

**COMPETITION POLICY REVIEW TEAM**

**DEPARTMENT OF HUMAN SERVICES**

**NATIONAL COMPETITION POLICY**

**LEGISLATION REVIEW**

**PSYCHOLOGICAL PRACTICES ACT 1973**

**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 is a review of the Psychological Practices Act 1973. 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 Psychological Practices Act should not restrict competition unless:

- a) the benefits of the restriction to the community as a whole outweigh the costs; and
- b) the objectives of the legislation can only be achieved by restricting competition.

In addition, the review panel has considered whether administrative procedures required by the Psychological Practices Act are unnecessary or impose an unwarranted burden on any person.

To satisfy the requirements of clause 5 of the Competition Principles Agreement the following documents have been reviewed:

- Psychological Practices Act 1973
- Psychological Practices Regulations 1996

References to sections are references to sections of the Psychological Practices Act 1973 unless indicated otherwise. References to regulations are references to regulations contained in the Psychological Practices Regulations 1996 unless otherwise indicated.

## **CONSULTATION**

This review was preceded by an issues paper which introduced the concepts of Competition Policy, and put forward a preliminary analysis of the Act from that perspective. Submissions were invited from any interested persons and organisations, especially consumers, practitioners, employers and training providers. An advertisement was placed in the 'Advertiser', copies of the paper were forwarded to organisations believed to have an interest in the matters raised, and a number were sent out on request. The Review Team accepted verbal or written submissions, by telephone, fax, postage or e-mail.

The closing date for submissions was Tuesday, 15th September 1998

## Part 1: Central issues

### 1.1 Purpose of Act

The object of the current Act is to protect the public, principally by ensuring psychological 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. The Act establishes systems of registration of psychologists. The Act establishes the South Australian Psychological Board to achieve these objectives, and empowers it to enforce the provisions of the Act.

The question was asked:

*Are these appropriate purposes, and are they clearly expressed at the outset of the Act?*

Most respondents were satisfied with the objective of protecting the public by registering psychologists and regulating their practice, but several favoured dropping all references to 'unqualified persons and certain harmful practices'. This relates to several matters raised below. Originally, the Act was intended to regulate all psychological practice, and hypnosis, but the SA Psychological Board has (a) been unsuccessful in attempts to that end, and, (b) is now in favour of restricting its activities to the registration and oversight of psychologists.

The **Review Panel recommends** that the Act be re-named 'The Psychologists Act', with an introductory statement to the effect of;

'An Act to protect the public, by providing for the registration of psychologists, and the regulation of their practice', etc.

### 1.2 Markets

The purpose of legislation review is to analyse the effect of legislative restrictions upon competition in markets. Competition within markets is 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.

### ***Psychological practices and hypnosis***

The provision of psychological services is undertaken mainly by psychologists as regulated by the system of registration established by the Act. Unregistered persons may practice under the supervision of a registered psychologist. Medical practitioners, dentists and other individually approved persons may also practice hypnosis in some circumstances.

The extent, if any, to which provisions of the Psychological Practices Act restrict competition between these providers of psychological practices and hypnosis is, therefore, relevant to this review. The Panel concluded that the Act has almost never been used to restrict such competition. One reason has been difficulties in defining the terms 'psychological practices' and 'hypnosis'. Because of this, the relevant Regulations provided for in the Act have never been gazetted, meaning that 'prescribed practices' have in fact never been prescribed. The other is the lack of evidence of demonstrable harm caused by the proliferation of unregistered and unregulated practitioners in related areas.

### ***Training markets***

A requirement of registration is that the applicant has prescribed qualifications. One function of the Board is to make the necessary inquiries in relation to training courses, and prescribe which providers (by gazettal) are 'recognised universities' for the purposes of registration. The market of providing psychological training, therefore, may be affected by decisions of the Board, and, therefore, is also a market relevant to this review of the Psychological Practices 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. 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***

Four broad categories of restriction have been identified in the course of reviewing the Psychological Practices Act:

- title protection;
- practice protection;
- professional misconduct; and
- approval of training courses.

### ***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, and 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 psychologist to call themselves a psychologist. Additionally, the Act requires any company or association wishing to use names relating to the word 'psychology' to seek prior consent of the Board.

### ***Practice protection***

The Act provides for restrictions which were intended to 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 sets out to prevent any person other than a registered psychologist from practising or claiming to be skilled in the practice or teaching of psychology, or to solicit human subjects for psychological research. The Act defines the area restricted as 'prescribed psychological practices' which includes any activity relating to intelligence or personality tests or inventories. It also restricts the practice of hypnosis.

### ***Professional Misconduct***

Restrictions upon conduct in the psychological profession contained within the Psychological Practices Act are relevant to this review. Central to these restrictions is the way in which the concept of "professional misconduct" is applied in practice by the Psychological Board

### ***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. Where the criteria are objective and transparent then issues of anti-competitive detriment are reduced, as any training course meeting those transparent and objective criteria should be recommended.

