice of both groups are similar to those found in South Australia. The Optical Dispensers legislation does not appear in the current time table for review. The numbers of practitioners are naturally much higher than those in SA, and separate management of the legislative requirements is possibly justified.

The issue of the extension of the pharmaceutical role of Optometrists has been canvassed heavily following recommendations from a Clinical Issues Working Party. The aim is to extend the role of the optometrist to treat 'minor anterior eye conditions'² by changing the range of medication available to the optometrist without recourse to a medical practitioner.

The NSW Act also acknowledges Orthoptist. It defines orthoptic treatment as:

"the employment of ocular exercises for the correction, remedying or relief of any abnormality or defect of sight". Orthoptists are prohibited from prescribing spectacles or contact lenses.

Victoria

Optometrists in Victoria have recently been granted the extension to practice sought in NSW.

There are separate Drugs, Poisons and Controlled Substances (Optometrists) Regulations which allow them to administer, prescribe, sell and supply a Schedule 4 poison as long as:

- a) *that poison is for ocular treatment of a person under his or her care; and*
- b) *the optometrist has taken all reasonable steps to ensure a therapeutic need exists for that poison.*

It has been agreed that the drugs in this list be significantly extended, although the training of optometrists to use this extended practice has not been agreed.

The Optical Dispenser has no regulatory mechanism in Victoria, and it is not envisaged that this will change based on current practice and training.

Section 60 of the Victoria Optometrists Regulation Act 1996 (Unregistered persons) also provides an exception. It allows an Orthoptist to:

- a) *measure refraction and prescribe lenses or prisms for the aid of the power of vision that are not in the form of contact lenses; and*
- b) *Doing so at the request of, or on the referral of, a registered optometrist or a registered medical practitioner who practises as an ophthalmologist where the request or referral has been made within 6 months before that measurement or prescription.*

Queensland

The Act specifically prevents optometrists from performing 'surgery', although there is currently no concomitant definition of surgery in that or the Medical Practitioners Act. The core practice of an optometrist proposed in the Issues paper of September 1996 includes that of 'prescribing of optical appliances for the correction or relief of visual defects and the fitting of contact lenses'. There is a caveat that medical practitioners are exempt from any provision of the Act and there is a preference in legislative review to define surgery and who may perform it.

² NSW Health Department, Report to the Minister Feb 1998, Clinical Issues Working Party

Part 2: ANALYSIS OF RESTRICTIONS

2.1 The Act Part 3--Sections 20-23--Registration of optometrists, optical dispensers- title protection and approval of training

Section 20 outlines the prerequisites for registration as an optometrist , as does Section 21 for an optical dispenser. A person must have prescribed qualifications or equivalent, and be 'fit & proper' 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 due to the extensive tertiary training required in the case of an optometrist and the requirement for 800 hours of supervision for optical dispensers.

Tertiary qualifications are similar in the training of optometrists throughout Australia, and the registration of other qualified persons is at the discretion of the Board should they meet all other criteria and their qualification has met Mutual Recognition or NOOSR requirements.

The position of optical dispensers requiring up to 800 hours of supervision (Regulation 11, 2), may at first seem a severe restriction. Measured against the type of activity that the dispenser undertakes, and the skill level that must be developed, the public can only benefit from this level of supervision before competency is attained.

The degree of restriction also depends partly on how the Board interprets the phrase 'fit & proper'. 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, there are no training providers in South Australia for the training of optometrists, and a single training provider for optical dispensers. Regulations 10 & 11 prescribe the courses and define qualifications deemed suitable for registration, but the Act provides for the Board to be 'otherwise satisfied' that an applicant for registration has attained suitable qualifications for registration in South Australia.

Regulation 9 allows for additional qualifications to be entered on the Register at the discretion of the Board. There may be a relative advantage to practitioners in advertising such qualifications and a small fee applies. The registering of additional qualifications and their use in the marketplace assists consumers to choose a practitioner with specialised skills should this be their desire. It is generally not a matter of consideration unless there is a specific need, as most consumers are referred to a particular optometrist or make a choice base on geographical realities.

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 optometry practice, so the Act has limited impact. All optometrists are trained outside of the state and may register in the state where trained before seeking relocation to South Australia, the Mutual Recognition Act assists in the process of unrestricted entry to the market in South Australia.

