

**Report of the Review of the
Chiropractors & Osteopaths Act 1991**

JANUARY 2000



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EXECUTIVE SUMMARY

1. INTRODUCTION

The Council of Australian Governments' Competition Principles Agreement provides that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of restricting competition and that the objectives of the legislation can only be achieved by restricting competition.

The Department of Health conducted a review to assess whether the *Chiropractors and Osteopaths Act 1991* accords with the principles outlined above. The terms of reference for the review are set out in **Appendix A**.

An Issues Paper seeking public comment was released in June 1998. Thirty five submissions were received by the Department. A list of submissions is at **Appendix B**.

The Final Report

The Department has prepared this Report for consideration by the Minister for Health and the NSW Government in satisfaction of the review requirements under the Agreement.

2. THE REGULATION OF CHIROPRACTORS AND OSTEOPATHS

Chiropractors and osteopaths provide services to consumers for a range of health conditions and ailments. Professionals use a range of interventions including manipulation of the spine, soft tissue or muscles, nutritional counselling, education and exercise to assist the human body to maintain its normal state of health.

Chiropractic and osteopathic services generate an estimated turnover in NSW of \$150 million per year involving some three million consultations. This turnover represents payments from health insurance funds, out of pocket expenses of insured consumers and payments by uninsured consumers.

The Chiropractors and Osteopaths Act provides that only those people meeting certain registration requirements can be registered as chiropractors and osteopaths respectively in NSW. Those who gain registration are entitled to use a title or description from which it may be inferred that he or she is a registered chiropractor and/or osteopath. In addition, the Act also provides that with the exception of medical practitioners and physiotherapists, only chiropractors and osteopaths may “manipulate the joints of the human spinal column including its immediate articulations”. The Act is therefore a “titles and core practice” Act.

The Act seeks to ensure that chiropractors and osteopaths achieve appropriate standards of professional conduct. The primary means through which this is done is the complaints system. A complaint may be made to the Board or the Health Care Complaints Commission (the “HCCC”).

The current Act contains a three tier disciplinary structure. The current statutory definition of “professional misconduct” is attached at **Appendix C**.

The principal requirements of the Act that may have an impact on competition can be summarised as follows:

- The restriction on the use of the titles “chiropractor” and “osteopath”.
- The requirements for registration.
- The complaints and disciplinary system or statutory restrictions on conduct including those contained within legislatively recognised codes of professional conduct.
- Restrictions on who may “manipulate the joints of the human spinal column, including its immediate articulations”.

3. THE OBJECTIVES OF LEGISLATION REGULATING THE PRACTICE OF CHIROPRACTIC AND OSTEOPATHY

The Chiropractors and Osteopaths Act does not contain a clear statement of its objectives.

The primary objective of the legislation at the time it was introduced was to protect the health and safety of members of the public. The Act seeks to do this by addressing the potential risk of harm from unqualified, unscrupulous or sub-standard operators in the market for chiropractic and osteopathic services.

Several submissions expressed the view that the objective of the Act is the minimisation of the risks of harm to those using or seeking to use the services of a chiropractor or osteopath.

A number of potential risks of harm to consumers have been identified. These can be summarised as follows:

- Consumers (most of whom lack specialised knowledge) have a limited ability to assess the need for chiropractic and osteopathic services or the type of service required. There are a number of different service providers not all of whom have the same training and skills or can offer the same service.
- The inability of consumers to identify competent service providers may result in a failure to detect chronic or severe illness.

The misuse of chiropractic and osteopathic practices can result in serious harm to consumers. The objective of the current Act to minimise the risks of serious harm or injury to consumers therefore remains valid.

Recommendation 1 – Regulatory objective

That any regulation of the chiropractic and osteopathic professions have the objective of minimising the risks of serious physical harm or injury to those seeking chiropractic and osteopathic services.

4. THE REGULATION OF CHIROPRACTORS & OSTEOPATHS AND COMPETITION

The overwhelming majority of submissions supported the continuation of restrictions on the use of title and on the practice of spinal manipulation. Following review of the submissions received the Department has further considered the issue of whether the current arrangements produce the greatest overall benefit for the community and are the most effective and least restrictive means for achieving the objective of the Act. In order to undertake this consideration, a number of options have been identified.

Option 1 – No Regulation

This option would involve the Chiropractors and Osteopaths Act being repealed. Consumer protection legislation would prevent chiropractors and osteopaths from engaging in false, misleading or deceptive conduct or anti-competitive practices. Action against an unethical or incompetent practitioner could proceed through a civil claim. Complaints could be made to a professional association that would play a role in monitoring the professional standards of its members. If this approach were adopted professional associations may choose to develop descriptors which assist the public in choosing suitably qualified practitioners, such as certified practising chiropractor /osteopath, although it must be noted that the use of such a descriptor would not be restricted.

Option 2 – Title Protection Only

Under this model only those people meeting certain registration requirements would be able to gain registration and be entitled to use a particular title. No disciplinary arrangements with a statutory basis would be established to complement restrictions on the use of title. The regulatory regime involving consumer protection legislation, the avenue of pursuing court action and the role of voluntary professional associations discussed in option 1 would apply.

Option 3 – Title Protection and Membership of a Professional Association

Under this model, to gain the right to use a particular title, a person would need to satisfy certain registration requirements and be required to have membership of a professional association.

Option 4 – Title Protection with Disciplinary Structure

This model is similar to options 2 and 3. However, the restrictions on title are complemented by a disciplinary system established under legislation.

Option 5 – Title and Core Practice Restriction

The current system is outlined in Chapter 2.

Option 6 – Title and Complete Practice Restrictions

This is the most restrictive form of professional regulation. In addition to restrictions on title, the entire scope of a profession's practice would be limited to a particular professional group.

In assessing the six options, option 1 has been used as the benchmark. However, it is not possible to quantify the benefits or costs of any of the options due to a lack of comparative data.

The Department is of the view that substantial public benefits will arise where risks are averted. As a consequence, in carrying out a comparative assessment of the options, it is likely that the option which has the highest overall net benefits or advantages for the community will be the one which most effectively and simply provides information to consumers and addresses any potential for serious health consequences.

The Core Practice of Spinal Manipulation

Most submissions considered the restrictions in the current Act on who may perform spinal manipulation. Many noted that a serious risk of permanent injury or death from misdiagnosis or improper techniques is associated with spinal manipulation when performed by persons without adequate training. There is a wide range of published material that provides evidence that spinal manipulation carries a risk of serious physical injury. The published material suggests that the vast majority of injuries are caused by registered practitioners, although this is an obvious and expected result of restricting the practice of spinal manipulation.

Several submissions have highlighted the depth of training which applicants for registration must undergo. Several submissions argued that there is likely to be under reporting of injuries associated with spinal manipulation. There was a broad based consensus in submissions that improper technique and misdiagnosis in the application of spinal manipulation can result in serious injury.

A different perspective has been put forward by a number of professional associations whose members are not registered practitioners. In particular, submissions have expressed concerns about the breadth of the current restrictions.

The range of submissions on this issue suggests that the restrictions on spinal manipulation could be refined to better target harmful practices, and reduce its adverse impact on competition without compromising patient health and safety. The hazard of manipulation is that the force is applied in a ballistic manner whereby it cannot be aborted once initiated.

The Department supports the restriction on spinal manipulation being refined to better target harmful practices by clarifying that it does not encompass other techniques such as spinal mobilisation. In circumstances where several professions are able to lawfully undertake the core practice and to ensure objectivity and transparency in enforcement of these core practice restrictions, the Department recommends that they be relocated to the *Public Health Act 1991*. This legislative framework already plays a key role in regulating practices that are

associated with risks to public health and safety and the relocation is consistent with the approach taken in other health professional legislation.

The Department concludes that option 5 most effectively achieves the objective of the Act whilst minimising any impact on competition subject to the core practice of spinal manipulation being more precisely defined.

Recommendation 2 – Registration by title

That chiropractors and osteopaths should continue to be registered by title.

Recommendation 3 – Core practice restriction on spinal manipulation

That the restriction on spinal manipulation should be revised to provide that unless performed by a person who is exempt it is an offence to manipulate the spine. “Manipulate” means a directed thrust to a joint of the spine to take it beyond the person’s usual physiological range of motion or what could reasonably be expected to be the physiological range of motion of a person with a similar physical condition.

