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Joint Committee on the Health Care Complaints Commission (left to right)
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The Hon Dr. Brian Pezzutti MLC, The Hon John Johnson MLC, The Hon Dr. Arthur Chesterfield-Evans MLC

CHAIRMAN'S FOREWORD

This inquiry into the adequacy and appropriateness of current mechanisms for resolving complaints concerning unregistered health practitioners was undertaken in response to repeated comments by the Health Care Complaints Commissioner, both in the Commission's Annual Reports, and during her meetings with the Committee, about the Commission's limited ability to protect the public from unprofessional treatment given by unregistered health practitioners.

It should be made clear at the outset that this inquiry was **never** about the efficacy of treatments offered by unregistered health practitioners. Although this issue came up frequently in the course of the inquiry, the Committee has been careful to focus merely on complaint handling and disciplinary issues. The principal thrust of this report is how the public can be better protected and more effectively seek redress if they have suffered at the hands of an unregistered practitioner.

The Committee decided to examine closely the existing mechanisms and how effectively they were operating. What it found was that there are a diverse range of legislative restrictions imposed on unregistered health practitioners through a wide range of Acts which many different government agencies administer. Unfortunately, few of these legislative restrictions actually apply to quality of care issues and rarely are such concerns the core business of the relevant agency.

The Committee therefore turned its mind to mechanisms which could be implemented to ensure better consumer protection for the future. Firstly, it considered ways in which the Health Care Complaints Commission's powers could be strengthened to better seek redress for consumers and to address unprofessional conduct by unregistered practitioners. The Committee has recommended a number of changes to the *Health Care Complaints Act* 1993. These include a public naming power similar to the one available to the Department of Fair Trading and the ability to require professional associations to implement complaint and disciplinary mechanisms.

In addition, the Committee would like to see the Commission play a greater consumer educative role in relation to consumers of unregistered health services. It is clear that many unsatisfied consumers are not presently identifying the Commission as the appropriate body to approach with their complaint. The Committee has also recommended that the Minister for Health consider either establishing or nominating a body which could order refunds for consumers where it deems appropriate.

The Committee's most important recommendation, at least in the long term, relates to the establishment of umbrella regulation of unregistered practitioners. Many of the problems the Commission presently faces in regard to dealing with these practitioners stem from the fact that the *Health Care Complaints Act* 1993 operates on the premise that there will be a professional disciplinary board to which the Commission can take a complaint after investigation. In order to fit in with the existing system and to best ensure standards of education, good character, clinical care and discipline, the Committee believes that registration is a preferred option. It does not, however, advocate individual registration of

unregistered professions, considering this to be too problematic. What it would like to see is a generic uniform approach to the issue, bringing all unregistered professions under the one Act. It would also like to see such legislation establish an Advisory Board to the Minister to give the unregistered professions a voice.

I would like to stress that I see the recommendations contained in this report to be the beginning of the process. Ensuring greater protection of the public in what is a rapidly growing area will present ongoing challenges for the Minister for Health and the Department and I hope the evidence the Committee has gathered throughout this inquiry and the directions it has taken in this report will assist them.

As this will be the Committee's last report for this term of Parliament, I would like to thank Commissioner Walton and her staff for their assistance over the last four years. I would also like to thank all those agencies and individuals who have written into the Committee or participated in our inquiries. On behalf of the members of the Committee, I express thanks to the Committee Director, Catherine Watson, her staff, the Clerk-Assistant, Hansard and printing staff of the Parliament, for their assistance in enabling the Committee to carry out its work. Lastly I would like to express my appreciation to my hardworking committee colleagues who have consistently and effectively contributed to what, I believe, has been a very effective oversighting Committee.

JOHN MILLS, MP
Chairman

SUMMARY OF RECOMMENDATIONS

1. **That the Health Care Complaints Commission take a greater role in educating consumers about the Commission's ability to investigate complaints about unregistered health practitioners through the production and dissemination of pamphlets and other information.**

2. **That the Department of Health and the Colleges support this initiative by encouraging the dissemination of such information through hospitals and Area Health Services.**

3. **That the Minister for Health consider providing the Health Care Complaints Commission with legislative power to refer matters which concern possible breaches of the Minister's Acts to the Director General of Health.**

4. **That the Health Care Complaints Act be amended to create a power which allows the Health Care Complaints Commission to require health professional associations to establish uniform complaints handling and disciplinary mechanisms and grants the Commission power to monitor the functioning of these.**

5. **That the Minister for Health examine the feasibility of establishing umbrella legislation to cover unregistered health care practitioners which establishes a generic form of registration, generic complaint and disciplinary mechanisms, a uniform code of conduct, entry criteria agreed amongst the relevant professions and an Advisory Board to the Minister.**

6. **That the Minister for Health consider providing the Health Care Complaints Commission with a naming power similar to the one available to the Department of Fair Trading by s86A of the *Fair Trading Act 1987.***

7. **That the Minister for Health consider either establishing or nominating a body with the power to issue court-enforceable orders to allow health consumers to obtain refunds through the Small Claims Tribunal from unregistered practitioners in circumstances where this body deems it appropriate after receiving recommendations from the HCCC.**

CHAPTER 1

Background and Context of the Inquiry

Under Section 65(1) of the Health Care Complaints Act 1993 (the Act), the Committee has the power:

> *(a) to report to both Houses of Parliament, with such comments as it sees fit, on any matter appertaining to the Commission and the exercise of the Commission's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;*
>
> *(b) to examine each annual and other report by the Commission, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report.*

The Health Care Complaints Commission (HCCC), both in its annual reports and during meetings with the Committee has raised ongoing problems with respect to its limited ability to deal adequately with complaints concerning unregistered health practitioners.

On 6 May 1998, the Joint Committee on Health Care Complaints Commission (the Committee) resolved to conduct an inquiry with the following terms of reference:

> *That the Committee examine the experience of consumers in dealing with unregistered health practitioners (including those practising in alternative health care fields) with a view to establishing:*
>
> *(a) what complaint mechanisms exist for consumers;*
>
> *(b) whether these complaint mechanisms are effective;*
>
> *(c) whether there is scope for strengthening voluntary codes of behaviour or conduct;*
>
> *(d) whether the provisions in the Health Care Complaints Act 1993, relating to unregistered health practitioners are appropriate or whether they need strengthening;*
>
> *(e) any other related matters.*

The Inquiry Process

In July 1998 the Committee released a Discussion Paper titled *"Unregistered Health Practitioners: The adequacy and appropriateness of current mechanisms for resolving Complaints".* Advertisements detailing the Committee's Terms of Reference and calling for written submissions were placed in several major newspapers.

A total of 27 submissions were received. In addition, evidence was taken from over 20 witnesses including representatives from relevant government and non-government agencies, unregistered practitioners, representatives from professional associations, consumers and Commissioner Walton.

The Committee travelled to Northern New South Wales in August 1998 and took evidence. It also visited the Nature Care College at St Leonards in October 1998.

Unregistered Health Practitioners and the Health Care Complaints Act 1993

Section 7 of the *Health Care Complaints Act* (the Act) specifies the type of complaints which can be made to the HCCC.

> *(1) A complaint may be made under this Act concerning:*
>
> *(a) the professional conduct of a health practitioner; or*
>
> *(b) a health service which affects the clinical management or care of an individual client.*
>
> *(2) A complaint may be made against a health service provider.*
>
> *(3) A complaint may be made against a health service provider even though, at the time the complaint is made, the health service provider is not qualified or entitled to provide the health service concerned.*

Section 4 of the Act defines a 'health practitioner' as a person who provides a health service whether or not the person is registered under one of the health registration Acts listed below:-

- *Chiropractors and Osteopaths Act 1991*
- *Dental Technicians Registration Act 1975*
- *Dentists Act 1989*
- *Medical Practice Act 1992*

- *Nurses Act 1991*
- *Optical Dispensers Act 1963*
- *Optometrists Act 1930*
- *Pharmacy Act 1964*
- *Physiotherapists Registration Act 1945*
- *Podiatrists Act 1989*
- *Psychologists Act 1989*

The definition of 'health service' in the Act includes services provided by dietitians, masseurs, naturopaths, acupuncturists, occupational therapists, speech therapists, audiologists, audiometrists, radiographers and services provided in other alternative health care fields.

Those other "alternative health care fields" referred to in the definition of 'health service' might include counselling, iridology, reflexology, social work, homeopathy, herbalism, traditional Chinese medicine, kinesiology, aromatherapy, hypnotherapy and Reiki. The Act defines a "health service provider" as a person who provides a health service.

Section 23 of the Act provides that the HCCC must investigate a complaint if it appears to raise:-

- *a significant issue of public health or safety; or*
- *a significant question about the appropriate care or treatment of a client by a health service provider; or*
- *provides grounds for disciplinary action against a health practitioner; or*
- *involves gross negligence on the part of a health practitioner.*

Section 39 prescribes the action which the Commission can take after investigation of a complaint.

> *(1) At the end of the investigation of a complaint against a health practitioner, the Commission must do one or more of the following:*
>
> *(a) prosecute the complaint as a complainant before a*

disciplinary body;

(b) intervene in the proceedings that may be taken before a disciplinary body;

(c) refer the complaint to the appropriate registration authority (if any) with a recommendation as to any disciplinary action the Commission considers appropriate in respect of the complaint;

(d) make comments to the health practitioner on the matter the subject of the complaint;

(e) terminate the matter;

(f) refer the matter the subject of the complaint to the Director of Public Prosecutions.

The section defines 'disciplinary body' as meaning the person or body, including a professional standards committee, established under a health registration Act, that has the power to discipline, suspend or cancel the registration of health practitioner.

A 'registration authority' is defined in section 4 of the *Health Care Complaints Act* as a person who has the function, under a health registration Act, of determining an application for registration under the Act.

Health Care Complaints Commission Powers in Relation to Unregistered Practitioners

Commissioner Walton explained what the Commission's present powers are in relation to dealing with complaints against unregistered health care practitioners:

> *The Health Care Complaints Commission has the power under the Health Care Complaints Act (the Act) to receive and investigate complaints against all health care providers. Health practitioners cover both registered health professionals as well as practitioners in occupations which are not subject to registration.*
>
> *Under section 39 of the Act, when an investigation concerning a registered health professional is finalised, the Commission has a number of options available to it, including, in serious cases, the prosecution of a complaint before a disciplinary body of the appropriate registration board.*
> *The only relevant action for the Commission in substantiated complaints against unregistered health practitioners is to make adverse comments to the respondent. The Commission is not able to make these findings public nor is it able to take any enforcement action in relation to its recommendations to the practitioner.*

> *The Commission considers that the public interest would be served and standards across all health services would be better maintained by amending the Act to allow the Commission to take appropriate action at the end of its investigations, including the discretion to make its findings public. The Commission further considers that a mechanism should be established which would allow enforcement action to be taken against unregistered health professionals when serious complaints have been sustained.*
>
> *Submission to the Committee , 9 July 1998.*

The *Health Care Complaints Act 1993*, while granting the Commission jurisdiction to investigate and conciliate complaints against both registered and unregistered health practitioners, is essentially based on the premise that there will be a professional board to hear the complaint.

In cases where there is a registered professional board the Commission has the broad scope to:

- *prosecute the case before the appropriate disciplinary body;*
- *intervene in proceedings taken before the disciplinary body;*
- *refer the complaint to the appropriate registration authority with a recommendation as to any disciplinary action the Commission considers appropriate;*
- *make comments to the practitioner on the complaint;*
- *terminate the matter or refer it to the Director of Public Prosecutions for prosecution.*

As there is no such professional board in the case of unregistered practitioners the Commission is essentially restricted to either: making comment to the practitioner about the complaint; terminating the complaint; or referring the matter the subject of the complaint to the Director of Public Prosecutions or another relevant agency.