## **1.4 Costs**

Two categories of cost arise from the training restrictions contained in the Psychological Practices Act. Firstly, the restrictions upon registration and re-entry to the profession may cause the supply of psychological professionals to be less than the demand. Restricting numbers of psychological professionals could cause the cost of psychological services to rise. This therefore, would be a cost upon the community.

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

## 1.5 Public Benefits

The professional regime established under the Psychological Practices Act achieves significant public benefits. Restrictions upon entry to, and participation in the psychological 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. There is public benefit in maintaining public confidence in the level of skill of designated professionals.

Restrictions upon conduct may also reinforce public confidence in the standards of professional care provided by registered psychologists.

## Part 2: Analysis of Restrictions

### 2.1 *Sections 20-24 of the Act Registration of psychologists - title protection and approval of training providers*

Section 22 outlines the prerequisites for registration as a psychologist. A person must have attained prescribed qualifications at a 'recognised university', fulfil all other prescribed requirements and be 'of good fame and character' to be on the register.

#### *Nature of the Restriction*

The requirement of registration restricts use of the title 'psychologist'. This is an intermediate restriction upon competition, given the extensive tertiary training required. 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 minimum acceptable 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.

The Panel believes the case for regulated title protection as a public benefit is adequate for this profession. There are many apparently similar services offered in the community, and it can be argued that the potential for a high degree of information asymmetry exists, and protection of the title 'psychologist' will assist the consumer to identify a practitioner with appropriate training and skills.

Several classes of client, among others including abused children, young people with serious mental health problems, and persons exhibiting potentially dangerous behaviour, are exposed to

unacceptable risks of irreversible harm which may be caused by inappropriately or inadequately trained persons.. The degree of trust afforded clinical psychologists, to work privately and extensively with such clients, is greater than for most other counselling professionals, except perhaps psychiatrists.

As the major single employer of psychologists, the State may rely to some extent on a system of registration to identify suitable employees. However, the State should promote registration as a pre-requisite for practising psychology in the public sector. It is the responsibility of all potential employers to satisfy themselves as to the suitability of candidates for selection.. Several references to psychologists appear in other legislation, such as the Firearms Act, so ease of identification by persons unfamiliar with this field is important.

**The Panel recommends** continuing protection of the title 'psychologist' and closely related terms including 'psychology', and 'psychological'

The degree of restriction also depends partly on how the Board interprets the phrase 'of good fame and character'. It is guided by a Crown Law opinion obtained in 1985, which states in summary 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 as a psychologist.'

In the issues paper, the Review panel asked the question; '*Is the use of the criterion 'of good fame and character' a necessary and appropriate restriction on entry to the profession?*'

Most submissions favoured retention of this concept, but several argued that 'fit and proper person' was a term better defined in law, and used in relation to most other health professions. The word 'fit' also correlates closely with 'competent' in this context, which tends to reinforce the responsibility of the Board to consider the applicant's competencies at the time of application. The same can be said of the situation on renewal of registration, when the Board should be able to assess the person's current competence, including evidence of continuing professional development.

**The Panel recommends** that the words 'of good fame and character' in Section 22(1) (b) be deleted, and replaced with 'a fit and proper person', and that Section (22) (3) clearly states the continuing requirement to consider 'fit and proper' with each renewal of registration.

Since the inception of the Act, the Board has effectively raised the educational standard for registration from the legislated three year course and three years practice to a four year course with two subsequent years of supervised practice. This is the standard accepted by all such registration bodies in Australia. It creates an intermediate restriction on competition in that entry to the profession is more difficult than previously, and more difficult than in a number of related disciplines.

The Board, along with most others in Australia, has negotiated these changes in concert with the Australian Psychological Society. The APS is currently proposing a membership requirement by the year 2000 of six years full-time tertiary study instead of the '4 plus 2' model. The Board is yet to determine whether it should use this benchmark for registration.

### ***Public Benefit***

A system of registration of psychologists aims to protect the public, particularly potential consumers, by ensuring that persons with the title 'psychologist' have achieved the competencies required to conduct practices which could be harmful if poorly performed. The ability to set requirements for supervised practice as well as 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 this restriction 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 psychologists. 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.

## **Discussion**

The Review Panel asked the question; *'Is there a net public benefit in the increasing educational requirements for registration?'*  
and,

*'Are the current and pending requirements a necessary restriction on entry to the profession?'*

All comment received supported the need for current and pending educational requirements. The SA Psychological Board proposes that these be a matter for Regulations rather than spelt out in the Act. The Panel wishes to go further, and proposes removing all references to the detail of courses in the Act and regulations. The market for training, the requirements of employers, and the preferences of consumers provide ample checks and balances to guide the Board to well-informed decisions on current training requirements.