That core practice restrictions, including the restriction on spinal manipulation be re-located to the Public Health Act.

5. SHOULD THERE BE ONE BOARD OR TWO?

The Issues Paper canvassed whether chiropractors and osteopaths should continue to be registered under one Act by one registration board.

The key proponents for a separate registration board for osteopaths are the Australian Osteopathic Association, the Osteopathic Steering Group and the University of Western Sydney. The Australian Osteopathic Association (AOA) has raised the following issues in its submission.

- Osteopathy is a separate and distinct health care profession.
- There are no combined courses in chiropractic and osteopathic offered in Australia.
- In no other country is there a conjoint osteopathic and chiropractic system of professional registration.
- 81% of members of the AOA have indicated their support for a separate registration board.
- Problems of “inequity and anti-competitiveness” with the current arrangements.
- Costs associated with the establishment of an osteopathic registration board can be minimised by sharing administration under the Health Professional Registration Boards. (The Health Professional Registration Boards is the mechanism by which the Health Administration Corporation administers the various health professional registration boards with the exception of the Dental, Medical and Pharmacy Boards which operate independently.)

Other issues that have been raised in submissions in favour of a separate registration board are as follows:

- The introduction of separate registration boards would enable greater consistency of standards to be achieved within each profession.
- The fact that common techniques are employed by chiropractors and osteopaths cannot be used to justify a joint Board, the logical extension of this argument would require all health professionals with common techniques to have joint registration boards.
- Osteopaths are separately registered in Western Australia (legislation is yet to commence) and Victoria. It is understood that the Queensland Minister for Health has publicly supported the establishment of a separate registration board for osteopaths in that State.
- Separate registration boards will encourage competition between two different approaches to the assessment and manual treatment of musculoskeletal complaints.

Submissions that oppose the creation of a separate board for osteopaths have raised the following issues:

- Essentially the two professions offer an identical service.
- The risks, dangers and threats to the health consumer are ostensibly the same for each profession.
- The similarities between chiropractic and osteopathy are such that both professions benefit from a single board.
- A potential for lessening of standards of professional education.
- The proposal would significantly increase the registration fees for dual registrants.

On balance, the Department supports the establishment of a separate registration board for osteopaths for the following reasons:

- Osteopathy is a separate and distinct health profession.
- Whilst osteopathy and chiropractic share some common techniques, osteopathy also shares a number of techniques with other professions such as physiotherapy which has a separate registration board.
- Different courses of education by different institutions are offered for registration as a chiropractor or osteopath. No combined courses are currently offered.
- The establishment of a separate registration board will enhance competition between the two professions.

Recommendation 4 – Separate boards for chiropractic & osteopathic Professions

That the Chiropractors and Osteopaths Act and the Chiropractors and Osteopaths Registration Board be replaced with two separate Acts and two separate Boards for the registration of chiropractors and osteopaths respectively.

6. ENTRY REQUIREMENTS

Accreditation Procedures

For a person to be eligible for registration as a chiropractor or osteopath, he or she must have:

- received a diploma, certificate or other academic award for the successful completion of a course of training prescribed by the regulations; or
- satisfied the Board at an examination arranged by the Board that he or she is fit to practise chiropractic or osteopathy in NSW; or
- registered elsewhere in Australia as a chiropractor or osteopath.

The Issues Paper sought comment on whether other accreditation procedures should be recognised as entitling a person to be registered as a chiropractor or osteopath.

The Chiropractors and Osteopaths Registration Board and Macquarie University have argued that the current system for accrediting courses is appropriate.

A larger number of submissions have been critical of the mutual recognition principle being extended to overseas trained practitioners. The Health Care Complaints Commission has expressed the view that a complete mutual recognition principle should not be adopted in respect of foreign qualified practitioners.

The Department can see considerable merit in the introduction of an additional method of accrediting courses for the purposes of registration provided that the graduates of such courses have a sufficient level of competence. Accreditation of courses would involve the Board developing accreditation criteria by which courses would be assessed. The accreditation criteria would be prescribed by regulation. The prescribed criteria would be set at a level such that graduates of approved courses will be of an equivalent level of competence as persons who have satisfied the Board of their competence at an examination conducted by the Board. Educational institutions would be able to apply to the appropriate Board to have a course of study accredited in accordance with the prescribed criteria.

As part of this process, and in view of concerns that have been raised about some courses of training which are currently prescribed in the Regulation, the Department recommends that the relevant registration board review the courses which are currently prescribed to ensure that they are all of a sufficient standard.

Recommendation 5 – Courses of training

That:

- *each registration board be required to develop accreditation criteria to be prescribed by regulation;*
- *each of the registration boards should have the power to approve courses of training for the purposes of registration; and*
- *educational institutions which are aggrieved by a board decision not to approve a course of training have a right of appeal to the Administrative Decisions Tribunal.*

That each of the boards review courses that are currently prescribed for the purposes of registration.

Good Character

Submissions to the review overwhelmingly supported the retention of the criteria of good character on the basis it is essential for minimising the risks of harm from inappropriate or unethical conduct. The Department does not support the narrowing of the “good character” requirement on the ground that courts may be inclined to interpret it narrowly and that such an outcome would not be in the public interest.

Age

The Department does not consider that the continuation of the restriction on age is warranted.

Recommendation 6 – Minimum age

That the requirement that applicants for registration be not less than 18 years of age be removed.

Grounds for Refusal of Registration

A transparent and impartial disciplinary process established by legislation is necessary to provide effective protection for consumers and to ensure consumer confidence in that process. It is essential that the grounds for refusing registration complement the grounds for taking disciplinary action.

The disciplinary machinery for handling complaints about chiropractors and osteopaths is discussed in Chapter 8.

The Chiropractors and Osteopaths Act currently sets out three grounds upon which the Board may refuse an applicant registration.

Competence to Practise

There was overwhelming support in submissions for the introduction of strategies for ensuring that applicants for registration are competent to practice.

Under the Medical Practice Act the Medical Board is prevented from registering an applicant for registration unless it is satisfied that the person “*is competent to practise medicine*”. If the Board is not satisfied as to the competence of an applicant for registration it must conduct an inquiry. An applicant who is aggrieved by a decision of the Board may appeal to the Medical Tribunal.

In the interests of enabling the registration boards to protect the public, the Department supports the relevant board having the power to refuse to register persons who are not sufficiently competent to practise chiropractic or osteopathy.

The introduction of such a system would not alter the position that competence would be established primarily through satisfying the qualification or examination requirements. The overall impact on market entry is likely to be minimal. The benefits in terms of improved information to consumers and reduced costs justify the amendment.

Conduct in Another Jurisdiction

Currently the Chiropractors and Osteopaths Registration Board may refuse to register a person if the person's name has been removed from any register kept under any law in any country for the registration or certification of chiropractors or osteopaths. Under the Mutual Recognition Acts, applicants for registration in this state who have had a condition imposed on their registration in any jurisdiction in Australia, or New Zealand, as a result of a disciplinary process will be accorded registration subject to the same condition. Currently there is no scope to allow the Board to impose conditions on registration where the applicant has engaged in professional misconduct in a foreign jurisdiction to which mutual recognition does not apply. By enabling the relevant Board to impose conditions similar to those imposed in a foreign jurisdiction, the same mutual recognition principles as apply to applicants from interstate will apply to applicants from overseas.

Criminal Convictions

The current Board can refuse to register a person who is otherwise entitled to be registered where the person has been convicted of a criminal offence which renders the person unfit in the public interest to practise chiropractic or osteopathy.

Under section 556A of the Crimes Act a court may find a charge proved but not record a conviction. As one of the main purposes of criminal proceedings is punitive, a judicial officer making an order under section 556A does not have as his or her paramount consideration whether the practitioner is unethical or incompetent. However, the jurisdiction of health professional registration boards is a protective rather than punitive one. The Department is of the view that the public would be better protected by conferring on the boards the power to refuse registration where an applicant is the subject of a section 556A order and it is of the view that the person has been rendered unfit in the public interest to practise chiropractic/ osteopathy.