There is also some scope for conciliation but all parties must agree to submit to the process. Section 24 of the *Health Care Complaints Act* provides that the HCCC may refer a complaint to the Health Conciliation Registry for conciliation if the complaint is not required to be investigated under section 23 of the Act and the parties to the complaint consent. In the case of a registered health care provider the appropriate registration authority must also be of the opinion that the complaint should be referred for conciliation. Conciliation is often the Commission's preferred option when dealing with complaints against unregistered practitioners due to the lack of disciplinary options following investigation.

The Commission is further restricted by its inability to advise outside agencies of adverse outcomes of investigations against unregistered practitioners. Section 37 of the *Health Care Complaints Act* restricts such disclosure to the following situations:-

- *with the consent of the person to whom the information relates;*
- *in connection with the execution and administration of the Act;*
- *for the purposes of any legal proceedings arising out of the Act;*
- *with other lawful excuse.*

Prosecution Under Other Acts

Section 25 of the *Health Care Complaints Act* 1993 provides that following assessment, the HCCC must notify the Director General of the Department of Health of details of a complaint if it appears to the Commission that the complaint involves a possible breach of any of the following Acts or their regulations:-

- *Area Health Service Act 1986*
- *Health Administration Act 1982*
- *Mental Health Act 1990*
- *Nursing Homes Act 1988*
- *Poisons and Therapeutic Goods Act 1966*
- *Private Hospitals and Day Procedure Centre Act 1988*
- *Public Health Act 1991*
- *Public Hospitals Act 1929*

The Commission also refers on complaints which it considers are best investigated by appropriate sections of the Department of Health. The Health Care Complaints Commission Annual Report 1996/97 provides the following information on complaints referred to the Department for that year.

Of the 62 complaints referred to the Director General of the Department of Health the Commission requested reports on 39 matters. The

following action was recorded in relation to these:

- *the Department of Health took action in five cases;*
- *information was provided following investigation in 11 cases;*
- *policy and procedural changes were instituted in seven cases;*
- *a medical practitioner was cautioned by departmental inspectors regarding drug prescription practices in five cases. These cases were followed up by the Commission and further action was taken; and*
- *department investigation continuing in 11 cases.*

Section 26 of the Act allows the Commission to refer a complaint to another body if it appears that the complaint raises issues which require investigation by that body. The Commission must continue to deal with the matter the subject of the complaint if it appears to the Commission that:-

- *the matter raises a significant issue of public health or safety;*
- *the matter raises a significant question as to the appropriate care or treatment of a client by a health service provider; or*
- *the matter provides grounds for disciplinary action against a health provider.*

As outlined in the Committee's report into Localised Complaint Handling Procedures, where appropriate, the Commission tries to facilitate direct resolution of complaints by referring relevant matters to the Area Health Services and hospitals.

CHAPTER 2

The Extent of Problems With Standards of Care Amongst Unregistered Practitioners

Introduction

Although many mainstream and well recognised health professions such as speech pathologists, physiotherapists and counsellors are presently unregistered in New South Wales, many unregistered health care providers fall under the category of what is termed “alternative health care” or “natural and complimentary medicine”. This type of health care is characterised by a proliferation of disciplines, modalities, concepts and techniques and a wide range of clinical standards, educational qualifications and efficacy. Any person can practise as an unregistered practitioner without having to meet any objective criteria.

There is little reliable information available regarding the number of unregistered health practitioners practising in New South Wales and the types and occasions of service they provide. The fact that many fields of alternative health care do not have one professional association which represents the discipline as a whole but rather a number of associations each supporting different standards and methods of practice complicates this situation further.

Recent research into the use of alternative health care suggests that the industry is growing and that a greater number of consumers are choosing to consult alternative health care practitioners each year.

A research project into the practice of Traditional Chinese Medicine (TCM) in Australia, conducted by the Victorian Department of Human Services, New South Wales Department of Health and Queensland Department of Health estimates that there are at least 2.8 million TCM consultations each year in Australia representing a turnover of $84 million within the health economy (Bensoussan A, Myers S, *Towards a Safer Choice,* University of Western Sydney, 1996).

The Health Funds Association indicated to the Committee that during 1998, 15 of its 18 member funds provided coverage for 740,000 natural therapy services nation-wide, of which 400,000 were in New South Wales. This translates to around $13m in benefits for natural therapies Australia wide, around $7m of this in New South Wales.

Evidence of Consumer Dissatisfaction

In the absence of serious study of the problems accompanying unregistered health care, any conclusions the Committee can draw are largely based on purely anecdotal evidence.

Despite the apparent prevalence of alternative health care use within the community complaints received by the HCCC concerning unregistered health practitioners remains relatively low when compared to the complaints it received concerning registered health practitioners. Still numbers are growing steadily. During the period 1994/95 to 1997/98 complaints received per year by the HCCC concerning unregistered health practitioners increased from approximately 30 to 54. In 1997/98 the HCCC received over 1000 complaints concerning registered health practitioners.

However, all parties who both submitted to, and appeared before, the Committee, including unregistered health care professionals themselves and their associations, were of the view that the problem was larger than complaint numbers to the HCCC may indicate.

In this vein, the New South Wales Department of Health expressed the view that greater vigilance is needed in this area to ensure standards of care and optimum public safety:

> *..the Department would share a concern that the quite clearly increasing evidence of use of alternative health care practitioners by the community is leading to the need to pay more attention to professional standards and training in the alternative health care sector ... I would agree that it is an emerging issue that the Department needs to maintain a close eye on.*
>
> *Transcript of Evidence, 24 September 1998.*

Of the 54 complaints received by the Commission in 1997/98;

- *8 concerned an unregistered counsellor, therapist or psychotherapist;*
- *7 concerned social workers;*
- *3 concerned Traditional Chinese Medicine practitioners;*
- *10 concerned natural therapists including herbalist, homeopath, naturopath;*
- *3 concerned deregistered or previously registered health providers;*
- *4 concerned other alternative health services including massage, Reiki, reflexology, iridology, herbalism, kinesiology, deep tissue therapy, aromatherapy; and*

- *19 concerned other unregistered practitioners.*

Of these complaints, 20 involved clinical standards, 8 provider/patient relationship, 10 business practices, 3 fraud and the remaining 13 complaints concerned a range of patient rights and professional practice issues.

The 179 complaints received by the Commission since 1994/95 were dealt with in a variety of ways:-

- *72 referred to another body or person;*
- *60 declined by the Commission;*
- *15 substantiated;*
- *23 not substantiated;*
- *5 directly resolved between parties;*
- *5 terminated by the Commission;*
- *3 terminated on complainant request;*
- *1 investigation remains incomplete; and*
- *1 in conciliation.*

In evidence to the Committee Commissioner Walton provided a practical example of a complaint received by the HCCC concerning an unregistered health practitioner and how the Commission dealt with it:

> *...we had a complaint from a person suffering from swollen and painful limbs who consulted a herbalist. An amount of $1,800 was requested before the treatment could begin and a guarantee of a cure within three days was made by the herbalist. The treatment provided two litres of a Chinese herb mixture and some tablets were prescribed. The complainant's condition worsened.*
>
> *He again consulted the herbalist. Medicated plasters were provided to put on the patient's limbs, and on the third day his condition deteriorated and his walking was extremely difficult. He again phoned the herbalist and was told there would be no further consultations but to keep drinking lemon water mixed with salt. A month later his condition showed no sign of improvement. We wrote to the herbalist , telling him about the complaint and requesting answers. The letter was provided to us in Chinese. We had it translated.*

> *...The herbalist would not respond to us in writing and the complainant advised that the herbalist arrived at his house and demanded to see the patient but the client was too scared to open the door, so the herbalist left a note under the door saying see him. In fact he refunded $1,500.*
>
> *Transcript of Evidence, 28 May 1998.*

The Commission provided the Committee with further examples of complaints made to the HCCC and the outcome achieved. Three examples are provided below.

Example 1

A complaint was made about a psychotherapist concerning personal and sexual relationship with the client during therapy. The HCCC conducted an investigation and obtained a Peer Review from a psychiatrist. A resume of the respondent showed no formal qualifications or study in the area of psychology or counselling. The respondent was not a member of a professional association. The review revealed that the respondent was under personal stresses and receiving counselling.

Outcome:

The HCCC was able to obtain an undertaking from the respondent that they continue therapy with their own therapist, accept work supervision from a psychiatrist, and permission from the respondent for the supervisor and therapist to intervene in the practice should they consider it necessary to do so.

Example 2

A complaint was made about a person holding himself out to be a doctor. The HCCC received an anonymous complaint about a person's name in the Medical Directory but not on the Register of Medical Practitioners. The HCCC and police investigated the complaint.

Outcome:

The respondent was charged by police with assault, obtaining a benefit by deception arising out of a consultation with a woman while claiming to be a medical practitioner and

holding himself out to be a doctor pursuant to section 105 of the *Medical Practice Act*. The respondent was convicted. HCCC closed file.

Example 3

A complaint was made about a naturopath alleging that the person was holding themselves out to be a doctor. The HCCC found that the respondent had little English and trained as a naturopath in China. The HCCC found that it is likely that the use of the title Doctor resulted from a lack of knowledge about legal restrictions on the use of the title.

Outcome:

The HCCC warned the respondent that a future breach of the Act could result in prosecution. HCCC closed file.
Information collected by HCCC and provided to the Committee on 3 June 1998

Complaints Received By Other Bodies

Commissioner Walton further advised the Committee that one reason for the small number of complaints received by the HCCC concerning unregistered health practitioners could be due to consumers utilising other complaint handling mechanisms such as the legislative provisions of the Fair Trading Act or self-regulation procedures of professional associations rather than the HCCC. Complaints made to these bodies would not necessarily come to the attention of the HCCC.

The *Fair Trading Act 1987* provides for general consumer protection and a mechanism for pursuing redress from a person who has contravened the Act. Complaints can be made to the Department of Fair Trading with regard to matters such as misleading and deceptive conduct, unconscionable conduct, false representations and accepting payment without intending or being able to supply as ordered.

Part 6 of the *Fair Trading Act* outlines enforcement and remedy provisions available. These include penalties for offences, injunctions against offenders and orders and payment of damages.

In a submission to the Committee, the Department of Fair Trading outlined complaints received by the Department concerning unregistered health practitioners:

- *Between 1 January 1997 and 29 July 1998, the Department of Fair Trading received 22 complaints (with a total value of $2 044.88) regarding the activities of unregulated health practitioners.*

- *These complaints covered contractual issues, pricing issues, quality issues, advertising, multi-level marketing and representations on health and safety.*
- *Of these 22 complaints:*

  - *full redress was found to be warranted and achieved by the Department in 5 instances;*
  - *1 complaint was clarified;*
  - *5 complainants were advised that their complaints should be put to the Consumer Claims Tribunal;*
  - *4 complaints were transferred to the onsumer Claims Tribunal;*
  - *1 complaint had been referred to the Department purely for information purposes;*
  - *1 claim was found to be unjustified;*
  - *1 claim was transferred to another jurisdiction;*
  - *2 complaints were not covered by legislation. (S27)*

Complaints are also received by professional associations when the subject of the complaint is a member.

For example, Ms Dodds and Ms Davidson from the Australian Association of Social Workers, during their appearance before the Committee stated that in the period 1986 to 1993 their Association received around 30 complaints in New South Wales. They regarded this as a significant underestimation of the potential complaints concerning Social Workers.

Mr Raymond Khoury, representative of the Australian Traditional Medicine Society (ATMS) which has over 6,000 members, told the Committee that the Society's Complaints Committee had received 13 formal complaints about ATMS members during the 1997/98 year.

> *A person overcharging, charging too much for his services; a poor level of unprofessional behaviour; lack of satisfaction of the member of the public with a particular service provided by the practitioner. They would be the main complaints.*
>
> *Raymond Khoury, Transcript of Evidence, 24 September 1998*.