Public Benefit

A system of registration of optometrists and optical dispensers aims to protect the public, particularly potential consumers, by ensuring that persons with the title ‘optometrist’ or ‘optical dispenser’ 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.

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 optometrists. The cost of registration itself is minor, but the full cost (ie, direct tuition costs and loss of income) 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.

The argument that the cost of services is set by Medicare and not affected by market forces has been used to refute that training costs are defrayed to the public. This may be true, as long as all optometrists use the Medicare fee scale and no other fee was charged. eg items for sale such as frames, optical care equipment and frequency of testing and other preventative 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 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/s 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.

Optometry practice and optical dispensing includes procedures that assist the consumer to manage not only ocular but systemic health.³ The response from the OAA also contends that title protection abolition would not reduce the costs to consumers, as the fee paid is set by Medicare (see comment above). They do not consider the fee that may be charged by a person working outside of those constraints.

The OAA makes a case for the abolition of the title protection for optical dispensers in stating that “as there is no risk to the public of physical harm”⁴. The Panel believes that the expanding role of optical dispensers, makes this increasingly untrue, and therefore the requirement for registration should stand.

³2 paraphrase from: Optometry Association of Aust (SA Branch) pg 3

⁴ ib id pg 4

2.2 Limited registration

The panel asked: *Is limited registration an effective tool for including persons in the field of optometry who might otherwise not meet the requirements for registration?*

There is a benefit to the public in limitations being placed upon the registration of persons where the skills or expertise of the person are insufficient for them to qualify for unrestricted registration. This provision enhances involvement in optometry by enabling the Board to provide limited registration to a person who otherwise would not qualify for registration and, therefore, would be prevented from practising altogether.

Provided that the criteria which the Board apply are based upon competency, and are applied consistently there are minimal anti-competitive costs of complying with this section. While limited registration is a restriction upon the individual professional, it is not an unjustifiable restriction upon competition in the market for optometry services.

2.3 Educational Requirements

The Panel asked *'Is there a net public benefit in government regulation of educational requirements for registration as an optometrist or an optical dispenser?'*

and

'Are the restrictions on training providers justified in terms of public benefit?'

The approval of training is undertaken by the Board with reference to national standards.

Optical dispensers may undertake training at TAFE in SA, but other qualifications are approved and currently are prescribed in Regulation 11⁵. The prescription of qualifications may act as a barrier to entry and the Board should have the power to approve training and qualifications as the market changes, courses expand or contract and new options for training are presented.

⁵ Optometrists Act Regulations 1996 Reg 11

The training of Optometrists is not undertaken in SA. There has been no course of study presented to the Board for accreditation in the recent past, but there is nothing in the current legislation to prevent this from occurring. The Optometrists Association of Australia notes in its electronic information that there “is neither an under-supply nor over-supply of optometrists in supply of manpower”⁶ indicating that there may be no call for a greater distribution of training at present. Regulation 10⁷ prescribes those courses which are approved by the Board and as previously stated, a less restrictive practice could be adopted to reflect the changing market and the requirement of consumers for the expertise of particular professionals.

As South Australia has a paucity of training of eye care professionals, the initial cost of establishing a practice in South Australia may be higher and thus this may be reflected in costs passed on to consumers.

The Panel recommends that Regulation 10 & 11 be deleted and replaced by a section to the effect that the person must hold optometry or optical dispensing qualifications acceptable to the Board.

The Panel asked *‘is the use of the criterion ‘fit and proper’ a necessary and appropriate restriction on entry to the profession?’*

The Panel believes that the term ‘fit and proper person’, as used in a number of similar professional registration acts other than the Optometrists Act is a suitable standard that has been and can continue to be applied by the Board.

The Panel recommends that Section 20 & 21 continue to include the words ‘is a fit and proper person’

2.4 Section 27 of the Act, and Regulation 11--practice of optometry by unregistered persons

It is an offence for any person other than a registered optometrist or registered medical practitioner, *‘for fee or reward, practise optometry’*. Optometry is defined in Section 1 of the Act.