Recommendation 7 – Refusal of, or conditions on, registration

That the Chiropractors Registration Board and the Osteopaths Registration Board should have the power to:

- *Conduct inquiries into the eligibility of applicants for registration where the Board is concerned that an applicant is not competent;*
- *Refuse to register or restore the registration of an applicant where he or she is not competent to practise or impose conditions on registration in appropriate cases;*
- *Impose conditions where an applicant has been the subject of disciplinary action in a foreign jurisdiction; and*
- *Refuse registration, or restoration of registration, where an offence has been proven which renders the applicant unfit in the public interest to practise chiropractic or osteopathy.*

That the specific power to require an applicant for restoration of registration who has not practised for five years to demonstrate their competence be deleted.

Appeals

Recommendation 8 – Appeals

That appeals against a decision to refuse to register a person; restore the registration of a person; or impose conditions on a person's registration as a chiropractor or osteopath should be made to the Chiropractors Tribunal or the Osteopaths Tribunal respectively.

Provisional Registration

Recommendation 9 – Provisional registration

Provisional registration may be granted for such period of time as the President of the Board considers appropriate in each case.

7. REQUIREMENTS FOR CONTINUING REGISTRATION

It has been suggested that strategies need to be developed in connection with registered health professionals to enable health professional registration boards to play active roles in the ongoing maintenance of professional standards. Possible strategies include:

- annual competency testing;
- continuing professional education; and
- the development of a more comprehensive annual renewal process for practitioners.

If a system of regular performance assessments were introduced, there would be additional costs to the profession and the community. No evidence has been put forward to demonstrate that practitioners are failing to maintain their competence or that the introduction of a performance assessment system is warranted.

Several submissions argued continuing education should be a mandatory requirement for registration to ensure that practitioners maintain their standards in an environment where there are rapid changes which practitioners must keep abreast of.

Many more submissions have supported voluntary continuing education.

By making continuing professional education mandatory for the purposes of ongoing registration, a barrier to registration is created as the cost of training programs would have to be borne by individual chiropractors and osteopaths on an annual basis. It is noted that professional associations already play a role in this area.

The Department does not support continuing professional education being made a condition of registration at this time. However, by requiring practitioners to make annual declarations as to the education they have undertaken awareness of the importance of education will be increased in the profession generally and the relevant Board will be well placed to formulate effective strategies for addressing any areas of concern that are identified.

The Department supports a more comprehensive process for renewing registration to enable a Board to assess whether any action needs to be taken by it in the interests of protecting the public.

Recommendation 10 – Annual renewal

That applicants for renewal of registration be required to make declarations on:

- *criminal convictions (recorded and unrecorded);*
- *charges for serious sex or violence offences where the allegations relate to conduct occurring in the course of practice;*
- *refusal of registration, suspension or deregistration in other jurisdictions;*
- *significant illness; and*
- *continuing professional education activities.*

8. DISCIPLINARY SYSTEM

A statutory disciplinary system can protect the public by taking action against incompetent or unethical practitioners. A disciplinary system should be independent, transparent, accountable to the public and fair to all parties. Clearly there are costs for the HCCC, the Board and chiropractors and osteopaths in conducting investigations and hearings. However, these costs are far outweighed by the benefits produced from removing incompetent or unethical chiropractors and osteopaths from the market or imposing conditions on their practice, which in turn ensures that patients have information about those holding themselves out as chiropractors and osteopaths.

The Definition of Misconduct

The Issues Paper sought submissions on the adoption of a two tier definition of misconduct in line with the definitions in the Nurses Act 1991 and the Medical

Practice Act. Submissions were unanimous in their support of this proposal. Complaints of professional misconduct will be referred for hearing by the relevant Tribunal and complaints of unsatisfactory professional conduct will be considered by the Board.

Recommendation 11 – Two tier definition of misconduct

That a two tier definition of misconduct be introduced whereby:

- *“Unsatisfactory professional conduct” is defined in similar terms to the definition of “professional misconduct” in the current Act.*
- *“Professional misconduct” is defined to mean “unsatisfactory professional conduct of a serious nature which may lead to suspension or de-registration of a practitioner”.*

Disciplinary Structures

The Issues Paper did not actively canvass the structure of the disciplinary system. The Department has, however, considered changes to disciplinary structures in reviews of other health professional registration legislation and considers that a structure that provides consumers with a readily accessible forum for resolving complaints about practitioners and also provides a formal system for hearing complaints of misconduct is appropriate. The Department considers that a system modelled on that in the Dentists Act should be adopted. Therefore an Assessment Committee-Board/Tribunal structure is recommended.

The Department acknowledges that before this structure is adopted further consultation with stakeholders will be required.

Recommendation 12 – Revised disciplinary structure

That a revised disciplinary structure be introduced whereby:

- *An Assessment Committee will be established to consider and investigate complaints, referred from the relevant Board, regarding professional fees and standards of professional services. The Assessment Committee will be able to conciliate and investigate consumer complaints and to make recommendations to the relevant Board for the resolution of those complaints or any further action the Committee considers should be taken. When a Committee recommends that there be an inquiry into unsatisfactory professional conduct or professional misconduct the Board must conduct an inquiry or refer the matter to the Tribunal for a hearing.*
- *The relevant Board will hear complaints of unsatisfactory professional conduct following investigation of a complaint by an Assessment Committee, the Health Care Complaints Commission or the Board’s own inspector.*
- *A Tribunal will be required to hear complaints of professional misconduct.*

Power to Compel a Practitioner to Respond to a Complaint

In the interests of assisting the relevant registration board to discharge its responsibilities in a timely and efficient manner, the Department supports the Boards having the power to compel a practitioner who is the subject of a complaint to respond to a request for information within a reasonable time frame.

Recommendation 13 – Failure to respond to a Board request for information

That the definition of “unsatisfactory professional conduct” should include failure to respond to a Board request for information without reasonable excuse.

Grounds for Making a Complaint

It is essential that the grounds for making a complaint complement the grounds for refusing registration. Accordingly, in view of Recommendation 7, the Department supports the grounds of complaint being amended to include cases where a practitioner’s conviction is subject to Section 556A of the Crimes Act.

Recommendation 14 – Unrecorded convictions

That the grounds for complaint be amended to include unrecorded convictions.

Composition of Disciplinary Bodies

In the context of other reviews of health professional registration Acts it has been argued that disciplinary bodies would be seen to be more impartial if board members are precluded from sitting on them and/or membership is drawn from a panel nominated by the Minister for Health. It is important to emphasise that the Department is not suggesting that board members serving on disciplinary bodies have been partial or otherwise unsuitable. Rather, the Department is of the view that by precluding board members from sitting on Committees and the Tribunal these bodies will be seen to be clearly independent of the respective board.

Recommendation 15– Composition of disciplinary bodies

That Board members should not be eligible to sit on Assessment Committees (if established) or on Tribunals.

Codes of Conduct

Codes of professional conduct can play an important role in protecting the public from harm by establishing standards to be observed by practitioners in the course of their professional practice. They can be used by disciplinary bodies to assist in defining standards of acceptable practice. Most importantly they serve as a guide for practitioners as to the expected standard of conduct or practice.

However, codes can be used to restrict competition. Where they are recognised in legislation, they can restrict competition by altering the behaviour of individual practitioners and can impose compliance costs on members of the profession. To this extent, the review needs to consider whether codes with a statutory basis are consistent with the guiding principles of the Competition Principles Agreement. Codes developed by professional associations may give undue emphasis to

protecting certain forms of commercial conduct by the profession and may not be consistent with the public interest.

The benefits and costs of a code can only be determined where the precise content of the code is known. Nearly all submissions on this issue have been broadly supportive of the concept of statutory codes of conduct. On balance, the Department supports the retention of statutory codes of conduct as they:

- are a valuable tool for directing practitioners on the standards of professional practice to be adopted;
- can be used by disciplinary bodies to assist in defining standards of acceptable practice; and
- can benefit consumers.

To ensure that any codes of conduct for chiropractors and osteopaths serve the interests of consumers and do not sanction anti-competitive conduct or contain trivial matters, the Department supports codes being made by regulation under the Act, following consultation with the relevant board.