Do Some Modalities Pose Greater Public Risk Than Others?

This issue was discussed in many of the submissions. Aside from sexual

and emotional abuse which all health practitioners are in a position to perpetrate, the consensus appeared to be that those practitioners who prescribe drugs probably pose the greatest risk. This largely involves traditional Chinese medicine and naturopathy.
Basically, risks of harm from unregistered health care providers fall into the categories of acts of omission and commission.

Dr Stephen Myers, Head of Natural & Complementary Medicine, Southern Cross University, considers that the analysis of risks made in *Towards a Safer Choice* concerning the potential risks to the public of TCM could be extended across the breadth of alternative health care providers.

> *...what we actually found was that there were certain risks associated with the clinical judgement of the TCM practitioner, and this could be said of the clinical judgement associated with complementary therapists. Those risks can be divided into twofold. The first is that they can actually be risks of omission and second is risks of commission.*
>
> *Dr Stephen Myers*, *Transcript of Evidence, 25 August 1998.*

Dr Myers explained that these risks are as follows:

Acts of omission include:

- *misdiagnosis or incorrect diagnosis;*
- *failure to refer;*
- *failure to adequately explain necessary precautions (eg. in taking herbal preparations).*

Acts of commission include:

- *removal from therapy (eg. advising a diabetic to discontinue insulin prescription);*
- *incorrect prescribing (correct diagnosis but inappropriate treatment);*
- *inappropriate duration of therapy.*

Dr Joe Gambin, a General Practitioner who practises in the Northern New South Wales town of Nimbin, also highlighted the need to appropriately diagnose and refer on for appropriate treatment in a timely manner:

> *...it is more a matter of not doing - how much harm will you do with a homeopathic treatment - some treatments don't involve giving much at all ... In those situations the harm that happens is from them not receiving Western medical care in an early enough stage.*

> *So I suppose that's where the harm comes from there... I see the major harm coming from people not accessing Western medicine at an early enough stage and spending too much time going elsewhere.*
>
> *Transcript of Evidence, 25 August 1998.*

The HCCC, in its submission to the inquiry, stated that it does not support the statutory registration of all health care providers but does consider that regulation is required in those areas of practice which have the greatest potential to harm the public.

One field of unregistered health care which does not involve the prescription of drugs but nevertheless may require some form of regulation is the practice of therapists and psychotherapists. Such forms of therapy have the potential to cause harm due to a number of factors including the vulnerability of patients and the potential for abuse of the relationship of trust which, in many cases, develops over a long period of time.

This point was discussed by the HCCC in its submission to the Committee:

> *The Commission considers that there may be some need to regulate the practice of therapists or psychotherapists given their potential to cause harm to the public and given the confusion in their status as a result of the variety of backgrounds and qualifications of practitioners who refer to themselves as therapists. (S21)*

The Victorian Government's review of traditional Chinese medicine concluded that in light of the not insignificant risks attached to TCM (*Towards a Safer Choice* estimates that four in every 1000 consultations will result in an adverse event), the benefits of public safety clearly outweighed the potential negative impact of occupational regulation. This decision was in the context of both the Mutual Recognition Policy enshrined in the Commonwealth *Mutual Recognition Act 1992*, which is directed at reducing unnecessary regulation of occupations and achieving flexibility of the labour force, and the National Competition Policy which ensures that any regulatory measure that might restrict competition must demonstrate that, first, the benefits of the restriction to the community as a whole outweigh the costs and second, that the objectives of the legislation can be achieved only by restricting competition.

In response to the report the Victorian Minister for Health, the Hon Rob Knowles, established a Ministerial Advisory Committee to assess the recommendations contained in *Towards a Safer Choice.* The inquiry conducted by the Ministerial Advisory Committee canvassed options for regulation of TCM including self regulation, co-regulation and statutory registration and state versus national approaches. In addition it considered potential implementation issues including funding of a regulatory system, constitution and powers of a TCM registration board and protection of title

versus protection of practice.

The Ministerial Advisory Committee made a number of recommendations to the Minister. In essence the Committee recommended that the most effective method of protecting the public from the risks of TCM was to apply the same models of regulation that apply to medicine, nursing, optometry and other regulated health occupations.

> *Recommendation 1:*
>
> *The statutory based occupational regulation of the profession of TCM be adopted as the most suitable method of setting educational standards, accrediting training courses and protecting the public from untrained or poorly trained practitioner.* (*Report on options for regulation of practitioners p 21).*

A legislative model for registration of TCM is currently being developed by the Victorian Government. This model will be considered by the Australian Health Ministers Advisory Council in the context of its criteria for assessing the regulation of unregistered health occupations.

In 1993, in line with Mutual Recognition Act and the National Competition Policy, the Australian Health Ministers' Advisory Council (AHMAC) agreed that before a State or Territory registered a health occupation, a majority of States should agree that registration was required.

AHMAC criteria for assessing the need for statutory regulation of unregistered health occupations includes consideration of whether activities of the occupation pose a significant risk of harm to the health and safety of the public and whether existing regulatory or other mechanisms fail to address health and safety issues.

Conclusion

The true extent of unprofessional and improper conduct by unregistered practitioners is presently impossible to define. However, indications are that there is more discontent amongst its consumers than is reflected in the figures held by the recognised complaint agencies.

While the Committee is of the view that some modalities such as counselling, traditional Chinese medicine and naturopathy may have the potential to cause more harm than say, iridology or Reiki, due to the nature of their practice, it does not necessarily support the view that professional registration of these individual professions is the answer.

The Committee considers that all unregistered practitioners can cause

consumers harm through overcharging, sexual abuse, inappropriate crossing of practitioner/patient boundaries etc. Accordingly, it advocates a more general encompassing approach to the problem.

CHAPTER 3

Why Consumers Are Not Complaining to the HCCC?

Introduction

Commissioner Walton, advised the Committee that, in her opinion, the relatively small number of complaints received by the HCCC concerning unregistered health practitioners could be due to a range of issues including:

- *the HCCC has not focussed on education of unregistered health practitioners nor targeted its clients with relevant information about the HCCC's role in complaint handling;*

- *consumers accessing the services of unregistered health practitioners may be unaware of the HCCC's jurisdiction in this area; and*

- *who have found orthodox medicine unsuccessful in treating a terminal or chronic illness might consult unregistered health practitioners with a full understanding and acceptance of the risks involved.*

Consumer Ignorance of the HCCC Role in Relation to Unregistered Practitioners

The HCCC itself admits that consumers may often be unaware of its jurisdiction to investigate complaints concerning unregistered health practitioners. In evidence to the Committee Commissioner Walton stated that one problem is that the Commission has not focused on this aspect of its jurisdiction.

> *Part of the problem is because the Commission has been reactive to a large extent. We have focused our resources on the types of complaints we get... If we decide to do an education and training promotion with the unregistered practitioners we may well generate hundreds of complaints. I think people do not generally know we can investigate their complaints. There is not as much awareness and knowledge about it. .. To a large extent the complaints we get are because that is the area we have concentrated on. ...we have not done pamphlets saying, "if you have complaints about your naturopath" so we have not ourselves focused on that area... Why would we go out and promote it when there is little we can do? ... People do not know about us*.

Transcript of Evidence, 28 May 1998.

This lack of consumer knowledge of where and how to complain about unregistered practitioners was confirmed by witnesses throughout the Committee's inquiry.

For example, the Australian Association of Social Workers said in their evidence:

> *... the public, in general, have a very clear understanding that medical practitioners have a registration board and there is a process for complaint. I think the public is much less clear about other professions where they are not registered or where it is difficult to convey that information to the public about their rights.*
>
> *Transcript of Evidence, 24 September 1998.*

The need for wider dissemination of practising information about complaining to the HCCC was also raised by Mr Brian Macgrath, a hypnotherapist:

> *I am in favour of people being able to complain about people who produce a medical service of any sort, and the mechanism is there in place. I think it is probably not well enough advertised.*
>
> *Transcript of Evidence, 12 October 1998.*

Are Consumers Accessing Unregistered Practitioners More Likely to Accept the Consequences of Inadequate Treatment?

Many parties agreed that this may be the case. For example, Commissioner Walton told the Committee that she believed that consumers accessing unregistered health care services may be more willing to accept a greater degree of attached risk:

> *They are a group of people who perhaps have purposefully shunned orthodox health services for some alternative and in a way they accept the risk attached to that ... a lot of people probably go there when they have chronic problems, like sinus or persistent headaches, where orthodox medicine has not worked, so when alternative methods or alternative practitioners have not worked they are not going to complain.*
>
> *Transcript of Evidence, 28 May 1998.*

Reasons why consumers are willing to accept the consequences of the alternative health care service that they are accessing may include:

- *philosophical grounds*

- *consumer expectations may influence a willingness to "cut their losses" if treatment is unsuccessful;*

- *consumers may consider some fields of alternative health care services as self-help rather than health care;*
- *a lack of recognisable standards makes it difficult to measure quality of care;*
- *a relationship has been established between the consumer and practitioner.*

Philosophical Grounds

Consumers are often accessing the services of practitioners in alternative health care fields on philosophical grounds. As outlined by the HCCC in its submission:

> *Where consumers have chosen to receive treatment from alternative health care service providers ... they may also have selected alternative health care on philosophical grounds and therefore be less likely to express concerns regarding the standard of the service provided to independent organisations such as the Commission. (S21)*

Lower Consumer Expectations

In its submission to the Committee the Central Coast Area Health Service raised the question of whether consumers have lower expectations of unregistered practitioners:

> *...are there lower community expectation of "alternative therapies" and unregistered health services in which tangible health outcomes are not necessarily expected or able to be demonstrated, and therefore a higher tolerance level? (S22)*

This view was echoed by the Australian Osteopathic Association:

> *Consumer expectation of the service provided by unregistered health practitioners may indeed be lower than that expected of registered professionals. (S23)*

Self Help

There was also a view taken that consumers may be less likely to complain given that they may feel more inclined to "own" the process of seeking non-traditional health care as it was a result of their own initiative. Hunter Area Health Service supported this view in their submission:

> *It certainly is possible that consumers with alternative health care would be less likely to complain, given that they had accessed this form of health care presumably because of a failure or lack of*

> *confidence in mainstream medical care. It is also possible that the consumer could have a perception that by attending alternative practitioners they are indulging more in self-help than seeking medical attention. (S15)*

Lack of Recognisable Standards

The lack of recognisable standards by which practitioners and consumers can measure health care provided by many unregistered health professions means that consumers may not always be able to judge whether the service they have received is adequate. In light of this consumers may be less willing to confront the practitioner or make a formal complaint. As the Northern Rivers Health Services pointed out:

> *Orthodox health care services measure their service and service delivery against established standards when determining the outcome. If alternative health care standards do not exist they* [consumers] *have nothing to measure their treatment against. (S19)*

Relationship With Practitioners

As with all health care practitioners, consumers may develop a relationship of trust with their unregistered health practitioner which will prevent them from complaining. This can be particularly the case where unregistered practitioners provide consumers with longer sessions than that afforded by the average general practitioner and there is more exchange of personal background information. This is common practise amongst natural and complimentary medicine practitioners. There is also often a greater tendency for such practitioners to offer consumers reassurance by swift diagnosis and definite remedies.