The practice of optometry is defined in the Act Section 1 (3)

- (a) the measurement of the power of vision;
- (b) the prescription of optical appliances;
- (c) the dispensing of prescriptions for optical appliances
- (d) the use of drugs for the purpose of detecting abnormalities of the eye or in connection with the fitting of optical appliances;
- (e) any related services of a prescribed kind;

⁶ Optometrists Association of Australia Web site <http://www.optometrists.asn.au>

⁷ . Optometrists Act Regulations 1996 Reg 10

Nature of the restriction

The definition of optometry used in the act results in the restriction of the practice of optometrists, in that there are practices for which they are competent and educationally prepared that are currently not within the definition. There are no prescribed practices, making part (e) redundant at present. But with the current interstate move to extending practices to the use of more and different drugs which do not fit the current definition, it is likely that part (d) will restrict activities of optometrists who become competent in other states to use these drugs, and thus limit the public's ability to choose an optometrist over other established practitioners.

This definition also creates a serious restriction on other providers of ocular services. Regulation 13 'Practice of optometry by unregistered persons' defines those practices that are deemed appropriate for non-optometrists to undertake. The Orthoptic Association of Australia (SA Branch) has highlighted the need to review these restrictions⁸ This is an echo of similar responses received by reviewers in other states. The practice of orthoptists, while mainly confined to hospitals has the potential to expand to other arenas which would require the provision of an exemption within the Optometrists Act and its Regulations to ensure that the right to practice was achieved with recognition of the potential of the professional group to provide services.

The Panel saw three alternatives regarding orthoptists; viz

a) a general exemption for orthoptists as applied to medical practitioners such as would reflect other acts ie Chiropractors & Physiotherapists where recognition is given to the similarity of practice without direct competition in the marketplace.

b) a specific inclusive section that defines the role of the orthoptist without limiting their scope of practice where there is evidence of training.

c) New South Wales Department of Health in June 1998⁹ reflected that there was no need to consider a regulatory framework for Orthoptists as there is a self regulatory body in place. South Australia can choose whether or not to recognise the scope of practice of orthoptists within the Act, but not to regulate in either case.

A similar problem arises in the services of the optical dispenser. They have a limited scope of practice under the act which does not necessarily reflect current and emerging trends in training and expertise. Optical dispensers are restricted from fitting contact lenses to the eye of a patient or providing aftercare to the patient by section 21 of the Act¹⁰

The optical dispenser is therefore limited in the scope of services provided to the public. The Optometrists Association of Australia (SA Division) seeks to maintain restrictions on optical dispensers due to deficiencies in the current training¹¹. There may be public benefit in a more flexible approach to competency based training which may develop over time.

Public benefit

The public benefit of the current system is achieved by the consumer having choices about ocular health by regulating practices to the professional group known as 'optometrists' and 'optical dispensers'. There are some services that could be as readily accessed from the professional group known as 'orthoptists'.

Costs

Restricting supply of labour is usually held to increase the cost of labour. This cost may be passed on to the consumer of optometry services. It may be that there are aspects of practice that could be competently and less expensively performed by other persons including orthoptists and optical dispensers, depending upon the maintenance of the previously discussed public protection.

⁸ The Orthoptic Association of Australia (SA Branch) Response to Issues Paper

⁹ Review of the Optometrist Act 1930 - Issues paper June 1998 NSW Health Department

¹⁰ 10 Optometrists act 1920 section 21 (3)

¹¹ 11 Optometrist Association of Aust (SA Division) Response to Issues paper pg 5

Discussion

The temporal issues of the future of practitioner training that may occur outside of the sphere of influence of the Board means the Board may have to be receptive to changes as they occur. In relation to optical dispensers this may be related to increased training to achieve competency in the fitting of contact lenses. As regards orthoptists, there is currently no flouting of the Act to the knowledge of the Board, even in independent practice, which is uncommon in SA, but not so in other states, especially New South Wales. Therefore there appears to be no need for further regulation which specifically identifies orthoptists, unless evidence of greater overlap with optometrists comes to light.

The panel recommends: Section 27 undergo review

- 1) In the matter of Optometrists part (d) of the definition must reflect the likely changes to the use of drugs by optometrists.
- 2) In the matter of Orthoptists option (c) be supported ie no need to consider a regulatory framework for Orthoptists as there is a self regulatory body in place, and the current forms of practice are not opposed by the Board.
- 3) In the matter of Optical Dispensers no changes are recommended, although the Panel notes that future training options could well change the competencies of dispensers, such that current restrictions, eg, on fitting of contact lenses, could be re-considered.