Pursuant to Section 22, the Board currently also specifies which training institutions are approved. (SA Government Gazette, 10/10/85) For potential alternative training organisations, this may be a serious restriction, because without Board approval they cannot hold out to potential students that successful completion of their course of instruction will lead to employment in the profession. The term 'recognised university' obviously excludes TAFE and the increasing number of private training organisations offering courses in related disciplines.

In the current training market, there may well be other providers seeking to offer the required courses. The Panel believes that this is an unnecessary restriction on potential providers, which should not appear in the Act or Regulations. Any tertiary teaching institution should be able to apply for approval of courses, increasing the possibilities of competition in the market for training of psychologists.

**The Panel recommends** deletion of Section 22 (1) (c) of the Act, to be replaced with the following;

- '(c) has approved qualifications and experience in the practice of psychology; and,  
(d) fulfils all other prescribed requirements'

## **2.2 Section 34 of the Act, and Regulation 11--practice of psychology by unregistered persons**

The Board has the power to restrict registered psychologists from employing unregistered persons in their practice, unless those persons are in an approved program of supervised practice, whether in order to obtain registration or otherwise. Because of the direct responsibility of the registered person to the Board, the full force of practice reservation occurs, despite the failure to regulate for 'prescribed practices' noted below.

### **Nature of the restriction**

Registered psychologists are not able to employ unregistered persons to carry out any aspects of psychological practice, except in an approved program or manner of supervised practice (which may or may not 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 psychological services. Depending on the supply of psychologists seeking pre-registration supervision, or limited supervised practice at a given time, this might also advantage one employer vis a vis another.

### **Public benefit**

The combination of title protection and these provisions has the benefit of assuring the public that any professional services occurring in a practice managed by registered psychologists will be properly supervised and fully accountable to the Board.

## **Costs**

Restricting supply of labour is usually held to increase the cost of labour. This cost may be passed on to the consumer. 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 psychologist, with redress against any negligence being available through other common law provisions applying to any business. It can be a cost to the registered psychologist to have to fulfil the Board's requirements for supervision of some of their employees. (although some trainees pay a psychologist for the supervision, and some work without remuneration to gain experience)

## **Discussion**

Most submissions supported the need for these restrictions, but the Board proposes greater flexibility through a power to grant limited registration. Such a provision could lead to more persons being able to practice areas of psychology under supervision, without necessarily being in a program leading to full registration.

**The Panel recommends** adoption of the Board's proposal for the concept of limited registration, through amendment of Section 34 of the Act, allowing the Board to restrict the times and places at which a person can practise, limit the areas of practice, specify the period of limited registration, and impose any other appropriate conditions.

A related matter is the potential time-lag between application and granting of registration. The situation often arises that a person clearly meeting all the requirements for registration wishes to commence practice immediately. Other regulatory systems provide for a person such as the Registrar of the Board to authorise provisional registration, until such time as the Board can consider the application.

**The Panel recommends** that Section 22 of the Act be amended to provide for the Registrar to authorise provisional registration of a person applying for registration, where it appears likely that the application will be approved subsequently by the Board.

### **2.3 Section 4 of the Psychological Practices Act: Interpretation - definition of 'prescribed psychological practice', Section 32, 'prescribed psychological practices and Section 33, 'advertising by unregistered persons'**

These sections make it illegal for any person other than a registered psychologist to carry out, or claim (including by advertising, or holding out) to be competent to carry out,

- (a) the administration or interpretation of individual tests of intelligence
- (b) the interpretation of personality tests or inventories
- (c) instruction in the practice of psychology
- (d) soliciting human subjects for psychological research

## **Nature of the Restriction**

These sections were intended to create a *reservation of practice*, whereby an area of activity is reserved exclusively to a designated group. This prevents any other person, even when not purporting to be a registered psychologist, to, for example, conduct specific tests if these are gazetted or listed in the regulations.

The relatively narrow definition of psychological practice in the Act, may allow for a variety of closely related practice by unregistered persons, but for some employers, especially in the public sector, the

requirement for work within the definition is extensive. This could constitute an intermediate to serious restriction on competition.

### **Public benefit**

The public benefit which may be ensured by these Sections is protection from harm to individuals being caused by such practices, if they were performed by persons not adequately trained and/or supervised. While this type of legislation does not usually attempt to describe such harm, it is important in this review process to ensure that the public protection case is clear and well founded.

### **Costs**

The costs of the potential restriction may include the cost of training for a person wishing to conduct such a practice, and the potentially increased costs to employers and consumers of obtaining the benefits of psychological practice.