Dr Joe Gambin, a general practitioner practising in Nimbin, New South Wales, discussed what he sees as the important "placebo effect" offered by alternative medicine:

> *I think what's happened is that doctors are now good at talking themselves out of the placebo effect. I do training for family medicine program trainees and I was sitting in with one the other day and I realised that they are all coming out of the hospital system full of the medico-legal stuff that they are all getting nowadays and they are terrified of actually making a diagnosis and being wrong. So this trainee had a patient where he basically said "I don't know what's wrong with you, and there's nothing I can do*
>
> *for you but I know you probably want something so here's a pill. It mightn't work and even if it does work here's a list of 300 side effects so it might actually make you sicker". I thought "Well, that*

> *patient is going to go home and say, 'Well, that doctor didn't know what was wrong, and he told me to take this and it is actually going to make me worse' " and therefore he will go to see the alternative practitioner down the road who is much better at saying "I know exactly what is wrong with you, you have this particular condition, and I can make you better.*
>
> *Transcript of Evidence, 24 September 1998.*

Consumers Taking Complaints to Other Agencies

Evidence presented before the Committee suggests that the low number of complaints received by the HCCC may be, in part, due to the fact that the HCCC is only one mechanism being utilised by consumers to complain about unregistered health care service.

For instance, consumers with a complaint about advertising or over charging may not see this as health related and lodge their complaint at first instance with the Department of Fair Trading or the ACCC rather than the HCCC.

In addition, consumers may be satisfied by taking their complaint to a professional association of which the practitioner is a member. Professional associations do not routinely refer complaints received to the HCCC nor, due to privacy legislation, inform the HCCC of the number and nature of complaints received over time.

This issue was raised by Mr Raymond Khoury of the Australian Traditional Medicine Society (ATMS) in evidence to the committee. Mr Khoury gave an example of a case in which a complaint against a member was lodged directly with the police.

Mr Yifan Yang of the New South Wales Association of Chinese Medicine agreed that, particularly with serious complaints, consumers are often not going to either the professional association or the HCCC but are taking the complaint elsewhere.

> *It depends on the case... Some serious cases, like where people hurt patients, they do not need to come to us; they just go to the courts.*
>
> *Transcript of Evidence, 12 October 1998.*

How Can Consumers Be Better Equipped to Complain?

Evidence that consumers may not be aware of the HCCC's jurisdiction to investigate complaints concerning unregistered health practitioners suggest that consumers and practitioners need to be better informed of their right to complain about unregistered health care providers and the process for making a complaint to the HCCC.

A number of witnesses and submissions supported a targeted media campaign in consultation with the backing of alternative medicine professional associations.

In its submission to the Committee the Greater Murray Health Service stated that better publicity of the HCCC powers to deal with complaints would facilitate consumer complaints.

> *The Health Care Complaints Commission needs to better publicise the fact that it is able to review complaints from unregistered practitioners. This would enable people to complain to an independent body should they feel the need to. (S 10)*

Commissioner Walton agreed that the HCCC could be doing more in the area of consumer awareness in this regard:

> *The Commission, as I have advised the Committee, has not targeted alternative health practitioners in any educational way. For example, we do not have a pamphlet. So that is an area we can decide to target, and that no doubt would improve the information. I think that is good and I will certainly put an enhancement in the budget to try and get some money to do that. ...there are many alternative health practitioner magazines and newsletters, and that could be one way, that we actually pay for the advertisement in all these magazines and newsletters which go out. And there are quite extensive communities, like up at Byron Bay, where we could look at specific strategies to identify communities.*
>
> *Transcript of Evidence, 19 November 1998.*

A number of professional associations agreed with the need for better education of consumers and practitioners. For example, the Australian Traditional Medicine Society Limited believed that a targeted media campaign supported by alternative medicine associations would be effective in informing consumers of their rights.

Similarly, the South Western Sydney Area Health Service submitted that:

> *The provision of generic information about complaint mechanism options for the general public in a range of circumstances would be valuable. (S25)*

Mr Paul Orrock, Registered Nurse, Naturopath and Osteopath of Southern Cross University told the Committee:

> *...we have to educate them (consumers) to report to the authorities if their naturopath or other natural therapist or*

> *alternative practitioner is not practising under ethical guidelines. This is quite apart from the diagnostic side of it. This is really just to do with their interaction with the sort of abuse situations that occur, the pricing policies, the unprofessional business side of their practices and often the natural therapists are guilty of this.*
>
> *Transcript of Evidence, 25 August 1998.*

The Commission also agreed that there may be scope for greater utilisation of Patient Support Officers to deal with the less serious complaints in a localised way:

> *They (the Patient Support Officers) certainly have a role. They can have a more extensive role. What they would actually do is no different to what they do now, because Patient Support Officers at the moment are available to health consumers with any problems that they have, whether it is iridologist or registered practitioner. It is really a matter of the Patient Support Officer getting into the community to let them know that they can use their services. So yes, there is a role. In terms of the description of the role, it is no different to what it is now, but it can obviously be used more extensively.*
>
> *Transcript of Evidence, 19 November 1998.*

Conclusion

HCCC information brochures advise that complaints can be made about anything to do with health care or a health service including treatment received from alternative and other non-registered health practitioners. However, the Committee considers that a targeted information brochure and an accompanying education campaign by the HCCC would significantly raise consumer and practitioner awareness of the HCCC's jurisdiction to investigate complaints. This campaign needs to be supported by the Department of Health in regard to the dissemination of HCCC information through hospitals and Area Health Services.

Recommendations

1. That the Health Care Complaints Commission take a greater role in educating consumers about the Commission's ability to investigate complaints about unregistered health practitioners through the production and dissemination of pamphlets and other information.

2. That the Department of Health and the Colleges support this initiative by encouraging the dissemination of such information through hospitals and Area Health Services.

CHAPTER 4

The Effectiveness of Existing Complaint Mechanisms

Introduction

There are a number of State and Commonwealth Acts which control practices of both registered and unregistered health practitioners. They include:

- *Fair Trading Act 1987 (NSW)*
- *Trade Practices Act 1974 (Cth)*
- *Poisons and Therapeutic Goods Act 1966 (NSW)*
- *Therapeutic Goods Act 1989 (Cth)*
- *Food Act 1989 (NSW)*
- *Crimes Act 1900 (NSW)*
- *Health Services Act 1997 (NSW)*
- *Medical Practice Act 1992 (NSW)*

This legislation covers a diverse range of practices which might form the subject of a complaint to the HCCC. These practices include:

- *importation, exportation, manufacture and supply of therapeutic goods;*
- *prescription of poisonous substances;*
- *sale, preparation and packaging of food;*
- *misleading conduct in relation to services;*
- *false representations in connection with the supply of goods or services; and*
- *criminal offences relating to sexual assault*.

The Committee took evidence on a number of the mechanisms available to consumers who wish to make a complaint about an unregistered health practitioner or to which the Health Care Complaints Commission can refer a complaint.

The New South Wales Medical Board

There are several ways in which the *Medical Practice Act* 1992 may impact on the operations of unregistered health practitioners. In particular, Section 105 of the Act provides that a person who is not a registered medical practitioner must not hold himself or herself out to be a registered medical practitioner, doctor of medicine, physician or surgeon, hold himself or herself out to be entitled, qualified, able or willing to practise medicine or surgery in any of its branches or to give or perform any medical or surgical advice, service, attendance or operation.

Section 108 of the Act prohibits unregistered persons from holding themselves out as entitled, qualified, able or willing to cure certain diseases specified by the regulations to the Act. These include cancer, diabetes and AIDS.

The Health Care Complaints Commission may investigate complaints involving possible breaches of the *Medical Practice Act*. However, it has no power to initiate proceedings for offences under the Act. The Commission may refer a complaint to the Medical Board for investigation or prosecution.

One instance of the application of the *Medical Practice Act* involved a complaint concerning a possible breach of the Act by an naturopath who had broadcast on the radio. In the broadcast the naturopath made claims about the use of aloe vera in connection with cancer. The HCCC investigated. The respondent stated that he had no idea he was breaking the law. Prosecution did not proceed as the action was statute barred although the respondent did apologise and undertook that he would not do it again. The HCCC consulted with the Medical Board. The respondent was warned that if any further complaints were received which alleged a breach of the *Medical Practice Act* that the HCCC would investigate with a view to prosecution (from information provided to Committee by HCCC on 3 June 1998).

The NSW Medical Board made the following submission to the Committee indicating that gaining a successful prosecution of unregistered practitioners under the Act can be problematic:

> *The Board takes the "shot across the bows" approach with unregistered persons holding themselves out, and has recently had occasion to prosecute an unregistered person who purported to treat a young man with testicular cancer by "kinesiology". Despite the death of the patient and the magistrate's view that he*
>
> *was inclined to disbelieve the evidence given by the kinesiologist, the*

> *prosecution was unsuccessful due to evidentiary and burden of proof difficulties, which tend to characterise such cases. (S8)*

The Medical Board further argued that there should not be any expansion of its jurisdiction in relation to alternative therapists:

> *The Board's public protection role focuses on the acts or omissions of registered practitioner, or unregistered individuals holding themselves our to be registered. It is the Board's view that it is inappropriate for it to attempt to police the activities of unregistered persons offering to provide health care, provided that they do not purport to be registered medical practitioners when they do so. (S8)*

It is clear that the Board's jurisdiction in regards to unregistered practitioners is limited to several specific provisions in the *Medical Practice Act*. Instances where the Board has attempted to prosecute through the Local Court have, according to the Board, been "singularly unrewarding".

The Department of Health

The New South Wales Department of Health is responsible for several acts which impact on unregistered health practitioners. These Acts include: the *Food Act* (1998); the *Public Health Act* (1991); and the *Poisons and Therapeutic Goods Act* (1966).

The Department regularly takes action itself for breaches of these Acts or refers the matter to the Crown for prosecution.

Commissioner Walton expressed the view to the Committee that it would be useful for the Commission to be given a legislative power to refer matters to the Director General of NSW Health similar to the power the Commission has to refer matters to the Director of Public Prosecutions under s39(1) (d) of the *Health Care Complaints Act*:

> *What we would like is to have some power similar to the power have under s39 (1) (d), where we can refer to the Department of Public Prosecutions. I think it would be good to have a power where we could refer the Director General so he or she could take action under one of the pieces of legislation they are responsible for.*
>
> *I think it would be very good to have a power where we could say "we think the Director General should consider", I mean, a power to actually get them to direct their mind to it.*
>
> *At the moment we have no power to do that. Just like a referral to*

> *the Department of Public Prosecutions; it does not mean that Department will prosecute. They have. We have only referred two, which I think did end up in prosecution. I am not sure about that. But that was sufficient, because the links then are with the other appropriate bodies.*
>
> *Transcript of Evidence, 19 November 1998.*

Therapeutic Goods Administration

The Commonwealth *Therapeutic Goods Act* aims to:

> *promote the development of a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods used in Australia or exported from Australia, whether the goods are produced in Australia or elsewhere (Section 4(1)).*

The major way in which the quality, safety and efficacy of therapeutic goods are ensured is by way of pre-market assessment of products, controlling manufacture of goods and monitoring the post market environment.

The Therapeutic Goods Administration (TGA) is responsible for the administration of the Act. A Complimentary Medicines Evaluation Committee (CMEC) comprising of 11 members is required to make medical and scientific evaluation of complimentary medicinal products which are intended to be included in the Register of Therapeutic Goods and to advise the Minister if those goods should be included on the Register. The Committee also provides scientific and policy advice relating to the import, export, listing, registration, sale and supply of complementary medicinal products. In particular, it advises on the safety, quality and efficacy of complementary medicine products.

Towards a Safer Choice details the difficulties which arise with the application of the *Therapeutic Goods Act 1989*, to certain herbs and herbal preparations. The report refers to the problems which arise when categorising herbs which might fall within the definition of a therapeutic good but are also used in cooking and other non-therapeutic situations (Bensoussan A, Myers S, *Towards a Safer Choice,* University of Western Sydney, 1996*, p 183).*

Mr Liang, a traditional Chinese medicine practitioner who gave evidence to the Committee outlined his concerns regarding the registration of herbs by the TGA:

> *I have documents from the TGA about the Chinese herbal medicine. They list about 15 to 20 herbs. In our professional view*

> *these herbs are quite safe, except aconite. On the other hand in 1989 more than 30 herbs in China were listed in the TCM laws. These are very poisonous. Unfortunately, they did not list them in the TGA document.*
>
> *If they are not listed in the TGA document, later on the TCM practitioner can use these herbs but people can be killed by 0.1 grams of these herbs, so in China they have very strict control in hospitals. They usually have to have it signed by the expert.*
>
> *Transcript of Evidence, 12 October 1998.*

The *Therapeutic Goods Act* does not directly affect practitioners. However, it does affect their access to medicines as is noted above, provided such medicines are registered under the Act.