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

The Act provides grounds for disciplinary action if an optometrist or an optical dispenser

- a) improperly obtains registration
- b) is found guilty of unprofessional conduct
- c) is convicted of an offence against the Act

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 ‘Code of Conduct’, which they currently use as a guide in such matters. The Code is not in the Regulations or gazetted. It is widely available to the profession and complainants, and it requires to derive authority from the Act for it to be enforceable as a standard against which behaviour can be measured.

The Code includes some of the specific competencies that the Board measures against when considering complaints of unprofessional conduct, including (for example) maintenance of patient records and supervision of unregistered employees. This may tend to reinforce the transparency and therefore the predicability of the Board’s decisions on such matters.

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 optometrists or optical dispensers 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 unprofessional conduct and the 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 optometry services. For individual practitioners there may be significant costs in loss or curtailment of practice rights.

The Panel recommends : The Act include an enablement of the 'Code of Conduct' to allow it to be used as a reference for minimum standards of behaviour, but ability for it to be altered from time to time to reflect contemporary professional practice and community expectations.

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

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?*

An 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 and disciplinary Division of 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

OAA¹² supports change to current processes to relieve the burden of appealing to the Supreme Court for both the consumer and the professional aggrieved by a decision of the Board. This is a reasonable step in view of the responses received to this issue in other reviews of health professional legislation under the same principles.

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

¹² *ibid* pg 10

2.7 Section 7-- Membership of the Optometry Board

The panel asked: *Is the membership of the Board appropriate in view of its functions and the objectives of the Act?*

The Act provides for the Board to comprise an ophthalmologist, four optometrists (two elected by optometrists), one legal practitioner, and one person to represent consumer interests.

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 optometrists who may be entitled to practice in a closely related area, especially optical dispensers. 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 optometrists, which may lead to restrictions on their capacity to provide optometrist services in a cost-efficient manner.

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 optometry. There may also be a higher rate of compliance with the policies of the Board from within the ranks of registered optometrists because of its composition.. There may also be benefit in the presence of an ophthalmologist, to bring expert knowledge of care and treatment of the eye to the decision-making processes of the Board.

2.8 Section 10--Role and Membership of the Optical Dispensers Registration Committee

The panel asked: *Is the membership of the Committee appropriate in view of its functions and the objectives of the Act?*

The Act provides for the Committee to consist of one ophthalmologist, one optical dispenser, one optometrist, one legal practitioner (who will be the presiding member) one person to represent the interests of institutions providing education for optical dispensers, and one person to represent consumer interests. While the role of the Committee is largely as the Board chooses to delegate, any disciplinary concerning an optical dispenser must (Section 17A) be undertaken by the Committee.

Nature of the Restriction

This section may tend to restrict competition in that it provides minimum representation of optical dispensers on the Committee. It may therefore tend to produce a pattern of decisions which restricts the field of practice of optical dispensers. The membership might also not adequately reflect the views of employers of optical dispensers, which may lead to restrictions on their capacity to provide services in a cost-efficient manner. The presence of the only current provider (TAFE SA) of approved education in South Australia may inhibit consideration of other possibilities, such as private providers or universities.

The separation of powers of the Board to the two types of providers registered under the Act is unusual and calls for comment. From the perspective of consumers this can lead to an unnecessarily bureaucratic process. Administratively it draws extra expense to the process of administering the Act.

The section is likely to be a trivial restriction on competition, as long as the operations and decisions of the Committee are transparent. However it is in the interest of the review to consider an alternative model for the administration of the Act that amalgamates the functions of the two bodies into one body considering all aspects of the Act and the actions of all those registered within it.

It is necessary to consider the position of training providers in the establishment of one Board. At present the Optical Dispensers Registration Committee has a position for the sole training provider in SA. As this

position may tend to be assumed to be the province of the current training provider to the exclusion of any future provider, it should be clear that training providers are a group who may seek a position on the Board, not a mandatory requirement for the Board to function.

Public Benefits

There may be a public benefit in having a separate body to manage registration and disciplinary matters regarding optical dispensers, in that the Committee may be able provide a more timely and informed service in protecting the public. There may also be benefit in the presence of an optician and an ophthalmologist, to bring expert knowledge of these related fields to the decision-making processes of the Committee. However, it is the contention of the review Panel that the current process is not the only available alternative to provide adequate public protection.

Costs

Some additional running costs (sitting fees, servicing the Committee) are generated by a second statutory body regulating optometry and optical dispensers separately under one Act.