### **Discussion**

The Panel asked the question, *'Is the Act's objective of restricting (reserving) practice justified in the public interest? If not, should the title of the Act be changed to 'The Psychologists Act' to better reflect its purpose?'*

To bring this restriction into effect, the Act requires the Board to specifically identify ('prescribe') each 'test of intelligence', 'personality test', or 'inventory' in the Psychological Practices Regulations. It has never done so. The difficulties in putting into regulations a complete and up-to-date list of all such instruments at any given time has been a major reason. Therefore, the effect of the Board's actions on competition in this matter has been trivial up until now. Similarly, because the Board has not promulgated a definition of hypnosis, the restriction on persons practising hypnosis has been trivial. Nevertheless, the provision for such a restriction is in the Act, and prescription could be enacted at any time, so it is appropriate in this review to consider the possibility of effective reservation of such practices.

It is true that most public sector employers in Australia have behaved as if these restrictions were absolute--ie, not allowing any employees except registered psychologists to practice in these areas--but this should be seen as a decision in the industrial and/or risk management contexts, and not as a necessary result of the operation of this and similar Acts. Similarly, suppliers of the most frequently used psychological testing materials usually restrict sales to registered persons in Australia, but this is not a result of the Psychological Practices Act or its equivalents interstate.

Other legislation does actually create some practice protection for registered persons, however, by designating them as the only persons authorised to carry out certain tasks. These include the Firearms, Children's Protection and Workcover Acts.

Since the Act was specifically intended to restrict practice ('An Act to provide --protection of the public from unqualified persons, and certain harmful practices--') and yet has not been used in that way in the 25 years since its inception, the need for the potential restriction has to be questioned.

No evidence was put to the panel of demonstrable harm to the public which could have been avoided by practice reservation. Undoubtedly, among the large number of 'therapists', 'counsellors' 'psychotherapists' and practitioners using many other titles, there are persons who may cause harm, but there is neither the evidence of a major issue of public protection, nor the practical means to define areas of practice without producing indefensible anomalies. Provided that the title 'psychologist' continues to be protected as recommended, so that employers, clients and other persons seeking a service know which is the 'Government guaranteed' provider, the Panel does not believe there is a sustainable case for practice protection.

All the legal avenues for redress against any service provider, whether an employee or a self-employed person, are available to a dissatisfied consumer of such unregistered persons. Therefore, the Panel believes that there are indeed other ways to protect the public in this instance.

**The Panel recommends** that Sections 32 and 33 and the relevant parts of Section 4 of the Act, concerning prescribed psychological practice and the advertising thereof, be deleted. To reinforce title protection for registered persons, Section 37 could be augmented by a phrase with the effect of protecting the term 'psychology' or any derivative of that word.

#### **2.4 Section 26 of the Act, 'Inquiries, disciplinary powers, etc'--professional misconduct**

The Act provides grounds for disciplinary action should a psychologist:

- a) improperly obtain registration
- b) be guilty of gross professional negligence or malpractice or misconduct
- c) be convicted of an indictable offence

#### ***Nature of the Restriction***

This concept of 'professional misconduct' may be more or less restrictive depending upon the manner in which the Board interprets the terms 'negligence', 'malpractice' and 'misconduct'. Determinations by the Board that certain conduct is 'unprofessional' constrains behaviour within the psychological profession.

The Code of Professional Conduct and Practice issued by the Board in 1998 adopts a definition from the then 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.'

Although the Act does not mention restrictions on advertising by registered psychologists, the Code includes 'misleading' 'disparaging' and 'rude offensive or undignified' advertising in the areas of unprofessional conduct that may lead to action by the Board.

Given that the powers of the Board include suspension or cancellation of registration, and costs can be awarded against individuals, depending upon the approach of the Board, this may be an intermediate restriction upon competition by the individuals concerned, and a trivial to intermediate restriction on the wider market for psychological practices. In any complaint received by the Board concerning a registered psychologist, it is first investigated by the Registrar, if necessary referred to the Complaints Committee, and if necessary to the Crown Solicitor's Office for further investigation. If a formal inquiry is conducted, the Crown will assist with legal counsel to act before the Board.

### **Public benefit**

If registration is designed to protect the public by providing an effective means of consumers and employers choosing competent practitioners, then there will also be public benefit if harmful or potentially harmful conduct by registered psychologists 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, by bureaucratic disciplinary procedures, or 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 psychological services. For individual practitioners there may be significant costs in loss or curtailment of practice rights.

### **Discussion**

The Panel asked the question, '*Does the concept of 'professional misconduct' in the Act reflect community and professional expectations?*

The unanimous response was affirmative. There is clear agreement that this is a key function of the Act. Setting training and experience requirements is important, but this must be complemented by the capacity to intervene when the competence and/or conduct of a registered psychologist is called into question.

Limitations in the current Act were highlighted in the Board submission.

The first is that it is not possible to initiate or continue enquiries into a psychologist's practice once that person is not registered. Given the ability to conduct very similar activities under a different title, it is a concern that practitioners can avoid investigation and any negative finding simply by becoming unregistered.