Director of Public Prosecutions

At the end of the investigation of a complaint made against a health practitioner, the Commission may refer the matter the subject of the complaint to the Director of Public Prosecutions (s39 (1)(f)).

The principal functions of the Director of Public Prosecutions are:

- *to institute and conduct, on behalf of the Crown, prosecutions (whether on indictment or summarily) for indictable offences in the Supreme Court and the District Court;*
- *to institute and conduct, on behalf of the Crown, appeals in any court in respect of any such prosecution; and*
- *to conduct, on behalf of the Crown as respondent, any appeal in any court in respect of any such prosecution.*

Criminal sanctions have the advantage of being public and they also send a clear message to the community about standards of professional behaviour. They are, however, dependent upon proof of criminality beyond reasonable doubt in contrast to registration boards which require the lower standard of proof of the balance of probabilities. In many cases involving health professionals this higher standard can be extremely difficult to meet. In evidence presented to the Committee Commissioner Walton commented on difficulties associated with evidentiary burdens which arise when the Commission refers matters to the DPP for prosecution.

It has been suggested that because of the unregulated nature of alternative medicine the criminal justice system provides important protection to consumers. The criminal law is important particularly in cases where sexual

assault is alleged. It is, however, not helpful in the context of raising standards of conduct for the reason that health care professionals rarely act with criminal intent (Kleynhans, A., "The alternative and complementary health care practitioner's perspective", *Health Care, Crime and Regulatory Control*, Hawkins Press, 1998, p107).

The Department of Fair Trading

Part 5 of the *Fair Trading Act* (NSW) provides general consumer protection. This section prohibits deceptive and misleading conduct, unconscionable conduct, making false representations and accepting payment without intending to, or being able to, supply. Part 6 of the Act provides a range of remedies including fines, injunctions, orders and payment of damages. The Minister for Fair Trading's power to issue public warnings against offenders is discussed in Chapter 7 of this report.

The Department provided the Committee with evidence about the number and range of complaints received which relate to alternative health practitioners. Between January 1997 and July 1998 the Department received 22 complaints regarding the activities of unregistered health practitioners. Complaints covered issues such as contractual matters, advertising, multi level marketing and representations on health and safety. Of the 22 complaints received full redress was found to be warranted in 5 instances; 1 complaint was clarified; 5 complaints were transferred to the Consumer Claims Tribunal; 1 complaint had been referred to the Department for purely information purposes; 1 claim was found to be unjustified; 1 claim was transferred to another jurisdiction; 2 complaints were not covered by the legislation.

Regarding the range of complaints and whether or not the Commission's powers should be strengthened the Minister for Fair Trading advised the Committee:

> *...from a Fair Trading perspective, given the range of complaints against unregulated practitioners mentioned in the Discussion Paper and the public health dimension of some of those complaints, there will undoubtedly be consumer grievances which are beyond the scope of the Fair Trading Act and the mechanisms established under the legislation (S27)*

During his appearance before the Committee Mr David Catt, Acting Assistant Director General of Fair Trading, further informed the Committee that:

> *The Department will, in certain circumstances, commence an investigation even though it has not got a complaint from a*

> *consumer. For example, with this referral the Department would conduct preliminary inquiries and consider whether a full investigation ought to be conducted, so we do not need a complaint....the Department has had a very small number of complaints in relation to unregistered health practitioners in recent times... we have a small number of complaints against unregulated medical providers compared to the thousands of complaints that we get each year.*
>
> *Transcript of Evidence, 12 October 1998.*

Mr Catt also commented on the fact that many consumers of alternative health services may not be aware that they can complain to the Department:

> *....the Department is very well known in the community as an agency to which you can complain about the provision of goods and services. There are some parts of the community where the Department is quite concerned that its services are not accessed or well known. For example, Aboriginal people have...not accessed our services sufficiently...So the starting point is that the patients of these people, broadly speaking, probably do know the Department of Fair Trading but they probably do not regard the Department as an agency that could help if they have a concern about the efficacy of the treatment. Certainly the analysis of the small number of complaints...is that they are to do with contractual provisions, products and things like that, so the indicia of a commercial transaction rather than some sort of arrangement were you are essentially seeking to have your health improved or whatever.*
>
> *Transcript of Evidence, 12 October 1998.*

The Australian Competition and Consumer Commission

The primary objective of the Commonwealth *Trade Practices Act* is to promote competition, fair trading and consumer protection. The consumer protection provisions prohibit unfair practices such as:

- *misleading and deceptive conduct;*
- *false representations;*
- *misleading statements;*
- *harassment and coercion;*
- *bait advertising;*
- *referral selling; and*

- *pyramid selling.*

The Act is administered and enforced by the Australian Competition and Consumer Commission (ACCC). The Commission is the only national agency dealing with competition matters.

The ACCC is primarily concerned with regulating practices of organisations and individuals on a national level. This was commented on by the Acting Director General of the Department of Fair Trading; Mr David Catt:

> *We work very closely with the ACCC, but they have their own priorities. Basically, they are a national regulator, so they investigate national markets. They investigate matters on a very selective basis, so there is no assurance that the agency will take up an individual matter, but we work very closely with them and our Fair Trading Act is modelled on the consumer protection provisions of the Trade Practices Act.*
>
> *Transcript of Evidence, 12 October 1998.*

Commissioner Walton noted in evidence before the Committee the need for uniform codes of advertising of medical services:

> *I think the strategy that we in New South Wales should adopt is to ensure that the Trade Practices Act does not leave any possibility of harm for consumers of medical services, so we should go down the path of getting mandated codes for any advertising of medical services, plus appropriate legislation to look at the sanctions that are available for unregistered people*
>
> *Transcript of Evidence, 16 June 1998.*

The difficulty of prosecuting under the Trade Practices Act was raised in evidence in the following discussion with Mr John Foley of the Qakatak Division of Australian Skeptics:

Committee Member: *How do you think we could regulate it in the interests of public safety...Should we take every single advertisement we see..to the ACCC and inundate the ACCC with complaints, or is there any other mechanisms we can use?*

Mr Foley: *I have been to the ACCC and got nowhere.*

Transcript evidence, 12 October 1998.

Effectiveness of Agencies and National Competition Policy

Commissioner Walton has commented publicly on a number of occasions regarding the fact that she does not consider National Competition principles to be in the public interest when applied to health services. The Commissioner further told the Committee of an example in which the HCCC had taken a complaint about a "listen machine" which claims to diagnose 400 diseases to both the Department of Fair Trading and the Therapeutic Goods Administration with little success:

> *We have referred the listen device to Fair Trading who have not taken it up, because either they do not see it as defective or misleading because of the nature of it, there is no advertising involved, and Fair Trading only deals with individuals. Unless they have an advertisement which says that the listen machine can cure you or something they are probably not going to do it and no-one advertises that.*
>
> *The Therapeutic Goods Administration has looked at it and given us a report and they said the machine that we gave them to look at was not registered. They said it was a pure administrative arrangement...if it is not authorised by them they cannot look at it.*
>
> *Transcript of Evidence, 19 November 1998.*

Overall the Commissioner expressed frustration and disappointment in relation to external agencies unwillingness or inability to properly take up the complaints referred to them by the HCCC:

Committee Member: *Are other agencies following through with inquiries about unregistered practitioners which you refer to them? Are you happy with their responses? Are there any that you have particular problems with, and if so what are the problems?*

Commissioner Walton: *Well, I do know of any referral that has resulted in any action. We do not routinely get any information back. But on the other hand we do not refer a lot because we would only refer complaints to them that we think they would handle, like a fees dispute for the Small Claims Tribunal, or whether a piece of equipment was properly registered under the Therapeutic Goods Act, which we have, as I said, in the case of the listen machine.*

We do not see it as a successful or viable alternative, because they do not look at the standards of care. They are

> *not concerned with about what we would call the core of the complaint, which is about preventing harm, or investigating the clinical aspects of the treatment. So it is not very good.*
>
> *I think our attempts through our inquiry into the impotence industry was to try and get these agencies to be more gutsy about their investigations, but when we have met with them they want a consumer to initiate the complaint rather than us, a consumer who is hurt or damaged because of an advertisement they have seen, and it is difficult for us to get that.*
>
> *...So just to summarise, we have not had a lot of success. I do not want to be critical of them; I just do not think that they have a role to play.*
>
> *Transcript of Evidence, 19 November 1998.*

Conclusion

It would appear that the range of mechanisms available to complain about unregistered health practitioners only provide very limited and piecemeal protection for health consumers. Further, many of the agencies who administer the relevant Acts do not see the protection of standards of health care as their core business. The result is that complaining about such practitioners can be a confusing, frustrating and ultimately fruitless task for health consumers. Further, on the basis of the evidence received from the HCCC, it does not fare much better in its attempts to refer matters on.

The Committee further sees merit in the HCCC proposal that it be given a legislative provision which allows it to refer matters to the Director General of Health when there has been a possible breach of one of the Departments Acts.

Recommendation

3. That the Minister for Health consider providing the Health Care Complaints Commission with legislative power to refer matters which concern possible breaches of the Minister's Acts to the Director General of Health.

CHAPTER 5

Is Self Regulation Working?

Introduction

Professional registration means that the government has passed legislation for a particular profession which sets out criteria regarding any prerequisites to practise such as qualifications, experience and good character. It also establishes appropriate mechanisms and adjudication bodies to hear any complaints. In the absence of relevant legislation requiring mandatory registration, the professions are left to a form of self regulation which involves voluntary membership of professional associations. There is generally more than one of these associations in each modality and required standards of education, experience, training and clinical practice vary widely between them as do codes of conduct and disciplinary structures. Most importantly, membership of these associations is totally voluntary and there is virtually no effect upon a practitioner's business if they are expelled for professional misconduct.

A Proliferation of Associations with Varying Standards

The Victorian Department of Human Services found during its inquiry into traditional Chinese medicine that there were twenty three professional associations representing segments of the profession, with no peak body representing the entire profession. These associations varied widely in their entry criteria.

Dr Stephen Myers, one of the authors of the TCM report told the Committee:

> *One of the things we found in regard to the TCM professions was that there were something like 26 professional associations representing TCM practitioners. Some of those associations had all the major components that would be considered to be important in a major professional association. They had a complaints committee, they had an ethical standard of conduct that was indicated to all members. They had policies and procedures set up for continuing education.*
>
> *Some of them had very clear entry criterion that was quite strict in regard to membership. Some of the associations unfortunately did not have those - both the entry criteria as well as some of the components we would consider to be the hallmarks of a good professional association. And it appeared to our understanding of the situation that a practitioner could be disciplined by their professional association and disbarred from membership and could the following day join another association and be back in the*

profession again without any penalty really having been placed on that individual.

It was the opinion of myself and my co-author Alan Bensoussan, but also the opinion of the review board (consisting of 18 representatives of the TCM profession), that self regulation in traditional Chinese medicine had failed. They had had ample opportunity to try and find a consensus position in regard to educational qualifications and in regard to the conduct of the profession and they had actually failed in doing that. This is really why we rejected the model of self-regulation. Because of the fact that the movement between one professional association and another was virtually seamless, that it was impossible in a sense to provide adequate coverage given the number of professional associations.

Transcript of Evidence, 25 August 1998.