Discussion

There is a good deal of business specific to the practice of optical dispensing, and it may well turn out to be necessary to maintain a sub-committee, probably with similar membership to the present, rather than deal with these matters in full at meetings of the Board. However, the effective exclusion of dispensers from the present Board, and the separate powers enjoyed by the Committee may have contributed to poor relationships and possibly some confusion of responsibility

The Panel recommends: Review of all sections of the Act pertaining to the separate functioning of the Optical Dispensers Registration Committee with a view to amalgamating its functions with the Board

The Panel further recommends: The membership of the Optometry Board be such that there is appropriate representation of the each of the registrant professions, including one optical dispenser. Consumers, employers and educators may be appointed as perceived necessary from time to time by the Governor.

2.9 Regulation 12 (pursuant to Section 46)--restrictions on advertising

The Review Panel asked: Are the restrictions on advertising necessary to protect the public?

Regulation 12, which has legal force pursuant to Section 46 of the Act, contains restrictions on advertising by registered optometrists, covering misleading material, discrediting of other optometrists, and additional educational qualifications.

Nature of the Restriction

The limitations and prohibitions of the Regulation are generally consistent with the requirements of consumer protection and trade practices legislation, and therefore constitute a trivial restriction on registered optometrists wishing to use advertising as a means of increasing their market share. The restrictions may also make it more difficult for consumers of optometry services to compare the effectiveness and cost of treatment from different providers.

The exceptions are:

- the prohibition of testimonials, including advertising which may discredit another optometrist.
- advertising of additional qualifications which have not been approved by the Board and placed on the Register .

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.

Costs

Consumers face increased costs of identifying the most appropriate optometry service provider, as optometrists 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?*'

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.

2.10 The sale of ready to wear (non prescription) glasses

There is a difference in the standard for the sale of so-called 'ready to wear glasses' between South Australia and at least one other state, NSW. The restriction as to the strength of the lens in South Australia is no greater than 3 dioptré, whereas in NSW it is greater.

The argument has been made by a retailer that glasses approved for sale in NSW could be sold in this state without the approval of the Optometry Board under Mutual Recognition Act 1992 Section 9¹³.

The matter is still under advisement with the Crown. The Optometry Board wishes to continue the current level of restriction in this state on public benefit grounds. The argument as to which jurisdiction is correct in the maintenance of its level of restriction is another example of the disparity of practice within Australia. However, it is not appropriate for this report to make recommendations while this matter is in litigation.

¹³ Correspondence of the Optometrists Board received November 1998

Section 3: ADMINISTRATIVE REQUIREMENTS

The review panel asked : *Do these administrative requirements impose unnecessary expense or other burden on any persons affected by the Act?*

Regulation 6--*Application for Registration as an optometrist* (including application forms and fee of \$220, and annual renewal fee of \$220)

Regulation 7-- *Application for Registration as an optical dispenser*(including application forms and fee of \$100, and annual renewal fee of \$100)

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.

Fees for registration form the major source of income for the administration of the Board and the Act. In considering the burden, the annual income of the registrants is assessed. as part of the available income of either group the fee for registration is not unreasonable.

The Panel sees the actual setting of fees as a matter to be taken up by the Board if and when it sees the need. Therefore the Panel can only arrive at a view on the current fees, which it believes represent a trivial restriction on the market of provision of medical services, fully justified by the functioning of the Board at no cost to Government.

The Panel recommends: Regulation 6 & 7 be deleted .The Panel recommends no change to the level of fees, which can be varied from time to time by negotiation between the Board and the Government.

**COMPETITION POLICY REVIEW TEAM
LEGISLATION REVIEW
OPTOMETRISTS ACT 1920**

TERMS OF REFERENCE

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

Ms Roxanne Ramsey Executive Director, Country Department of Human Services

Mr David Meldrum Department of Human Services

Mr Nick Storer, Registrar, Optometry Board of SA

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 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)

◇ Review of the Optometrist Act 1930 -Issues Paper, NSW Department of Health

◇ Code of Conduct for Optometrists sanctioned by the Board, see appendix 4

- ◇ Orthoptic Association of Australia State Branch recommendations to issues papers, NSW & QLD
- ◇ Optometrist Association of Australia Website: <http://www.opptometrists.asn.au>
- ◇ Responses to Issues paper SA

appendix 3

Mr Nick Storer
 Registrar
 Optometrists Board of SA
 PO Box 122
GLENSIDE SA 5065

Optometrist Association of SA
 99 Frome Street
ADELAIDE SA 5000

Royal Australian College of Ophthalmologist
 27 Commonwealth Street
SYDNEY NSW 2000