**The Panel recommends** that Sections 26 and 27 be amended to allow for investigation and disciplinary action against a person who has ceased to be registered since the cause for action arose.

The second limitation identified by the Board in its submission is the need for a 'mentally or physically unfit' clause in this part of the Act. The concepts of negligence, malpractice and misconduct do not include the possibility of a mental or physical incapacity which may hinder competent practice. The Act would also need to empower the Board to require medical and other appropriate examinations.

**The Panel recommends** amendment of Sections 26 27 and 28 to provide the Board with cause to make enquiries as to mental and physical fitness to practice, and to order medical and other examinations as appropriate.

The final limitation identified is that the Board can only cancel or suspend registration (for a period not exceeding 12 months) There is a clear case for conditional or limited registration being available as an option for the Board. Specific restrictions on practice could be used to protect the public, while allowing some psychologists to continue all aspects of their work except where a problem has been identified.

**The Panel recommends** that Section 26 of the Act be amended to allow the Board to impose conditions restricting the right of practice of a registered psychologist

## 2.5 *Section 29 of the Act--Appeals against orders of the Board*

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. The Board has the resources of the Crown Solicitor's Office to defend its position, while a complainant will most probably be acting alone, possibly unrepresented.

### Public benefit

There is benefit in practitioners 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.

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?'

There was little comment on this matter. The Panel believes these provisions are a useful safeguard against the Board and the Tribunal from exercising their powers in an anti-competitive manner. However, it has become apparent with this and a number of similar arrangements (such as for the Dental Board, and the Physiotherapy Board) that appeals to the Supreme Court tend to be more expensive for all parties, and involve longer delays, than can be obtained by appeals to the Administrative and Disciplinary Division of the District Court.

Another matter which has arisen in regard to appeals is the restrictions on evidence which is accepted by the Supreme Court. The particular problem is the requirement to present complaints about individual alleged instances of unprofessional individually --ie, one alleged incident per hearing. Public protection, which is the paramount concern of the Board, is often served by recognising a pattern of complaints or reported incidents which mean that informal methods of correcting the problem are not sufficient. It is precisely these sequences of events which cannot be tendered at an appeal as the logic for the Board's decisions.

*The Panel recommends that Sections 29 be amended so that appeals resulting from decisions of the Board and/or Tribunal will be heard in the Administrative and Disciplinary Division of the District Court.*

*The Panel recommends that evidence of repeated acts of unprofessional conduct be admissible at appeals*

*( \*\*The panel also noted the limitations of the term 'order' used in Section 29, in relation to matters which can be appealed. It may be that 'decision' is a more inclusive term which would ensure that any finding of the Board is subject to appeal.)*

## **2.6 Section 39 of the Act--Hypnosis**

The 'practice of hypnosis' (not defined) is restricted to registered psychologists, medical practitioners, individually approved dentists and other 'prescribed persons' acting under conditions specified by the Board.

### ***Nature of the restriction***

People in a number of professions/disciplines/pursuits may wish to use hypnosis for fee or reward, but are restricted from doing so by this provision of the Act. However, the lack of a definition of hypnosis in the Act has limited the effect of the restriction. Provided that there has not been reliance on use of the actual term 'hypnosis', it appears that many providers have been able to offer a related or even identical service to that performed by a registered person. Therefore, the restriction can be classified as trivial in its outcome, if not its intention. It actually applies in full only to those who do register, which can only be achieved through training at institutions prescribed in Regulation 5.

### ***Public benefit***

The degree of public benefit depends on what harms are minimised by the provision, and this is a point of controversy. The intention is to prevent untrained persons from practising hypnosis, which at least gives the public a good guide as to who may be more capable of minimising any risks involved. However, the automatic entitlement of all registered psychologists and doctors to use hypnosis, regardless of their specific training in that field, has also raised questions as to the effectiveness of the provision

### ***Costs***

Income may be lost as a result of restrictions on practice. Potential consumers may find it more difficult to access services because providers are forced to use other, less familiar, terms to describe their services.

The Panel asked '*Is the intended restriction on the practice of hypnosis justified in the public interest?*' Submissions from the SA Association of Hypnotherapists and the Psychologists' Council of SA support the restriction, and propose several amendments to strengthen its effect of preventing practice by other than registered persons. One suggestion is insertion into the Act of a definition of hypnosis.

The panel is aware that this matter has been in contention in most states and territories for several decades. The majority opinion is clearly against further attempts to restrict the practice of hypnosis. The difficulties of defining hypnosis and in taking action against unregistered persons practising hypnosis are well proven; in some cases in the courts at considerable cost. Registered persons may of course be regulated in matters of their training requirements and competency, including hypnosis,

and the Board has as much power to control hypnosis in the hands of psychologists as any other aspect of practice.