The Committee considered the Australian Association of Social Workers to be a good example of a strong professional association. It has been in existence since 1933 and approximately a third of all practising social workers are currently members. The association offers continuing professional education, publishes a newsletter and a quarterly referee journal, and also runs a biannual conference. They also provide affordable indemnity insurance.

The majority of complaints the association receives about members relate to breaches of confidentiality and inappropriate relationships which can range from sexual relationships with clients to breaches of personal boundaries; becoming too closely involved in the client's situation. A number of these type can suggest manipulation. Some complaints are merely about general standards of practise.

However, the Australian Social Workers Association itself expressed concern about its lack of ability to deal with improper conduct by its members:

Committee Member: *The reality is that even though they (members) are barred from membership of your association, they can still practise...If they seriously err, there is no mechanism in place to address that, they could walk away from your organisation?*

Ms Davidson: *Yes.*

Transcript of Evidence, 24 September 1998.

The Association finds that Members who have either left under an

investigative cloud or have been expelled have little trouble finding work, even within the government sector:

> *Our experience with another former member, whom we expelled for cogent reasons, is that that person has travelled around the health industry seeking employment with other agencies and not declaring that they are no longer eligible for AASW membership and it has not always been checked out. In one instance it was checked out after the person had been employed and led to a very difficult situation.*
>
> *Ms Davidson ,Transcript of Evidence, 24 September 1998.*

Unfortunately, restrictions under the *Privacy Act* and confidentiality provisions under the *Health Care Complaints Act* provide barriers to both the Health Care Complaints Commission notifying professional associations as to adverse outcomes of investigations involving their members and the Associations in turn notifying the Health Care Complaints Commission, Department of Health and existing and potential employers:

Ms Davidson: *Unfortunately like any profession, we do have our share of people who do not have the highest qualities of practise. One of the things that concerns me is that social workers and psychologists, in particular, work in the same positions. Child, youth and family teams often employ a psychologist/social worker and one is registered and one is not, yet they are doing the same work. There is no differentiation in terms of what work they take on, so the work is the same.*

Ms Dodds: *The accountability mechanisms that govern their practice are different and the potential for redress for the person who has been harmed is enormously different.*

Ms Davidson: *And that deeply concerns us. If you are a psychologist and you are found guilty of certain behaviour you can be deregistered; if you are a social worker guilty of the same behaviour, if you are*

not a member (of the AASW) we cannot do anything about you.

Transcript of Evidence, 24 September 1998.

Effect of National Competition Policy

An unfortunate outcome of National Competition Policy appears to be that private health funds are being forced into a position of being de facto regulators. In deciding which unregistered practitioners to issue provider numbers, the health funds can no longer rely on membership of an approved professional association. The private health funds are understandably uncomfortable with this position and also feel a further effect of the policy has been to take away one of the few important incentives for membership of a professional association. The Health Funds Association said in their submission:

> *As the Committee's Discussion Paper notes, as a general practice, prior to the application of the Trade Practices Act to the health care area through the National Competition Policy, health insurance companies provided benefits for alternative health care if the health practitioner was a member of a professional association and registered as a provider with the health fund. In recent years, this situation has changed as the understanding of health funds is that they can no longer require a practitioner to be a member of a professional health association in order to be listed for provider recognition. Instead, as noted in the Discussion Paper, health funds have entered into a process of direct provider recognition for health benefits, independent of association membership.*
>
> *The New South Wales Health Funds Association is concerned that there have been a number of unwanted effects of the Trade Practices Act in relation to unregistered health professionals that do not appear to be in the public interest. The legislation has had a negative effect on incentives for voluntary certification of unregistered health professionals. In the past, eligibility for benefits from private health funds was the major incentive for some practitioners to seek membership of associations with higher educational standards. Since the introduction of the National Competition Policy, health funds are reluctant to use practitioner membership of an association as a criterion for payment of rebates and now generally assess qualifications on an individual basis.*
>
> *The New South Wales Health Funds Association is concerned that this situation has affected the ability of professional associations to*

> *discipline their members. As noted in the Discussion Paper, practitioners who are disciplined or suspended by one association simply resign or discontinue their membership, thereby avoiding all disciplinary action, but still retaining provider recognition, whereas in the past they would have been forced to comply with the association's requirements in order to retain provider status.* (S4)

The Health Care Complaints Commission's View

Commissioner Walton expressed the view to the Committee that she did not consider self-regulation of unregistered health professions to be effective:

> *If you are talking about self-regulation by a professional association I think with the best will in the world, it cannot protect the public. It is about professional self-interest, and if you look at all the professional associations, boards of management, or committees, no public members are on them.*
>
> *It is about enhancing the professional image of their own representation....I think they are very important for educating their members about ethics and codes of conduct and so forth, and expelling them if they do not abide by the standards.*
>
> *But I am not a big supporter of self-regulation in terms of the laissez-faire approach. I just do not think that works in terms of the protective requirements that consumers today expect. If there is one role Government is expected to do it is to protect the public from sharks and shonks and quacks.*
>
> *Transcript of Evidence, 19 November 1998.*

The Health Care Complaints Commission has suggested to the Committee that it be given powers to require professional associations to put in complaint mechanisms and that these be transparent and include lay members in the complaint handling and disciplinary process the same as the registered boards.

The Commission drew the Committee's attention to the Community Services Commission model which allows this process.

This proposal is outlined as follows:

Mandatory development of complaint handling mechanisms by professional associations: Health Care Complaints Commission legislative proposal.

The Commission supports an amendment of the *Health Care Complaints Act 1993* to extend its powers to naming unregistered health practitioners or services when it had substantiated complaints against such practitioners or services. It further recommends that health care providers, facilities and professional associations develop complaint handing mechanisms and disseminate information regarding these mechanisms and the role of the Commission.

Reference was made during the oral submission of 19 November 1998 to the provisions contained in the *Community Services (Complaints, Appeals and Monitoring) Act 1993* ('CAMA') which... ...established the Community Services Commission. Commissioner Walton recommended that these provisions could be included (as appropriately amended) into the *Health Care Complaints Act 1993.*

Relevant provisions under CAMA

Section 113 of CAMA specifies:

> *"It is a condition of the provisions of funds under the community welfare legislation and any program administered by the Minister within the Department (of Community Services) that the recipient of the funds must make such arrangements for their expenditure as are necessary to facilitate the resolution of complaints at a local level:*

The Community Services Commission is specifically empowered to "assist service providers in improving their complaints procedures" (s.83 (1) of CAMA) and to "provide information, education and training, and to encourage others to do so, relating to the making, handling and resolution of complaints about the delivery of community services." (s.83 (1) (j) of CAMA). The Community Services Commission may decline to entertain a complaint where it has been assessed as "able to be resolved at a local level" (s.21 (1) (a) of

CAMA), which is consistent with the objects of the Act, which include the encouragement of, "wherever reasonable and practicable, the resolution of complaints at a local level." (s.3 (1) of CAMA).

Under the above provisions, the Community Services Commission has a mandated role in assisting local agencies to develop and implement effective complaints handling mechanisms, with the risk to agencies of withdrawal of funds by the Minister for Community Services where this is not satisfactorily complied with. The Community Services Commission will also only deal with a complaint where it would not be amenable to local complaint handling.

Recommendations

The philosophy of this provision could be imported into the *Health Care Complaints Act 1993* and into the proposed Health Practitioners Act by requiring health practitioners, facilities and professional associations to make such arrangements as are... ...necessary to facilitate the resolution of complaints at a local level, ie to develop and implement effective complaints handling mechanisms. The Health Care Complaints Commission could have a legislated role under the Health Care Complaints Act 1993 in assisting service providers and professional associations in their development of complaint handling mechanisms and would act as a review body to monitor the effectiveness and accessibility of these mechanisms for patients and their families. The development of complaint handling mechanisms could be part of the accreditation requirement process under the Health Practitioners Act.

Conclusion

The Committee is not of the view that self regulation of unregistered health practitioners through their associations is particularly effective, particularly in the National Competition Policy environment. It believes that some type of mandatory registration and complaints and disciplinary mechanism is needed.

Nevertheless, as an interim measure the Committee strongly supports giving the Commission powers to mandatorily require unregistered practitioner associations to install uniform complaint mechanisms. This power could be similar to that provided to Community Services Commission under Section 113 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993*.

Recommendation

4. That the Health Care Complaints Act be amended to create a power which allows the Health Care Complaints Commission to require unregistered practitioner associations to establish uniform complaints handling and disciplinary mechanisms and grants the Commission power to monitor the functioning of these.

CHAPTER 6

Umbrella Legislation

Introduction

As mentioned in the previous Chapter, the Committee considers that self regulation of unregistered practitioners is ineffective. The most efficient method of ensuring standards of care appears to be registration, particularly as the *Health Care Complaints Act 1993* is specifically set up to allow the Commission to deal with practitioners within a registration model. However, after examining all the issues in relation to registration of individual presently unregistered health modalities, the Committee has come to the view that such an approach would be too lengthy and problematic due to definitional and standards issues. Given the rate at which new modalities emerge, it would also be difficult to provide comprehensive coverage.

The New South Wales Department of Health appears to agree with this view and has at this time not chosen the Victorian path of attempting to register traditional Chinese medicine, although the Department may ultimately be required to respond to the issue through AHMAC if Victoria implements a working model.

Due to the inherent difficulties in registering all presently unregistered health professions, the Committee considered the idea of an umbrella type of legislation which would capture alternative practitioners under a generic form of registration and generic disciplinary procedures. Although it looked comparatively at other jurisdictions it was unable to find an actual working legislative model of this type. The Committee did, however, find a type of umbrella scheme operating in some of the Canadian provinces and a British proposal to introduce such a scheme to cover psychotherapists.

The Seighart Report: Statutory Registration of Psychotherapists - Report of a Professions Joint Working Party

In 1978 the British Professions Joint Working Party on Statutory Registration of Psychotherapists produced a report which recommended that all psychoanalysts in Britain be registered under one statute. This working party contained representatives of the seven leading professional psychotherapy associations in Britain.

In summary the Working Party made the following recommendations in relation to such a scheme:

- *The relevant statute should follow the general lines of those regulating the other professions. It should establish a statutory body called the Council for Psychotherapy which would maintain a statutory register of psychotherapists and have powers to regulate the profession, including the power to strike practitioners off the register for professional misconduct. This Council would include lay members;*

- *Instead of making it an offence for unregistered practitioners to practise, the legislation would create an offence for them to call themselves a member of the profession if they are not registered. It was considered that this would get around the definitional problems inherent in what psychotherapy actually is. Otherwise arguably clergymen, social workers etc. could be unintentionally caught by the legislation;*

- *The Working Party was divided on the issue of qualifications for registration. The British Association for Behavioural Psychotherapy argued strongly that membership should only be reliant on membership of a bona fide professional association that enforces a code of ethics while the other bodies represented on the Working Party wanted to go further and demand successful completion of a course of training approved or endorsed by the Statutory Council. "Grandfathering mechanisms" to recognise exceptional experience would also be required here;*

- *The Statutory Council should be given the power to approve or endorse training courses for registered practitioners;*

- *The Statute should make provisions to accommodate new forms of psychotherapy which may be identified in the future;*

- *Appeals against decisions of the Statutory Council should be to the Privy Council.*

While the recommendations of the *Sieghart Report* were never ultimately translated into legislation, the Report represents an example of how proposed associations of unregistered practitioners can work together to formulate a model of uniform generic registration.

The Drugless Practitioners Act 1925 (Ontario) - Canada

Ontario, like some other provinces in Canada, has umbrella legislation covering its health professions. The *Regulated Health Professions Act* 1991 (Ontario) registers 23 different health professions, some of which are presently unregistered in New South Wales such as masseurs and speech pathologists. Each health profession regulated under the Act has a college with seven major committees whose function is to assist the college fulfill its mandate under the Act which includes regulating the profession and developing, establishing and maintaining standards of qualifications, practise, competency and professional ethics.