Recommendation 16 – Codes of conduct

That codes of conduct are to be made by regulation following consultation with the relevant board.

Notification of Criminal Convictions and Relevant Serious Criminal Charges.

The Department has been considering all health professional registration Acts to ensure that they continue to reflect the high standards expected by the community by adequately addressing questions of character and criminal conviction. The Department has identified a number of strategies that would be of assistance in this regard.

- Courts are to be required to notify the relevant registration board of any practitioners who are convicted of an offence, whether the conviction is recorded or not.
- Practitioners are to be under a positive obligation to notify their registration board if they are convicted of an offence of a type reportable by the courts.
- Practitioners are to be under an obligation to notify their registration board within seven days if charged with a “serious sex or violence offence” where the allegations relate to conduct occurring in the course of practice.

A criminal charge per se would not constitute the basis for disciplinary action. Rather, the charge and the circumstances surrounding it can be relevant to a practitioner’s overall ability to practise and to questions of character.

Recommendation 17 – Criminal convictions

That:

- Courts be required to notify the relevant registration board of any practitioners who are convicted of an offence (irrespective of whether it is recorded or not) unless it is an offence of a type that is not required to be reported to the board concerned.
- Practitioners be required to notify the relevant registration board if they are convicted, whether that conviction is recorded or not, of an offence which is reportable by the courts.
- Practitioners be required to notify the relevant registration board within seven days if charged with a “serious sex or violence offence” where the allegations relate to conduct occurring in the course of practice. A “serious sex or violence offence” means an offence involving sexual activity, acts of indecency, physical violence or the threat of physical violence that would be punishable by imprisonment for 12 months or more.

Statutory Declarations

The Department considers that by deferring the requirement for a statutory declaration until a matter is to be referred for disciplinary action, the Health Care Complaints Commission will be able to promptly investigate matters but ensure that the details of the complaint are verified to protect the interest of the practitioner should the complaint proceed to disciplinary action.

Recommendation 18 – Statutory declarations

That the requirement for statutory declarations be deferred until the point where a matter is to be referred for disciplinary action.

Withdrawal of a Complaint

Recommendation 19 – Withdrawal of a complaint

That a complaint be able to be withdrawn once an investigation or disciplinary action has been commenced, following consultation between the relevant board and the Health Care Complaints Commission.

9. RESTRICTIONS ON COMMERCIAL CONDUCT

Advertising

The current Act provides that regulations may be made about “*the manner in which and the extent to which a chiropractor or osteopath is authorised to advertise*”. If the power to regulate advertising was deleted from the Chiropractors and Osteopaths Act, advertising would be controlled by the Trade Practices and Fair Trading Acts which prohibit misleading and deceptive conduct.

Restrictions on advertising can exacerbate the fundamental disparities in market information by denying consumers access to information about the availability, quality and price of services provided by competing practitioners. Restrictions can eliminate or constrain normal forms of competitive behaviour.

Nearly all submissions to the Issues Paper supported the retention of the power to regulate advertising under the Chiropractors and Osteopaths Act.

On balance, the Department supports the registration boards continuing to have a role in the area of advertising for the following reasons:

- Removal of the power to regulate advertising would mean that in circumstances where evidence was available of advertising that was false, misleading or deceptive and there was direct evidence of an adverse patient outcome that warranted disciplinary action, the matter would have to be dealt with in two different forums. In addition, the advertising issue would involve an assessment of the veracity of claims made. Health professional registration boards are well placed to undertake this task.
- The Chiropractors and Osteopaths Act contains a broad range of sanctions which range from counselling to de-registration.
- The Chiropractors and Osteopaths Regulation prohibits advertising that promotes the *unnecessary or inappropriate* use of the services of a chiropractor or osteopath.

The advertising restrictions in the Chiropractors and Osteopaths Regulation are generally modelled on consumer protection legislation. The only restriction in the Regulation that does not conform to this model is the prohibition on registered practitioners claiming or implying “superiority for the registered practitioner in the practice of chiropractic or osteopathy.”

The prohibition on claims of superiority results in less informed consumers and constrains normal forms of competitive behaviour and must be considered in the context of the prohibition on advertising which is “*false, misleading or deceptive*”. The Department supports the removal of the prohibition.

Many submissions argued that the power to regulate advertising under the Chiropractors and Osteopaths Act should be extended to include corporations advertising the practices of chiropractic or osteopathy. Such an amendment would ensure that uniform requirements would apply to all advertising of the practices of chiropractic and osteopathy and ensure a “level playing field” for individuals and corporations, similar to a number of other registration Acts.

Recommendation 20 – Advertising

That the prohibition on advertising which “claims or implies superiority for the registered practitioners in the practice of chiropractic or osteopathy” be deleted.

That the scope of the regulation making power be extended to include corporations advertising the practice of chiropractic or osteopathy.

That when a body corporate commits an offence, every director and person who takes part in its management will be taken to have committed the same offence unless he or she proves that:

- the offence was committed without his or her consent or connivance; and*
- he or she exercised all such due diligence to prevent the commission of that offence as he or she ought to have exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.*

Restrictions on Use of Qualifications

The Act currently prohibits registered practitioners from using any certificate, diploma, membership, degree, licence, letters, testimonial or other title, status, documents or description in relation to him or herself or in the practice in which the practitioner is registered, unless the particulars are recorded in the register. The policy of the Chiropractors and Osteopaths Registration Board has been to decline to record in the register qualifications other than those related to chiropractic or osteopathy. As a result, chiropractors and osteopaths have not been permitted to make use of adjunctive qualifications (eg qualifications in homoeopathy and acupuncture). Submissions have addressed the use of both adjunctive (ie other disciplines) and chiropractic and osteopathic qualifications in the context of the provision of chiropractic and or osteopathic care. Most submissions have supported the easing of the restrictions on the use of adjunctive qualifications.

The Department considers that the current restrictions operate in an anti-competitive manner by limiting the ability of practitioners to communicate to patients their qualifications in other disciplines and thereby denies patients access to information which may be relevant to their treatment choices.

The Department supports the relevant board having the power to record additional qualifications in chiropractic and osteopathy as consumers will benefit from having an independent source of information of appropriate and inappropriate qualifications. At issue, however, is whether there should be any sanctions against a practitioner who uses duly conferred qualifications, which the relevant Board has refused to recognise, in the context of his or her chiropractic or osteopathic practice.

In view of the diversity of professional qualifications the task of preparing and policing a list of “acceptable” qualifications is extremely difficult. The prohibition is anti-competitive because it limits consumer access to information about practitioners. Any harm can be minimised by the general prohibitions on false, misleading and deceptive conduct.

Recommendation 21 – Restrictions on use of qualifications

That the current prohibitions on registered practitioners using certain diplomas, titles and descriptions etc, unless they are recorded in the register, be deleted.

Restrictions on the Title “Doctor”

The Act currently prohibits a chiropractor or osteopath from using a title or description which infers or is capable of inferring that the person is a medical practitioner. A substantial number of submissions addressed this issue. Most have argued that the prohibition is anti-competitive. A number of submissions have argued that the removal of the prohibition on the use of the title “Dr” would confuse the public.

The Department supports the current restrictions being narrowed so as not to prevent a person who has a PhD from using the title “Dr” on the condition that the title “Dr” is accompanied by PhD and the person’s profession. However, the Department does not support the removal of the restrictions in their entirety for the following reasons:

- Consumers may be misled and believe they have received comprehensive medical treatment.
- The profession could seek to create additional barriers to entry in order to justify increased confidence in the term “Dr” in the minds of the public.
- A competitive advantage would be conferred over other groups that may treat similar conditions (eg physiotherapists).

Both misleading information and an increase in restrictive practices are inconsistent with principles of competition policy and lay the foundation for the protection of market share and a lack of price competition within the industry.

Recommendation 22 – Prohibition on use of “Doctor”

That the current prohibition on the use of the title “doctor” should be retained but narrowed so that it does not prohibit the use of that title by a person with a Doctor of Philosophy provided that the title is accompanied by “PhD” and the person’s profession.

10. BOARD ISSUES

The Issues Paper canvassed whether any changes were needed to the current composition of the Board.