Allison Burchell
 Orthoptic Association of Aust (SA Branch)
 Suite 9, 147 Ward Street
NORTH ADELAIDE SA 5006

Australasian Dispensing Opticians Assoc (SA
 Division)
 23 Wiltshire Street
SALISBURY SA 5109

Royal Society for the Blind SA Inc
 230 Pirie Street
ADELAIDE SA 5000

Mr Peter Miller
 Executive Officer
 Aboriginal Health Council
 167 Fullarton Road
DULWICH SA 5006

Managers
 Option coordination Agencies
 21 Blacks Road
GILLES PLAINS SA 5061

Mr Mark Henley
 Director
 SACOSS
 220 Victoria Square
ADELAIDE SA 5000

Gail Jackson
 COTA
 GPO Box 1583
ADELAIDE SA 5000

Cynthia Betterman
 Executive Officer
 Parent Advocacy Inc
 5 Ninth Avenue
BOWDEN SA 5007

Roxanne Ramsey
 Michael Jelly
 Brian Dixon
 Maxine Menadue

OPTOMETRISTS CODE OF CONDUCT 1993**SANCTIONED BY THE OPTOMETRISTS BOARD**

(This Code of Conduct is aimed to be a guide to the profession and the Board in the understanding of issues which may be considered "unprofessional conduct". The list is neither exclusive nor exhaustive)

- a) Optometrists shall act at all times to provide a service for persons in their care unrestricted by considerations of nationality, race, creed, culture, political or social status.
- b) Optometrists shall not, in relation to his/her practice, enter into an agreement, arrangement or understanding or do or omit to do anything which may-
- (i) Restrict the ability of the optometrist to give impartial, confidential comprehensive professional advice, services or care to his or her patient
- or
- (ii) Jeopardise the health or well being of his/her patient
- c) Optometrists shall maintain eye examination standards and exhibit competencies acceptable to the Board. the Board shall undertake to issue guidelines which reflect contemporary standards.
- d) Optometrists shall
- (i) Maintain accurate and available records on every patient containing case history, findings, diagnosis, treatment and disposition.
- (ii) Retain full and independent control of responsibility for patient records. This does not preclude the provision of copies of patient spectacles prescriptions for subsequent optical services, nor does it preclude the provision of patient records to any entity with the consent and authorisation of the patient.
- (iii) Maintain such records for a period of not less than five years following the last entry into the patient's file.
- (iv) Treat all information concerning patients as confidential and not be communicated to others except when authorised to do so by the patient or required to by law.
- e) Optometrists shall ensure that when they prescribe Contact Lenses:
- i) the prescription is dispensed in an appropriate manner
- ii) That they have examined and fitted the person for whom the prescription is dispensed
- (iii) That they have examined the person in the case of soft contact lenses, within the last two years and in the case of hard contact lenses, within the last three years and
- (iv) that they shall not cease after care for a person until they are satisfied that the patient is adopting good contact lens practice
- f) Optometrists shall not disclose or otherwise make available to any person information kept in optometrists patient records except where the disclosure is:
- (i) Necessary for the provision of additional separate optometrical services
- (ii) Required by law
- (iii) Authorised in writing or requested in person by the patient

(iv) Resultant from the acquisition of the records by another optometrist

(v) Necessary for specialist optometrical, medical or alternative practitioner referral

In addition, any person acting as a locum shall ensure that the records relating to patients of a practice for which he is providing a service shall be kept in a confidential manner and be subject to the conditions of custody and control exercised by the optometrist for whom the locum is providing service.

g) Optometrists who appear in:

i) A lecture, talk or public appearance

ii) Radio, television or other transmission

Shall be subject to the same restraints as contained in the Advertising Regulations and optometrists shall not seek professional advantage.

h) Staff working in an optometric practice may dispense prescriptions and undertake tasks delegated by a registered optometrists in the delivery of optometric services only where the optometrist assumes full responsibility and ensures that there is appropriate training and supervision.

i) An optometrist shall not remain in the employ of any entity not complying with this code of conduct or advertising regulations pertaining to optometrists.

j) Persons or business interests employing optometrists are equally bound by this code and advertising regulation pertaining to optometrists.