Therefore, **the Panel recommends** that all references to hypnosis, principally Section 39, be deleted from the Act. Psychologists (and other regulated health professionals) completing training in approved courses/institutions will be able to note these qualifications in their registration details, assisting members of the public to assess their competence to practice hypnosis.

## **2.7 Section 8(1): Membership of the Board**

This section provides that the Board shall consist of the following members appointed by the Governor:

- legal practitioner who shall be chairman
- 1 medical practitioner (a psychiatrist)
- 1 person who teaches psychology at a tertiary level
- 4 registered psychologists

### ***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 psychologists and medical practitioners, who may also be entitled to practice. 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 psychologists, which may lead to restrictions on their capacity to provide psychological 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 the profession. There may also be a higher rate of compliance with the policies of the Board from within the ranks of registered psychologists because of its composition. Conversely, it should also be noted that the Chairperson must be the Legal Practitioner on the Board. This could serve to reduce the likelihood of anti-competitive outcomes from the Board.

### ***Costs***

Not applicable.

### ***Discussion***

The Panel asked the question '*Is the membership of the Board appropriate in view of the objectives of the Act?*' Most submissions addressed this matter. Some respondents who were in favour of continuing the regulation of hypnosis proposed representation of that area of practice. The Panel does not support this because of its position on hypnosis. One submission argued against inclusion of a medical practitioner. All respondents argued that the requirement for the legal practitioner member to be the Chair was inappropriate, while most wanted a registered psychologist to chair.

The Panel accepts the merit of having a legal practitioner as a member, given the importance of managing enquiries in a legally competent manner, although there seems no good reason why the Minister should be restricted to the appointment of the legal practitioner to chair the board.

The reason for inclusion of a medical practitioner is less clear. Twenty-five years ago, when this Act was developed, there may have been a greater need to monitor the interface of medical and psychological matters, especially the overlap with psychiatry, but the scope of the two fields is much better delineated in modern practice. The Panel strongly supports the inclusion of a person representing the interests of consumers, and, not wanting to make the Board too large, prefers this appointment over continuation of a medical practitioner.

**The Panel recommends** that the requirement for the legal practitioner to chair be deleted from the Act.

**The Panel recommends** that the requirement for a medical practitioner to be a member of the Board be deleted

**The Panel recommends** that the Board membership include a consumer representative

## **2.8 Section 36 of the Act--Restriction on the naming of companies or associations**

This section allows the Board to restrict the use of names including 'psychology' and psychological' by any company or association, whether or not 'it consists wholly of' and/or is operated by registered psychologists.

### ***Nature of the restriction***

There may be commercial or professional advantages to companies or associations using the restricted terms. The Board's prerogative to prohibit this could be an intermediate restriction on a business where the alternative nomenclature is less well understood by the public.

### ***Public benefit***

There is a benefit to the public in being protected from advertising which may wrongly suggest that appropriately qualified people will perform the services offered by the business in question. It is not clear what benefit would be achieved by preventing registered psychologists using such business names. The 1973 catalyst for this Bill (banning various practices by Scientologists) may explain its inclusion. It should be noted that the Board has never used these provisions to restrict the name of a business.

### ***Costs***

Income may be lost as a result of restrictions on such business names. Potential consumers may find it more difficult to access services because businesses are forced to use other, less familiar, terms to describe their services. However, the restriction has not been enforced.

### ***Discussion***

The Panel asked; '*Is the intended restriction on the naming of companies and associations justified in the public interest?*'

The Board has never invoked this restriction, mainly because it is not clear if it applies where there are no registered psychologists operating a business (even if registered psychologists are employed by that business) Therefore it appears there has been no effective naming restriction on any person owning, operating and advertising a company which is falsely claiming to provide psychological services.

The argument for retaining this restriction, if it could be made to work, is that such misrepresentation serves to undermine the effect of the Act, in that consumers will be less able to recognise regulated services.

Section 37 covers the individual practitioners who would actually perform any services as employees of a business. This partly achieves the public protection offered by the Act, ie, ensuring a consumer is not misled into believing they are being assisted by a registered psychologist when this is not the case.

If companies and businesses were added to the holding out prohibitions on unregistered persons in Section 37, this would complete title protection by effectively making all such misrepresentation unlawful. The Panel could not then see why companies or businesses would have to seek prior approval from the Board for the choice of a business name, since the legal restrictions would be quite clear

**The Panel recommends** that Section 36 be deleted, and that Section 37 be amended to include names used by companies or businesses in its prohibition of improper 'holding out' ( advertising ) with terms including 'psychology', 'psychological' etc.

#### 2.9 *Sections 28, 31,34,35,37, 41, Regulations 10 and 11--Fines*

**The Panel recommends** that all fines prescribed in the above sections and regulations be adjusted as required so as to be comparable with other contemporary legislation

#### 2.10 *Section 41(a) --Power to set fees for registration etc.*

**The Panel recommends** that this section be amended so as to give the option for the Board to set fees. The current wording allows only the Governor to set fees, which has proved unwieldy. All other similar Acts provide for Boards to adjust fees from time to time, without the need to go to Executive Council or the Government Gazette

### **Part 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:

**Section 17** The Board must prepare and deliver to the Minister, on or before 30 September, an annual report detailing the administration of the Act and containing the audited accounts.