- Most submissions have argued that a medical practitioner on the Board is not required as the Board can procure medical advice when required.
- Several submissions touched upon the issue of consumer representation with most arguing that the current arrangements are adequate.
- A significant number of submissions have advocated that there should be increased representation for osteopaths.

As noted above the Department supports separate registration boards for chiropractors and osteopaths and supports both boards having seven members. It is considered that the appointment of a medical practitioner is not required in view of the ability of the Board to call on medical advice as and when required. In addition, a more flexible approach to the appointment of members of the profession to the relevant Board is advocated. It is questionable whether a specific

association should be given a legislative monopoly on the nomination of Board members. New associations may emerge which could seek involvement. Further, legislative recognition of direct nomination by a specific association may tend to reinforce a misconceived view that the nominees are appointed to represent the interests of the nominating association rather than having a duty to serve the interests of the Board as a whole and not those of the association.

Recommendation 23 – Board composition

That the Chiropractors Registration Board be constituted as follows:

- *three chiropractors selected by the Minister from nominations provided by one or more professional chiropractic bodies;*
- *one chiropractor selected by the Minister from nominations provided by educational institutions providing chiropractic education in NSW;*
- *one barrister or solicitor nominated by the Minister;*
- *one officer of the Department of Health or an Area Health Service nominated by the Minister; and*
- *one person (not being a chiropractor) nominated by the Minister to provide consumer and community perspective.*

That the Osteopaths Registration Board be constituted as follows:

- *three osteopaths selected by the Minister from nominations provided by one or more professional osteopathic bodies;*
- *one osteopath selected by the Minister from nominations provided by educational institutions providing osteopathic education in NSW;*
- *one barrister or solicitor nominated by the Minister;*
- *one officer of the Department of Health or an Area Health Service nominated by the Minister; and*
- *one person (not being an osteopath) nominated by the Minister to provide consumer and community perspective.*

Terms of Board Members

The Chiropractors and Osteopaths Act provides that members of the Chiropractors and Osteopaths Registration Board are to hold office for terms not in excess of three years. The Issues Paper canvassed whether a limit should be introduced on the number of consecutive terms a person may serve

The Department considers that by limiting the number of consecutive terms of office a person may serve to two with each term not to exceed four years, a board's ability to benefit from fresh perspectives that a new member can bring to the organisation would be enhanced but at the same time provide sufficient scope for the retention of the corporate memory of the organisation.

Recommendation 24 – Terms of Board members

That:

- *a person may not hold office as a member of a board for more than two consecutive terms; and*
- *each term of office as a board member is not to exceed four years.*

Delegation

Recommendation 25 – Delegation

That the Chiropractors Registration Board and the Osteopaths Registration Board each have the power to delegate any of its functions (other than this power of delegation and the power to approve expenditure from the Education and Research Account) to:

- *the President;*
- *the Deputy President;*
- *a committee of two or more members of the Board; or*
- *the Registrar or any other member of staff of the Board.*

However, a Board must not delegate any of its functions in relation to complaints or disciplinary proceedings (ie Part 5) to the Registrar or any other member of staff of the Board.

11. OTHER ISSUES

A small number of submissions have advocated the introduction of a regulation that imposes minimum standards for the form and content of clinical records. The Department is of the view that it has not been demonstrated that record keeping practices cannot be adequately dealt with under the codes of professional conduct.

Access to Clinical Records

The Department is of the view that the issues of access to records should be dealt with in a consistent manner for all professions. This is more appropriately considered separately from any review of legislation covering a particular profession.

Professional Indemnity Insurance

A number of submissions have noted that there would be significant public benefits associated with mandatory professional indemnity insurance as consumers would be able to obtain compensation for injury caused by a practitioner. The Department is currently considering in conjunction with the Attorney-General's Department a range of issues concerning health professional indemnity.

Mandatory Disclosure of Fees

Very few submissions addressed this issue. Whilst the Department supports the concept of practitioners providing information to patients on the cost of any proposed care, it is appreciated that there may be practical difficulties with enforcing a duty to provide full fee disclosure to patients prior to the commencement of treatment and that this is not the only strategy for achieving the

desired outcome. For example, this is an issue that could be addressed in a code of conduct.

1. INTRODUCTION

1.1 Background to the Review

The Council of Australian Governments Competition Principles Agreement provides that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of restricting competition and that the objectives of the legislation can only be achieved by restricting competition. In undertaking the Review, Governments have agreed that legislation reviews will:

- (i) clarify the objectives of the legislation;
- (ii) identify the nature of legislative restrictions;
- (iii) analyse the likely effects of the restriction on competition and the economy generally;
- (iv) assess and balance the costs and benefits of any restrictions identified; and
- (v) consider alternative means for achieving the same result.

The Department of Health has conducted a review of the *Chiropractors and Osteopaths Act 1991* in accordance with the principles outlined above. The requirements to be considered during the review are set out at **Appendix A**.

1.2 Conduct of the Review

An Issues Paper designed to facilitate comment from the professions and the public was released in June 1998. Approximately 300 copies of the Paper were distributed to consumers, government bodies, chiropractors, osteopaths, professional associations and other health care professionals. 35 submissions were received by the Department.

A list of submissions is at **Appendix B**.

1.3 The Final Report

The Department has prepared this Report for consideration by the Minister for Health and the NSW Government in satisfaction of the review requirements under the Agreement.

2. THE REGULATION OF CHIROPRACTORS AND OSTEOPATHS

2.1 Introduction

Chiropractors and osteopaths provide services to consumers for a range of health conditions and ailments. Professionals use a range of interventions including manipulation of the spine, soft tissue or muscles, nutritional counselling, education and exercise to assist the human body to maintain its normal state of health.

As at 30 June 1998 there were 1277 chiropractors and osteopaths registered in NSW. Of this number 868 were registered as chiropractors, 197 as osteopaths and a further 212 held dual registration as chiropractor-osteopaths. Of the total number of registrants it is estimated that over half work in sole practice. Group practices and multi-disciplinary practices have become more prevalent since 1991. The predominant type of treatment provided is for lower back pain for both work and non-work related ailments.

Chiropractic and osteopathic services generate an estimated annual turnover in NSW of \$150 million per year involving some three million consultations. This turnover represents payments from health insurance funds, out of pocket expenses of insured consumers and payments by uninsured consumers. The majority of health insurance funds in NSW provide rebates for chiropractic and osteopathic services. Neither chiropractic nor osteopathic services are included in the Commonwealth Medicare Benefits Schedule.

2.2 The Chiropractors and Osteopaths Act 1991

The *Chiropractors and Osteopaths Act 1991* replaced the *Chiropractic Act 1978* and updated the provisions governing the registration and discipline of chiropractors and osteopaths.

2.2.1 Restriction on title and core practice

The Act provides that only those people who meet the registration requirements can be registered as chiropractors and osteopaths respectively in NSW. Those who gain registration are entitled to use a title or description from which it may be inferred that he or she is a registered chiropractor and/or osteopath. In addition, the Act also provides that with the exception of medical practitioners and physiotherapists, only chiropractors and osteopaths may “manipulate the joints of the human spinal column including its immediate articulations”. The Chiropractors and Osteopaths Act is therefore a “titles and core practice” Act.

2.2.2 Registration requirements

For a person to be registered as a chiropractor under the Chiropractors and Osteopaths Act he or she must be of good character, be 18 years of age or above, have paid the prescribed fee and:

- have received a diploma, certificate or other academic award for the successful completion of a course of training prescribed by the regulations; or
- have satisfied the Board at an examination arranged by the Board that he or she is fit to practise chiropractic in NSW; or
- be registered elsewhere in Australia as a chiropractor.

The criteria for registration as an osteopath mirror the requirements for registration as a chiropractor.

Currently, the registration fees for chiropractors, osteopaths and chiropractor-osteopaths are the same. As at the year ended 30 June 1998, the fees levied by the Board were \$145 for registration, \$124 for annual renewal of registration and \$145 for restoration of a practitioner's name to the register.

The Board can refuse to register a person otherwise entitled to be registered where:

- the person has been convicted of an offence which renders the person unfit in the public interest to practise chiropractic or osteopathy; or
- the person's name has been removed from any register or roll providing for the registration or certification of chiropractors or osteopaths; or
- the person is an habitual drunkard or addicted to any deleterious drug.