Complimentary to the *Regulated Health Professions Act* is the *Drugless Practitioners Act* 1925 (Ontario). This legislation was originally designed to register generically a wide range of health practitioners who were not licensed to prescribe drugs and did not have individual professional registration. Some of these professions such as chiropractors, physiotherapists, massage therapists and osteopaths have now obtained their own independent registration under the *Regulated Health Professions Act*. At present, only naturopaths remain under the jurisdiction of the *Drugless Practitioners Act.*

Although generically registering various professions as “drugless practitioners” the legislation has never created a generic complaints committee or disciplinary board. Each profession, like those under the *Regulated Health Professions Act*, and its predecessor, the *Health Disciplines Act* has always had its own complaints and disciplinary structures and established its own standards of care. The *Drugless Practitioners Act* establishes a Board for each relevant unregistered profession under s.3(1) of the Act.

Nevertheless, the *Drugless Practitioners Act* represents a working example of how a number of health professions who do not have separate registration can be grouped together under one Act and given a form of generic registration.

Queensland Model of Health Registration

A model of umbrella legislation for 15 registered health professions is currently under review by the Legislation and Policy Branch of the Queensland Department of Health.

The model will introduce two Bills. The first will provide a disciplinary and complaints mechanism for the registered professions. One judge will be appointed to make decisions. A group of Assessors will be appointed to advise the judge on matters of fact only. The judge will only hear matters of a 'serious' nature. Less serious matters will be dealt with by the individual professions' standards Boards.

The individual Boards will prosecute matters before the judge. The judge will be able to issue pecuniary penalties and orders.

A second Bill will provide for the establishment of an administrative secretariat.

The advantages of this model include that it is one of 'negative licencing' in that it aims to protect individual title rather than what the professions actually do.

The Department prefers umbrella legislation because it is much easier to amend. That is, it is easier to amend one Act than fifteen or more Acts.

It is also of the view that this model is pro-competition in that it protects title. This model complies with AHMAC criteria in that it does not involve registration of new professions.

Unregistered health practitioners will eventually be bought under the umbrella scheme although there is no intention for them to become registered. The judge, upon a complaint being substantiated, would be given the power to stop the individual from practising in the particular profession.

The Health Care Complaints Commission's View

Prior to the Commissioner's second appearance before the Committee she was advised that the Committee wished to seek her opinion regarding the feasibility of umbrella legislation.

The Commission prepared the following outline of an umbrella model which would cover both registered and unregistered health professions in New South Wales:

Umbrella Legislation: HCCC Proposal

Background

In its submission of 20 August 1998, the Health Care Complaints Commission advised that it did not advocate the introduction of any particular model of regulation for all health care services, however that there may be merit in an exploration of the development of omnibus or umbrella legislation dealing with the advertising of health services and accreditation or certification of health practitioners. The Commission has since reviewed various pieces of legislation and models regarding what form such legislation could take and how it would operate.

Recommended model

The Commission supports a framework for certain restrictions on practice and the development of minimum standards for the services provided by unregistered health practitioners. The recommended model, which is still at development phase, is based on the Ontario legislation and would involve the introduction of umbrella legislation which would cover all health professions, registered and unregistered. A *Health Practitioners Act* would establish certain generic minimum standards of practice and would detail certain restricted activities which would only be permitted for those practitioners who were accredited under the Act. Registered health practitioners (eg doctors, nurses) would be covered by this Act by dint of their registration under their own legislation.

Accreditation of practitioners would be based on the following criteria:

- satisfactory completion of educational courses which meet relevant recognised industry standards (eg tertiary qualifications in area of practice),

- maintenance of skills and knowledge through participation in continuing education courses.

Non-accredited practitioners would have the following non-exclusive restrictions on practice:

- advertising of health services direct to members of the public,
- use of any accredited title in any advertising, publications, or promotional activity,
- providing a diagnosis on tissue below the dermis, the surface of a mucous membrane, the cornea or the teeth,
- setting or casting a fracture of a bone or a dislocation of a joint,
- moving spinal joints beyond normal physiological range,
- administering a substance by injection or inhalation,
- putting an instrument, hand or finger into natural or artificial orifices of the body,
- applying or ordering the application of a form of energy (eg electricity for defibrillation, electroconvulsive shock therapy, electromagnetism, soundwaves for diagnostic ultrasound),
- prescribing, dispensing, selling or compounding a drug, or prescribing or dispensing glasses, hearing aids, dental devices,
- providing therapeutic counselling or psychotherapy.

The *Health Practitioners Act* would establish a Health Practitioners Board. The Board would have two roles; one for the accreditation of practitioners and the other for the maintenance of standards. Professional standards would be maintained through investigative and disciplinary processes, which would occur in consultation with the Health Care Complaints Commission, as currently occurs for the registered professions. A generic disciplinary board could be operated with a common registry which would appoint panels in accordance with the profession of the respondent. The panel would include public members to represent the community as well as representatives of the practitioner's field of specialisation who were of good standing within the profession (eg 10 years post-graduate experience, participation in peer review/standards setting/educational processes etc). This disciplinary board could... ...cover the unregistered professions alone, with the registered professions continuing to use the various disciplinary processes contained in their registration acts, or all professions could be dealt with by a common process with specialist divisions, analogous to the Administrative Decisions Tribunal model.

Advantages/Disadvantages of proposal

This proposal would establish an administrative and legal framework which would provide some certainty as to standards within unregistered areas of practice. Standards would be maintained by a government accredited body in conjunction with the professions themselves and the public would have the ability to choose accredited practitioners who complied with the industry educational requirements and met the minimum standards of competence and ethics. There would be cost implications with some government involvement in the development, accreditation of practitioners and the publication of industry standards.

During her appearance Commissioner Walton briefed the Committee

further on how she envisaged this proposed model operating:

> *If I could just quickly describe what we envisage. Think of the health environment. We have a piece of legislation. I do not like the word "health professionals". I think it should be the "Health Practitioners Act" or whatever. It is an umbrella piece of legislation that creates a health advisory board that gives advice to the Minister.*
>
> *Within the Health Practitioners Act you have both registration boards who all maintain their current requirements and provisions and you have unregistered groups that focus on accreditation and limitations of practise rather than the similar elements of registration, but governing all of them I like the idea of a health practitioners' procedural code which looks at mechanisms of information to consumers and patients, looks at complaint mechanisms generally being transparent and accessible and looks at the associations in terms of their role to provide continuing education and so forth.*
>
> *The disciplinary staff and the complaint mechanisms would be maintained as they are in the current registration Acts, but for those where there are no Acts there would be one generic body where you would have a panel of public members available to the Registrar of the unregistered practitioners. You would have a Registrar which could sit in all of them or indeed to link into the new Administrative Decisions Tribunal.*
>
> *We (the HCCC) would still investigate the complaint like we do now. We would take it to the Administrative Appeals Tribunal and the implementation of the orders or the power would remain with the Registrar, just like it does with each individual board.*
>
> *Transcript of Evidence, 19 November 1998.*

The Committee's View

The Committee is strongly of the view that umbrella legislation which creates a generic form of registration, a generic disciplinary board and a uniform code of conduct agreed upon by the professions may be a feasible model for New South Wales.

Unlike the Health Care Complaints Commission, the Committee does not

see the need to bring the existing regulated professions under this Act, particularly as the health registration Acts are gradually moving towards a system of mirroring each other anyway. Instead, the Committee believes that new legislation could be enacted just to cover unregulated health practitioners in the way that the *Drugless Practitioners Act* 1925 (Ontario) does. It would seem likely that such registration would need to cover only presently recognized unregistered modalities which are named in the legislation such as counsellors, naturopaths, physiotherapists etc. with provision made for new modalities to be brought in as required.

As suggested in the *Seighart Report* it may be easier to prohibit unregistered health professionals from calling themselves any of the professions registered under the Act than trying to define what each profession does and prohibit the exercise of those tasks. However, the Committee considers that is a matter for the Minister responsible for the Act.

The Committee considers that such an Act could also provide for a generic complaints committee and professional standards and disciplinary boards, with the inclusion of lay people and members of the relevant profession to which the subject of the complaint belongs. It would ideally like to see the existing associations for each modality come to a consensus regarding clinical standards of treatment for their modality as well as educational standards and other criteria for registration under the Act.

The Committee sees merit in the Health Care Complaints Commission's suggestion that the Act establish an advisory body to the Minister for Health. This would give the unregistered modalities an important voice, particularly in regard to efficacy of treatments.

Not all Committee Members agreed that a generic registration process was necessary. Alternatively, it is proposed by the Hon Dr Brian Pezzutti MLC that the Minister for Health consider formulating and implementing legislation which would not require registration of unregistered health practitioners but would establish a disciplinary board which could hear complaints about practitioners who are unregistered but fall within the definition of "health practitioner" in Part One of the *Health Care Complaints Act* 1993. The Health Care Complaints Commission could prosecute cases before this Board which would have the power to impose penalties such as

fines and official reprimands. This Board would also have the ability to order that the practitioner be publicly named or to order remedial training if

appropriate.

Recommendation

5. That the Minister for Health examine the feasibility of establishing umbrella legislation to cover unregistered health care practitioners which establishes a generic form of registration, generic complaint and disciplinary mechanisms, a uniform code of ethical conduct, entry criteria agreed amongst the relevant professions and an Advisory Board to the Minister.*

* ***Dr Pezzutti wishes the Report to note his dissent to Recommendation 5:***

Dr Pezzutti does not support the above recommendation and proposes instead that the Minister for Health examine the feasibility of establishing umbrella legislation to cover unregistered health care practitioners which establishes complaint and disciplinary mechanisms and a uniform code of conduct. Such legislation would not require practitioner registration nor be modality specific.

CHAPTER 7

STRENGTHENING THE COMMISSION'S POWERS

As outlined in the previous Chapter the Committee supports the introduction of umbrella legislation to capture presently unregistered health practitioners. However, the Committee considers that such registration will take some time to develop and introduce. Further, such legislation will not cover devices used by alternative health practitioners such as the listen machine. The Committee therefore advocates the strengthening of the Health Care Complaints Commission's powers as soon as possible to deal more effectively with unregistered health practitioners, at least in the short term.

Section 39 of the *Health Care Complaints Act* 1993, (the Act) prescribes the action which can be taken after the Health Care Complaints Commission investigates a complaint about a unregistered health care practitioner. This action is limited to making comments to the health practitioner, terminating the complaint or referring the matter the subject of complaint to the Director of Public Prosecutions.

Under the present provisions of the Act the Commission cannot initiate or participate in disciplinary action against an unregistered practitioner. Likewise, it cannot prevent an unregistered practitioner, against whom a complaint is found sustained, from continuing to practice.

The Committee gave consideration to a number of options to strengthen the Commission's powers in regards to handling complaints against unregistered health professionals.

Naming Power

At present there is no specific power in the Act which would enable the Commission to publicly name a practitioner where a complaint has been substantiated nor does the Commissioner have the ability to name practices which may not be in the public interest. This could be addressed by giving the Commissioner a naming power similar to that found in the *Fair Trading Act*.

At present the Commissioner's powers following the investigation of a complaint are contained in s39 of the *Health Care Complaints Act as follows:*

39.(1) At the end of the investigation of a complaint against a health practitioner, the Commission must do one or more of the following:

(a) prosecute the complaint as a complainant before a disciplinary body;

(b) intervene in any proceedings that may be taken before a disciplinary body;

(c) refer the complaint to the appropriate registration authority (if any) with a recommendation as to any disciplinary action the Commission considers appropriate in respect of the complaint;

(d) make comments to the health practitioner on the matter the subject of the complaint;

(e) terminate the matter;

(f) refer the matter the subject of the complaint to the Director of Public Prosecutions.