**Section 18** The Board must keep proper accounts of its financial affairs and these shall be audited at least once a year.

**Section 22/** Persons must provide the required information in order to be/ considered for registration or **Regulation 6/** re-registration.

#### **Regulation 7**

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

All submissions which addressed this area recommended continuation of the current requirements, and **the Panel agrees** that no changes are required.



# COMPETITION POLICY REVIEW TEAM

## LEGISLATION REVIEW

### DRAFT 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 *Psychological Practices Act 1973* will be examined during the legislative review in accordance with the obligations contained in Clause 5 of the Agreement. Regulations enacted under the Act will be examined concurrently.

#### REVIEW PANEL

Ms Jill Whitethorn, Director Policy and Development, Department of Human Services  
Mr Peter Martin, Registrar, SA Psychological Board  
Mr David Meldrum, Director, Competition Policy Review Team

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

#### ISSUES TO BE ADDRESSED

1. Clarify the objectives of the Psychological Practices Act, 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 any 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 Act, 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 will review submissions received in the consultation process undertaken within the prescribed period. A list of Key Interest Groups will be 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 of the review  
Persons and groups consulted  
Analysis and recommendations

## Documents Consulted

South Australian Psychological Board (July 1998)	Code of Professional Conduct and Practice
South Australian Psychological Board (July 1995)	Guidelines on Registration
South Australian Psychological Board (October 1993)	Guidelines on Supervision
Crown Solicitors Office (October 1995)	Re 'good fame and character' and undertakings
South Australian Psychological Board (March 1995)	'Proposed Legislation--Psychologists Bill'

## **Distribution/Consultation List**

*DHS*

Mental Health Unit  
Director.

*DHS*

Aboriginal Health Unit  
Brian Dixon  
Manager

Dept for Correctional Services  
Chief Executive  
Mr. John Paget  
GPO Box 1747  
ADELAIDE. SA 5001

Dept of Education, Training and Employment  
Chief Executive  
Mr. Dennis Ralph  
GPO Box 1152  
ADELAIDE SA 5001

Family and Youth Services  
Executive General Manager  
Mr. Ian Proctor  
2<sup>nd</sup> floor Citi-centre Building  
11 Hindmarsh Square  
ADELAIDE SA 5001

SOTAP

Mr. Don Sandford  
Program Manager  
PO Box 2551  
KENT TOWN SA 5071

Head of School, Psychology  
Flinders University  
Prof. Peter Wilson  
GPO Box 2100  
ADELAIDE SA 5001

Head of School, Psychology  
University of SA  
Prof. Kevin Howells  
GPO Box 2471  
ADELAIDE SA 5001

Head of School, Psychology  
University of Adelaide  
Mr. Christopher Cooper  
North Terrace  
ADELAIDE SA 5005

Deputy Head of School, Psychology  
University of Adelaide  
Dr. Ted Nettlebeck  
North Terrace  
ADELAIDE SA 5005

SACOSS  
Mark Henley  
Director  
220 Victoria Square  
ADELAIDE SA 5000

Mental Health Resource Unit  
(Association of Relatives & Friends of Mentally Ill,  
Mood Disorders Association (SA) Inc,  
Schizophrenia Fellowship) **3 copies**  
PO Box 310  
MARLESTON SA 5033  
1 Richmond Road  
KESWICK SA 5035

Panic Anxiety Disorders Association  
PO Box 83  
FULLARTON SA 5063

OCD Support Services  
33 Pirie Street  
ADELAIDE SA 5000

Panic Anxiety Education Management Services  
Director Bronwyn Fox  
PO Box 258  
FULLARTON SA 5063

Anorexia & Bulimia Nervosa Assoc of SA Inc  
47 Waymouth Street  
ADELAIDE SA 5000

Women's Health Statewide  
Director, Ms. V. Toovey  
64 Pennington Tce  
NORTH ADELAIDE SA 5006

Australian Psychological Society  
Chair, Assoc Prof T Winfield  
PO Box 134  
NORTH ADELAIDE SA 5006

Institute of Private Practising Psychologists  
President, Ms G. van der Schyff  
33 Dequetteville Terrace  
KENT TOWN SA 5067

Psychologists Council of SA  
Chair, Ms K. Prescott  
PO Box 23  
KENT TOWN SA 5067

Mr. R Oborn  
PO Box 23  
KENT TOWN SA 5067

Adelaide Association of Psychologists in Private Practice  
Secretary, Dr Jack Metzger  
233 North Terrace  
ADELAIDE SA 5000