However, the Board may not refuse to register a person on the grounds that the person's name has been removed from another register or roll unless:

- the reason for the removal was an act or omission of a nature affecting the person's conduct in a professional respect; and
- the act or omission, if it had been done or omitted to be done in NSW, would have authorised the removal of the person's name from the register.

Chiropractors and osteopaths are required to renew their registration on an annual basis.

2.2.3 Regulation of the conduct of chiropractors and osteopaths

The Act seeks to ensure that chiropractors and osteopaths achieve appropriate standards of professional conduct. The primary means through which this is done is the complaints system. A complaint may be made to the Board or the Health Care Complaints Commission (the "HCCC") that a chiropractor or osteopath:

- has been convicted of an offence which renders him or her unfit in the public interest to practise chiropractic/osteopathy;
- is an habitual drunkard or is addicted to any deleterious drug;
- has been guilty of professional misconduct;
- does not have sufficient physical or mental capacity to practise chiropractic/osteopathy; or
- is not of good character.

The current Act contains a three tier disciplinary structure (ie Chiropractors and Osteopaths Registration Board, Professional Standards Committees and the Chiropractors and Osteopaths Tribunal) with only one category of professional misconduct. The current statutory definition of “professional misconduct” is attached at **Appendix C**.

While breaches of specific offence provisions of the Act can be pursued through criminal action in the Local Court, the definition of “professional misconduct” is such that breaches of the Chiropractors and Osteopaths Act and regulation can be pursued through the Act’s disciplinary system. The Act currently contains a number of offence provisions (eg use of a title from which it is capable of indicating that he or she is a registered medical practitioner; the making of false entries in the register).

A complaint can be made to the Chiropractors and Osteopaths Registration Board under the Chiropractors and Osteopaths Act or to the HCCC in accordance with the provisions of the *Health Care Complaints Act 1993*. Under the two Acts processes are in place to ensure that complaints are handled in a coordinated manner. In the first instance, complaints made to one body are referred to the other. Action on a complaint is then determined through consultation between the Board and the HCCC. Matters can be handled in a number of ways including referral to the Health Conciliation Registry for conciliation, referral to the HCCC for investigation and dismissal.

Following an investigation, the HCCC can make a recommendation that disciplinary action be taken. As a general rule, more serious complaints that may, if substantiated, provide grounds for suspension or deregistration are to be referred to the Chiropractors and Osteopaths Tribunal. Less serious matters are referred to a professional standards committee (“PSC”). A PSC or the Tribunal can inform itself of any matter as it sees fit, summon witnesses, take evidence and obtain documents. Neither body is bound by the rules of evidence. Legal representation is only permitted before the Tribunal.

A wide range of protective orders can be made by a PSC if it is satisfied a complaint is proved after a hearing. These orders include a caution; an order that the practitioner receive medical or psychiatric treatment or counselling; the imposition of conditions on registration; an order that the practitioner undertake continuing education; an order that the person report on his or her practice at the times and in the manner specified; an order that the person take advice in relation to the management of his or her practice; and a fine of up to \$5,500. The Tribunal may exercise all of these powers as well as suspending the practitioner’s registration for a specific period of time or cancelling the practitioner’s registration.

2.3 Other Legislation

It is important to note the broader regulatory environment in which chiropractic and osteopathy services are provided.

- Consumer protection laws (ie the Commonwealth *Trade Practices Act 1974* which is administered by the Australian Competition and Consumer Commission and the NSW *Fair Trading Act 1987* which is administered by the NSW Department of Fair Trading) prohibit chiropractors and osteopaths from making false and misleading representations in the course of providing a service, for example, falsely claiming to hold qualifications or membership of professional associations.
- The HCCC has the power to investigate complaints about any person who provides a health service, whether registered or not.
- In the case of a dispute between a health professional and a consumer, either party could seek to resolve their differences through the civil legal system, although it is recognised that this is generally an expensive process and is unsuitable for minor complaints. As an alternative such matters and complaints about fees can also be heard before a Consumer Claims Tribunal which has the objective of providing a simple low cost mechanism for dispute resolution.

2.4 The Role of Professional Associations

In addition to the Board, professional associations play a role in monitoring standards among chiropractors and osteopaths. The Chiropractors' Association of Australia (NSW) and the Australian Osteopathic Association both have codes of conduct which deal with a number of performance related issues such as continuing professional education. However, not all chiropractors and osteopaths are members of professional associations.

2.5 Other Service Providers

There are a number of health professionals that provide some of the services that are ordinarily provided by chiropractors and osteopaths. This includes medical practitioners and physiotherapists. Both of these professions have their own statutory registration boards. All persons providing health services, whether registered or not, are subject to the Health Care Complaints Act and the other consumer protection legislation outlined above.

2.6 The Regulation of Chiropractic and Osteopathy in Other Jurisdictions

While all Australian jurisdictions provide for the establishment of a registration board and academic requirements for registration, different arrangements apply for the disciplining of members and the handling of complaints. For example, whilst NSW restricts the use of the titles “chiropractor” and “osteopath” and prohibits specific practices from being performed by unregistered persons, some jurisdictions only prohibit the use of certain titles. A summary of the main features of legislation

regulating chiropractic and osteopathy in other jurisdictions is provided at **Appendix D**.

2.7 Impact of the Legislation on Competition

Legislative controls imposed by Government often have positive outcomes for the community where they effectively address problems that arise from the provision of services in an unregulated environment. These problems are sometimes known as ‘market failures’. An example of such a problem is where there is an imbalance of information between service providers and consumers, limiting the ability of the latter to make informed choices when seeking services. However, regulation may also restrict competition among service providers. This may result in new problems or costs for business, consumers and government which are not justified having regard to the nature of the problem which the intervention was designed to address. Alternatively, regulation may not be effective in addressing the identified problems at all.

The principal requirements of the Act that may have an impact on competition can be summarised as follows:

- The Act imposes restrictions on who may “manipulate the joints of the human spinal column, including its immediate articulations”. Manipulation may only be undertaken by registered chiropractors, registered osteopaths, registered medical practitioners and registered physiotherapists.
- The complaints and disciplinary system, although generally directed at ensuring high standards are adopted by practitioners, may inappropriately focus on the commercial conduct of chiropractors and osteopaths thus limiting information to consumers on the different services available.
- The requirements for registration may restrict competition where the number of persons that may gain registration (and hence the right to use the title “chiropractor” or “osteopath” and practise spinal manipulation) is limited beyond that which is necessary to ensure that the objectives of the Act can be achieved. Limitations on the number of practitioners, whether those limitations are effected by requirements for academic qualifications or the imposition of specific requirements such as character, may result in a lessening of competition.
- The restriction on the use of the titles “chiropractor” and “osteopath” by unregistered persons may confer a competitive advantage on chiropractors and osteopaths over other service providers.
- The power to impose conditions on registration can, in certain cases, be used to limit competition.

The guiding principles of the Competition Principles Agreement are that legislation is not to restrict competition unless the benefits to the community outweigh the costs and the objective of the legislation can only be met by restricting competition. In assessing the restrictions outlined above the review has applied these guiding principles.

3. THE OBJECTIVES OF LEGISLATION REGULATING THE PRACTICE OF CHIROPRACTIC AND OSTEOPATHY

3.1 Objectives of the Current Act

To comply with the Competition Principles Agreement the NSW Government is required to identify the objectives of the Chiropractors and Osteopaths Act and to consider whether there is a rationale for continuing to achieve these objectives through legislation. If it is established that there is a rationale for legislative intervention, the precise form of intervention must be considered. (see **chapter 4**)

The Chiropractors and Osteopaths Act does not contain a clear statement of its objectives. The preamble states:

“An Act to regulate the practice of chiropractic and osteopathy and to repeal the Chiropractic Act.”

The functions of the Chiropractors and Osteopaths Registration Board are as follows.