Section 37 of the *Health Care Complaints Commission Act* relates to the disclosure of information in relation to the investigation of complaints. It states:

If a person discloses information obtained in exercising a function under this Division and the disclosure is not made:

(a) with the consent of the person to whom the information relates; or

(b) in connection with the execution and administration of this Act; or

(c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings; or

(d) with other lawful excuse, the person is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

The Commission's View

The Commissioner is of the view that the HCCC's powers should be extended so that the Commission has a specific power to name both individuals and/or practices. She has stated that:

> *In relation to substantiated complaints against unregistered health practitioners there is no avenue for the Commission to refer a complaint for disciplinary action which may result in findings and protective orders in the public arena. In these circumstances the public interest would be satisfied if the Commission was able to make public its findings and publicly name the practitioner concerned.*
>
> *Correspondence from HCCC to Committee, 18 June 1998.*

The Commissioner has stated that if she is given the power to name a practitioner publicly where a complaint has been investigated and substantiated this will:

> *improve the awareness of consumers in relation to the provision of unregistered health care services and more particularly in relation to the areas of practice which have been found to be ineffective, inappropriate or a risk to public health and safety. (S21)*

In addition a power to name treatments, equipment or specific 'medical' practices which the Commission investigates and concludes that there is a risk to public health and safety would beneficial.

The Commissioner cited the "listen machine" as an example of where a dangerous product could be named.

> *For example, I think our naming provisions we have in our Act would be very powerful in terms of the listen machine. The listen machine is a machine that is being used by both registered doctors, registered nurses and unregistered people. For $200 or $300 a pop this machine, you give your blood and you put it in it and it claims to be able to diagnose 400 diseases. We have had it scientifically examined and that is not true. I think it would be very good for the Commission to be able to say 'Everyone has to beware of paying this money for the listen machine evaluation' or diagnosis.*
>
> *Transcript of Evidence, 19 November 1998.*

Below is the HCCC's proposals for a naming power:

Health Care Complaints Commission's Proposal for a Naming Power

Background

In its submission of 20 August 1998, the Health Care Complaints Commission recommended that it should have the ability under the *Health Care Complaints Act 1993* ('the Act') to name a practitioners publicly where a complaint has been investigated and substantiated. It was noted that other options such as disciplinary activity do not exist for unregistered health care practitioners in contrast to those available for registered providers.

How the proposal would work

Under the Act, the Commission has the jurisdiction to receive and investigate complaints against any health care practitioner or health care service, whether these relate to unregulated services or to those provided under legislation covering registration or public health. If the Act were amended to include a naming power, the Commission would have a number of options available to it when it substantiated a complaint against an unregistered health care practitioner. These options would include the publication of names and relevant details by the Minister for Health, in Health Investigator (the journal of the Commission), the Annual Report, or the issuing of media releases by the Minister or by the Commissioner. The Commission could further provide information to the relevant professional association (where one exists) for membership mail-outs or for inclusion in the association's own publications. The following model is substantially based on the powers contained in the NSW *Fair Trading Act* 1987 and the Fair Trading (Public Warnings) Amendment Act.

The Minister for Health or the Commissioner would have the power to make or issue a public statement identifying and giving warnings or information in the public interest about any of the following:

- health products that are unsatisfactory or dangerous and persons who supply them;

- health services supplied in an unsatisfactory manner and persons who supply them;

- unfair business practices and persons who engage in those practices;

- any other matter that adversely affect or may adversely affect the interests of persons in connection with their acquisition of products or services from health practitioners.

Naming health practitioners would occur in the following circumstances:

- where there is an immediate and urgent need for a warning because members of the public are likely to suffer inadequate or inappropriate health treatment or care, financial or other loss;

- as part of the Commission's longer-term strategy to achieve one of the following: -

  1. influence health care practitioners to improve the standards of their treatment and products;

  2. warn the public about particular unsatisfactory providers or treatments;

  3. provide information to the public about consumer rights and ways to avoid or deal with problems.

The Minister or the Commission would also be able to issue general warnings when the particular health care treatment complained about is widespread, it is not appropriate to single out or name any particular practitioner and the warning is expressed in general terms.

These public statements and warnings would occur after a full

investigation, when serious allegations have been substantiated and where publication is in the public interest. Absolute privilege would attach to these statements as for other publications concerning complaints under s.17R of the Defamation Act 1974.

Advantages/Disadvantages of naming power

This option does not possess many of the advantages of more expansive powers to initiate disciplinary action or to have restrictions or mandatory requirements placed on a person's practice. However, it may be the most appropriate option for most alternative and unregistered health care practitioners, given the rapid rate of development in this area. One particular advantage of the proposal is that the Commission's power to name would depend on the nature of the treatment rather than on any arbitrary classification or title of the practitioner.

Other Views

The Deputy Director of Policy of the Department of Health stated that the Department supported the Commissioner being given a power to name:

> *...the Department would support the commission being able to bring to the public's attention an issue of public concern. We suggested that perhaps the lawful excuse provision already under the Act may be sufficient, but clearly others would need to assess whether that is the case or if it is not....the Department has come to the view that the Health Care Complaints Act needs some amendment to specifically provide and put it beyond doubt that the commission has the ability to do that. The department would not have a problem with that and in fact would support that.*
>
> *Transcript of Evidence, 24 September 1998.*

With regards to the Commissioner already having the power to name under the 'lawful excuse' provision contained in s37 the Commissioner stated the following:

> *It is also arguable that a specific power under the Act allowing this course of action would be a more effective and consistent option that relying on the "other lawful excuse" exemption contained in s37(d) for the Commission to make public comment.(S21A)*

A number of witnesses supported the extension of the Commissions powers to include a naming provision. The President of the Australian Association of Social Workers supported the Commission being given a power to name:

> *We would be pleased to see something like that. We have a problem with how far we can go in terms of informing the interested community about someone and not being then open to legal action.*
>
> *Transcript of Evidence, 24 September 1998.*

Community support for such a power was also strong. The Medical Consumers Association in its submission to the Committee stated that the HCCC's powers should be extended to making public statements about its investigations of unregistered practitioners. The Faulconbridge Residents Association stated:

> *One of the first changes would be to name the offender. If ever there was a deterrent to a possible re-offender it is to be named. It would at once introduce a discipline into an otherwise un-regimented industry. (*S2)

The South Western Sydney Area Health Service stated:

> *It may be in the consumer's interest to have the findings of the HCCC in relation to unregistered practitioners made public.* (S25)

The Committee gave consideration to the naming power contained in the Fair Trading Act 1987 as a possible model for the Commission. Under s86A of that Act the Minister or Director-General may make or issue a public statement identifying and giving warnings or information about any of the following:

> *(a) goods that are unsatisfactory or dangerous and persons who supply those goods,*
>
> *(b) services supplied in an unsatisfactory manner and persons who supply those services,*
>
> *(c) unfair business practices and persons who engage in those practices,*
>
> *(d) any other matter that adversely affects or may adversely affect the interests of persons in connection with the acquisition by them of goods or services from suppliers.*

Such a statement can identify particular goods, services, business practices and persons (s86A(2)). The Minister or the Director-General is not to make or issue a statement under this section unless satisfied that it is in the public interest to do so (s86A(3)).

Regarding the use and application of s86A, the Acting Assistant Director General of the Department of Fair Trading stated in evidence:

> *It is used in two broad circumstances: one where there is an immediacy or an urgent need, and that could be associated with say,*

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dangerous product that is on the market and the public needs to be warned to ensure that there is no injury or other detriment, and it is also used in the context of our broader complaints strategies.

Because it is a very significant power...the department has developed some guidelines, which are set out in a publicly accessible document to ensure proper procedures..Essentially...the department has to gather full and accurate information in relation to the matter, so normally there will have to been a full investigation by the department, and that investigation will establish that the trader has behaved illegally or his conduct has been detrimental to the public and the trader has not been prepared to desist the conduct or change the way in which he conducts his business in the future....Regard is had to the type of conduct or the services or products, the number and type of persons affected, the impact that naming would have on the trader.

Transcript of Evidence, 12 October 1998.

Regarding the issue of public interest Mr Catt gave the following evidence:

There is no specific definition of public interest. A whole lot of factors feed into that, but it really ties into what is the object of the Fair Trading Act altogether, which is a fair and informed market place and that really is what the department is all about.

Transcript of Evidence, 12 October 1998.

The Committee does note, however, from the evidence given from the Department of Fair Trading that some practitioners, if determined, can merely re-invent themselves and carry on the same practices under a different guise or in a different location. The power of such a legislative provision is limited and of fairly temporary duration. The Department cited examples of businesses which had been named three and four times by the Minister.

Court Enforceable Orders

Another option is to provide the HCCC with power to issue court-enforceable orders. In regards to this proposal the Commissioner has suggested that:

These orders would relate to the right of a patient to receive a refund of costs associated with health care treatment from a non-registered practitioner. This would occur where the treatment had been the subject of investigation and it had been found to be of an unsatisfactory professional standard by the Commission by reference to established criteria, guidelines issued by professional associations or adverse comment by a qualified peer practitioner of good standing.

> *Commission-issued orders could then be enforceable by the complainant in local court proceedings*.
>
> *Proposal for amendment to Health Care Complaints Act 1993 - naming powers, tabled by HCCC, 19 November 1998*

The Commissioner sees this power as operating similarly to the one which had been available under the previous *Medical Practice Act*. Under this legislation there was a Medical Charges Committee which could issue the consumer with a certificate for a refund which was analogous with a court order. The consumer could then take this to the Small Claims Tribunal and have it enforced.

The Commissioner explained to the Committee that she felt the proposed extension of the Commission's powers could serve as an important method of dealing with unregistered practitioners, at least until umbrella legislation was introduced:

Committee Member: *Given that it could take up to potentially four to five years for umbrella legislation to be accomplished, in the intervening period is there going to be a capacity to deal with some of these people who are offending?*

Commissioner Walton: *I think the naming powers, of both individuals and treatments, the capacity to order refunds, which gives it some oomph, and the power for the Commission to require them to put in complaint mechanisms, to have transparency of those processes (see Chapter Five)....I think that is an interim thing.*

Transcript of Evidence, 19 November 1998.

Conclusion

The Committee considers that a naming power would be an appropriate mechanism by which the Commission could alert health consumers to unsafe or inappropriate methods of treatment, devices and practitioners. However, given the fact that such a power has its limitations as individuals and businesses can change their names, the Committee thinks that such a power must considered alongside other stronger mechanisms such as the introduction of the umbrella legislation model already outlined in Chapter Five.

The Committee therefore considers that the Minister for Health should give consideration to providing the Health Care Complaints Commission with a power to make or issue public statements identifying or giving warnings or information in the public interest about any of the following:

- *Health products which are unsatisfactory or dangerous and persons who supply them;*
- *Health services supplied in an unsatisfactory or dangerous manner and persons who supply them;*
- *Unfair business practices and persons who engage in those practices;*
- *Any other matter that adversely affects or may adversely affect the interests of persons in connection with their acquisition of products or services from health practitioners.*

The Committee agrees that the Minister for Health should consider giving the Commission powers to recommend refunds for costs associated with health care treatment from unregistered practitioners in circumstances where the amount charged has been inappropriate or the service provided fraudulent or inadequate. The circumstances in which such refunds are granted may need to be established by an independent body and open to review.

Recommendations

6. That the Minister for Health consider providing the Health Care Complaints Commission with a naming power similar to the one available to the Department of Fair Trading by s86A of the *Fair Trading Act 1987.**

7. That the Minister for Health consider either establishing or nominating a body with the power to issue court-enforceable orders to allow health consumers to obtain refunds through the Small Claims Tribunal from unregistered practitioners in circumstances where this body deems it appropriate after receiving recommendations from the Health Care Complaints Commission.

* ***Dr Brian Pezzutti dissents from this recommendation.***