Australian Guidance & Counselling Association  
Secretary,  
12 Seville Avenue  
PARA HILLS SA 5096

Psychologists Association of Australia  
Secretary, Mr.L. Eddie  
52 Miller Street  
UNLEY SA 5061

Public Sector Psychologists Association  
Secretary, Ms. Jenny Harvey  
6 Baldina Street  
EDEN HILLS SA 5050

Psychologists Industrial Committee

c/ Public Service Association  
122 Pirie Street  
ADELAIDE SA 5000

Australian Society of Hypnosis  
President, J. Hinora  
Level 3, 25 King William Street  
ADELAIDE SA 5000

South Australian Association of Hypnotherapists  
President, Ms. J. Dakin  
PO Box 176  
GOODWOOD SA 5034

There were also 15 requests for Consultation drafts from Organisations, individual professionals and consumers.

## Submissions received/Summary of issues

TOPIC	RESPONSES	SUMMARY
<b>The Act, including Purpose</b>	3	There should be an Act for the registration of psychologists. The SA Assoc of Hypnotherapists wish the Act to regulate the practice of hypnosis. This is not universally supported, see "Hypnosis". Flinders University submit "ensuring practice of a high standard" as an important role of the Act.
<b>Registration</b>	3	That there should be a clause pertaining to de-registration for non-compliance with the Act. Should there be a defence required, natural justice within the public system should prevail. The SA Assoc of Hypnotherapists wish registration to specifically include Hypnotherapists on the register for all purposes. There is a case forwarded for the use of the "specialist" system for credentialling purposes. The Psychological Board submit substantial change to the wording of registration to clarify training requirements and include the registration of companies, see "Companies"
<b>Definitions</b>	5	There is general consensus that there are few adequate definitions of "psychological practices". Submission offered suggestions to contrary ends. Some wished them included in the Act some used them as grounds for exclusion. Hypnosis being the most prevalent. defining practices was mentioned as a restriction in itself. It was stated that it is not possible to legislate that which is not defined.
<b>Hypnosis</b>	5	It is suggested that the words are protected, but the practice is not, this is not elaborated upon. The Psychological Board of SA suggests that hypnosis be removed from the legislation. This is more widely supported in submissions than the contrary view. A middle ground is suggested in reporting and recording of areas of expertise that the public may access. Some of the arguments for the regulation of hypnosis ie the danger to the public are discussed and supported by submission. There appears on this evidence to be no case for regulation.
<b>The Board including constitution, membership &amp; powers</b>	4	The notion of recognition and participation is forwarded, ie all different specialist areas require Board representation, one submission continues to state that the Powers of the Board must be clearly stated for the benefit of the Public. The submission supporting the inclusion of Hypnosis requires changes to the Board that reflect this inclusion. The Board supports review of "functions" of the Board, including the levying and collections of Fees and Fines. A change from Supreme to District Court Appeals is supported. There is an assertion that the "Profession" is unanimous in requiring a Chair who is a registered psychologist. There is also a similar assertion that a psychiatrist was not essential, a legal practitioner was

<b>TOPIC</b>	<b>RESPONSES</b>	<b>SUMMARY</b>
<b>Companies</b>	3	SA Assoc of Hypnotherapist are strong in their opinion that the Board has no function in the running of Companies. There is another view that states that one Director be a registered psychologist and another that supports that the Public requires protection equally from companies and individuals. The Board wishes to register companies as with dentists in the interests expressed prior.
<b>Discipline</b>	4	The enquiry into of mental and physical fitness is seen s requiring a more conciliatory approach where there are a number of choices for practitioners undergoing review. There is an equally strong point for the Board to respect and consider the Codes of conduct of professional Bodies. There were submission that addressed the issue of professional misconduct by stating that they were satisfied with the current state.
<b>Good fame &amp; character</b>	2	It is generally accepted that there should be an attempt to standardise these types of terms across legislation. The term used most frequently is “fit & proper person” and this is mentioned on submissions. There is a contrary opinion that states that the current term engenders public confidence in attitudes and morals that are appropriate for the profession.
<b>Title protection</b>	4	Title protection is mentioned as an important benchmark for recognition for employers and the Public. The ability to confer limited registration via a protected title may help the public. The Public benefit of the title being recognised is seen as essential in the consumer information arena.
<b>Practice protection</b>	2	The word “psychology” and its derivatives are seen as the explanatory words of the practices of psychologists. The perceived dangers of some practices are a concern if listed in the act. There are some specific recommendations.
<b>Education</b>	2	There are some concerns about “grandparenting” legislation, the use of industry standards and experienced as terms of common understanding. The Board is assumed to exercise adequate judgement in the recognition of non-university training by some, but this is seen as a quality issue elsewhere.
<b>Administration</b>	1	An individual comment about fee structures and the notion of specialist registration incurring greater fee payment