“22 The Board has the following functions:

- (a) to promote and maintain high standards of chiropractic and osteopathic practice in New South Wales;*
- (b) to advise the Minister on matters relating to the registration of chiropractors and osteopaths, standards of chiropractic and osteopathic practice and any other matters arising under or related to this Act or the regulations;*
- (c) to consult with professional and educational bodies on matters affecting chiropractors and osteopaths, where the Board considers it appropriate to do so;*
- (d) to publish and distribute information concerning this Act and the regulations to chiropractors and osteopaths and other interested persons; and*
- (e) to exercise the functions conferred or imposed on it by or under this or any other Act.”*

The primary objective of the legislation at the time it was introduced was to protect the health and safety of members of the public. The Act seeks to do this by addressing the potential risk of harm from unqualified, unscrupulous or sub-standard operators in the market for chiropractic and osteopathic services.

The Issues Paper noted that:

“[t]he Act is based on the premise that some consumers may need assistance to identify chiropractors and osteopaths because they lack the professional knowledge to identify people with appropriate qualifications and experience.”¹

3.2 Submissions

Very few submissions directly addressed the issue of whether the objectives stated in the paper are appropriate objectives for Government intervention in relation to the provision of chiropractic and osteopathic services. Clearly, the appropriateness of the objectives of legislative intervention can only be determined by reference to the problems that exist in an unregulated environment. Most submissions highlighted the potential risks of harm to the “health and safety of consumers” in an unregulated environment, although no submissions have provided evidence to demonstrate this point.

The HCCC in its submission stated that:

“the no regulation model would leave consumers of chiropractic and osteopathic services:

- (a) at greater risks of serious injury and harm;*
- (b) at greater risks of exploitation including financially and sexually;*
- (c) in a position of making choices about their care without adequate and reliable information and without the ability to assess the quality and adequacy of the services so provided;*
- (d) with no adequate means to make and to have health complaints appropriately resolved.”²*

One submission noted that since the Chiropractors and Osteopaths Act was introduced

“the potential risk of harm from unqualified or substandard unregistered practitioners has not reduced.”³

3.3 Conclusions

Several submissions expressed the view that the objective of the Act is the minimisation of the risks of harm to those using or seeking to use the services of a chiropractor or osteopath. The rationale underpinning this objective is that in the absence of government intervention, consumers will have difficulty identifying

¹ P6, Department of Health, Review of the Chiropractors and Osteopaths Act 1991, Issues Paper, June 1998

² Submission – Health Care Complaints Commission

³ Submission – Chiropractors’ Association of Australia (NSW)

competent and ethical service providers. In short, there is an imbalance of information that has the potential to expose consumers to harm.

A number of potential risks of harm to consumers have been identified. The “harm” that is sought to be addressed is not limited to acts of registered or unregistered persons that injure a patient, but includes the injury that may result if a patient is unable to obtain the services they need, or is discouraged from seeking those services. These can be summarised as follows:

- Consumers (most of whom lack specialised knowledge) have a limited ability to assess the need for chiropractic and osteopathic services or the type of service required. There are a number of different service providers not all of whom have the same training and skills or can offer the same service.
- The inability of consumers to identify competent service providers may result in a failure to detect chronic or severe illness. If an incompetent practitioner is consulted in the first instance, appropriate treatment may be delayed or inappropriate treatment provided. Consumers may be discouraged from seeking services. Unmanaged or untreated illness can result in reduced health, well being and in some cases death, all of which have a financial impact on individuals and the economy in general.

It is also noted that there are risks of harm associated with those who are qualified and registered to practise as chiropractors and osteopaths.⁴ Each year a proportion of the complaints received by the Chiropractors and Osteopaths Registration Board concern the clinical competence of chiropractors and osteopaths.

The misuse of chiropractic and osteopathic practices can result in serious harm to consumers. The objective of the current Act to minimise the risks of serious harm or injury to consumers therefore remains valid. The most appropriate means of achieving this objective is considered in the next chapter. If it is proposed to achieve that objective through legislative intervention that legislation should include a specific statement of this objective.

Recommendation 1 – Regulatory objective

That any regulation of the chiropractic and osteopathic professions have the objective of minimising the risks of serious physical harm or injury to those seeking chiropractic and osteopathic services.

⁴ Appendix B, Department of Health, Review of the Chiropractors and Osteopaths Act 1991, Issues Paper, June 1998

4. THE REGULATION OF CHIROPRACTORS & OSTEOPATHS AND COMPETITION

4.1 Introduction

The primary forms of intervention by which the Chiropractors and Osteopaths Act seeks to achieve the objective outlined in the previous chapter are the registration system, the placement of restrictions on who may use the titles “chiropractor” and “osteopath” and limitations on who may perform spinal manipulation. The restriction on title aims to achieve the objective of the legislation by providing consumers with a simple and understandable means of identifying practitioners capable of providing chiropractic or osteopathic services. By enabling consumers to identify such practitioners, risks of injury and the costs to consumers of seeking qualified practitioners will be reduced. The rationale behind the restriction on spinal manipulation is to reduce the risk of serious health consequences that may be associated with that practice.

Although the Issues Paper noted that the prohibition on the use of the title “chiropractor” or “osteopath” by unregistered persons could have benefits for consumers, it was also noted that this might also have disadvantages or costs, primarily through its impact on competition. A restriction on title may confer a competitive advantage on registered chiropractors and osteopaths because it indicates that they are able to provide a superior service. By restricting the number of practitioners who may be registered, competition among chiropractors and osteopaths may be affected. This may result in unnecessary costs for consumers. A restriction on spinal manipulation confers on chiropractors and osteopaths a further competitive advantage as these professions have a near monopoly on the performance of particular procedures.⁵ If prices rise substantially, then consumers could be discouraged from using the services of chiropractors and osteopaths.

This chapter will focus on the impact of the restrictions on the use of the titles “chiropractor” and “osteopath” and who may perform spinal manipulation and whether these forms of intervention are necessary to achieve the objective of the Act. Alternatives to these restrictions are considered to determine whether they can achieve the objective of the legislation, at a lower cost and with less impact on competition. Before turning to these alternatives it is important to reiterate that the Chiropractors and Osteopaths Act is not the only legislation which regulates the delivery of chiropractic and osteopathic services. The Trade Practices Act, the Fair Trading Act and the Health Care Complaints Act are also relevant in this regard.⁶

4.2 Submissions

Submissions were sought on the effectiveness of the current Act, the costs and benefits of the current system and whether the objectives of the legislation could be achieved by other means. The overwhelming majority of submissions supported the continuation of restrictions on the use of title and on the practice of spinal manipulation.

⁵ Medical practitioners and physiotherapists are exempt from this prohibition.

⁶ See 2.3

“... the existing regulatory regime has ensured that health consumers in New South Wales have enjoyed a high professional standard in the provision of chiropractic and osteopathic services.”⁷

“It is the view of MBF that not having both title and practice restrictions is likely to endanger consumers’ health, thus creating larger costs to NSW in the long run.”⁸

4.3 Options to Achieve the Objective

In view of the submissions received concerning the current Act and the impact on competition, the Department has further considered the issue of whether the current arrangements produce the greatest overall net benefit for the community, and are the most effective means for achieving the objective of the Act. In order to undertake this consideration, a number of options have been identified.

4.3.1 Option 1 – No regulation

This option would involve the Chiropractors and Osteopaths Act being repealed. Consumer protection legislation would prevent chiropractors and osteopaths from engaging in false, misleading or deceptive conduct or anti-competitive practices (eg price fixing and exclusionary dealing). Action against an unethical or incompetent practitioner could proceed through a civil claim in negligence or for breach of contract. Complaints could be made to a professional association that would play a role in monitoring the professional standards of its members. If this approach were adopted professional associations may choose to develop descriptors which assist the public in choosing suitably qualified practitioners, such as certified practising chiropractor/osteopath, although it must be noted that the use of such a descriptor would not be restricted.

4.3.2 Option 2 - Title protection only

Under this model only those people meeting certain registration requirements would be able to gain registration. Only registered practitioners would be entitled to use a particular title. No disciplinary arrangements with a statutory basis would be established to complement restrictions on the use of title nor would there be any practice restrictions. The regulatory regime involving consumer protection legislation, the avenue of pursuing court action and the role of voluntary professional associations discussed in option 1 would apply.

4.3.3 Option 3 – Title protection and membership of a professional association

Under this model, to gain the right to use a particular title, a person would need to satisfy certain registration requirements and be required to have membership of an accredited professional association. This would provide a forum for the continued monitoring of professional standards. Once the

⁷ Submission – Chiropractors and Osteopaths Registration Board

⁸ Submission – Medical Benefits Fund of Australia Ltd

person ceases to be a member of the association, he or she could no longer use the title.

4.3.4 Option 4 - Title protection with disciplinary structure

This model is similar to options 2 and 3 in that only those people meeting certain registration requirements would be able to use a particular title. However, the restrictions on title are complemented by a disciplinary system established under legislation.

4.3.5 Option 5 – Title and core practice restriction (current system)

For the purposes of this analysis, the current system is outlined in paragraph 2.2.

4.3.6 Option 6 - Title and complete practice restrictions

This is the most restrictive form of professional regulation. In addition to restrictions on title, the entire scope of the profession's practice would be limited to the registered professional group.

4.4 Assessment of Options

The Department is of the view that substantial benefits to the public will arise where the risks of physical harm are minimised. As a consequence, in carrying out a comparative assessment of the options, it is likely that the option which has the highest overall benefits or advantages for the community will be the one which most effectively and simply provides information to consumers and addresses any potential for serious health consequences. The effectiveness of the system can then be compared to the costs of the system, in particular the anticipated impact on competition.

In assessing the six options it should be noted that it is not possible to quantify the benefits or costs of any of the options, including the current system due to a lack of comparative data.

4.4.1 Option 1 – No regulation

Removal of registration would have the benefit of removing any adverse impacts on competition. However, there would be a reduction in the amount of information readily available to consumers and an increase in the potential for physical harm and associated increased costs to consumers and the economy.

This system would have the following **advantages**:

- There will be no restrictions on competition and any person will be able to undertake the practices of chiropractic and osteopathy and hold themselves out as capable of so doing.

- There will be no regulatory costs to government and only those practitioners who make the choice to join a professional association will incur costs associated with that membership.

Such a system would have **disadvantages** or costs, as outlined below:

- Although consumer protection legislation would assist consumers in the choices they make by precluding practitioners from engaging in false, misleading and deceptive conduct, it would not be effective in situations where qualifications are held but are not of a sufficient standard for the services the consumer is seeking. This is significant because it is unlikely that consumers will be in a position to identify which qualifications are necessary and appropriate for the purpose of practising chiropractic or osteopathy safely. In the absence of extensive, and possibly expensive, promotional activities by the professions consumers are likely to incur significant transaction costs in seeking to do this.
- Most consumers in the market for professional health care services lack specialised knowledge and as a result have a limited ability to distinguish the competent from the incompetent practitioner, assess the quality of the services offered and whether they are excessive or inadequate in relation to their needs. These distortions may result in an increase in injuries and costs associated with receiving care that is inappropriate or delayed.
- While the Health Care Complaints Act enables consumers to make a complaint about any health service provider, registered or not, specific disciplinary action can only be taken where the person is registered. Although complaints could be referred to a professional association for action, this may be inadequate as not all chiropractors and osteopaths are members of a professional association and the sanctions available to professional associations are limited.
- Consumers may place unwarranted weight on the fact that a practitioner is a member of a professional association and may require assistance identifying those associations which play an active role in relation to monitoring the professional standards of their members.
- A disciplinary system administered by professional associations may lack transparency.
- While there would be no costs associated with a registration board, there would be costs connected with professional bodies assessing qualifications for the purpose of determining entry criteria and the promotion to consumers of the benefits of membership of a particular professional body.
- Court action against an unethical or incompetent practitioner could be expensive and slow.

On balance, the Department considers that in view of the disadvantages identified above this option is unlikely to meet the objective of the current

legislation which is to minimise the risk of serious harm to members of the public.

4.4.2 Option 2 – Title protection only

The **advantages** of this model are:

- Most consumers who wish to access chiropractic and or osteopathic services are not easily able to judge the skill and competence of a chiropractor or osteopath before receiving treatment. A restriction on title is a means of providing a signal that a registered person possesses qualifications that have been assessed as appropriate.
- The imposition of qualification and training requirements for registration results in more competent practitioners. The more competent practitioners are the lower the risk of harm to patients, their families and the community.
- Improved use of appropriate health service providers by patients operates to reduce the social costs of illness to both the community and the health system.

There are a number of **disadvantages** associated with this model.

- There are costs associated with obtaining the qualifications an individual must have for registration.
- There are costs associated with administering a system of registration. The practice of the current Chiropractors and Osteopaths Registration Board is for all costs to be recovered through registration fees.
- Registration and regulation may allow registered practitioners to attach a price premium to their services above that which would be expected to occur in a fully competitive market. Isolating a premium for any profession is complicated. Even if a price premium was observed and registration has served to elevate the public perception of the standard of services on offer, it is not clear that this can be directly attributed to registration.
- This model does not provide a sanction to prevent a practitioner from repeatedly offering substandard or unethical services to the public as a “chiropractor” or “osteopath”. The lack of a disciplinary structure means that consumers would not have sufficient information in relation to the ongoing competency of practitioners.
- This model does not address the risk of harm which can be associated with spinal manipulation techniques when performed by practitioners who have not received training in careful screening, clinical diagnosis, the safe practice of various forms of spinal manipulation and contraindications for this type of treatment.

Overall, the Department does not consider that this model provides sufficient protection to consumers as it provides no information to consumers about the ongoing competence of practitioners. Further the model does not address the issue of spinal manipulation which was identified at the time of the passage of the Chiropractors and Osteopaths Act in 1991 as a potentially harmful practice when carried out by a practitioner without adequate training. Spinal manipulation is discussed at length in option 5.

4.4.3 Option 3 – Title protection and membership of a professional association

This option has many of the advantages and disadvantages identified for the previous option (title regulation only) and includes a number of additional advantages and disadvantages.

The added **advantages** of this option are:

- Membership of a professional association may provide some guarantee for consumers that practitioners are subject to a disciplinary structure.

The added **disadvantages** of this option are:

- Membership requirements may be more restrictive and more expensive than under the existing Chiropractors and Osteopaths Act.
- For a disciplinary structure to provide sufficient information to consumers about the ongoing competency of practitioners it must be transparent, open to public scrutiny and adequately represent the interests of consumers. The disciplinary structures in professional associations may not possess these necessary qualities. In addition, a professional association may lack the power to impose sanctions. The presence of Government would ensure the disciplinary structure remains accountable, transparent and impartial.
- This model does not provide a sanction to prevent a practitioner from repeatedly offering substandard or unethical services to the public as a “chiropractor” or “osteopath”. The lack of a disciplinary structure means that consumers would not have sufficient information in relation to the ongoing competency of practitioners.

A number of these additional disadvantages could be addressed in whole or in part by Government accreditation of professional associations although such accreditation would impose additional costs on the profession and/or Government. In addition sanctioning or removing the accreditation of non-complying associations may be problematic.

Overall, the Department does not consider that this model provides sufficient protection to consumers as it does not provide consumers with accurate information about the ongoing competence of practitioners. As noted previously the issue of spinal manipulation is discussed at length in option 5.

4.4.4 Option 4 - Title protection with disciplinary structure

Again this option includes the advantages and disadvantages outlined for option 2. The added **advantages** of this option are:

- A disciplinary system that is transparent and fair to all parties will provide consumers with information on the competency of practitioners.
- The regulatory and disciplinary machinery may help to partially overcome supplier induced demand because consumers are better able to gather information as to what an appropriate level of service should be or to report incidents they feel constitute over-servicing.
- There are reduced transaction costs for patients in identifying appropriate practitioners and settling disputes with professionals.

The added **disadvantages** of this option are:

- There are increased costs associated with administering a system of registration which also contains a disciplinary structure. In addition to the costs of administration⁹ there are additional costs associated with disciplinary investigations and hearings and potentially costs associated with appeals from those hearings

Whilst it is considered that of Options 1 to 4 this model provides the best protection to members of the public, the Department is concerned that none of these options adequately address the issue of harmful practices by persons other than registered practitioners. This issue is considered in the following option.

4.4.5 Option 5 -Title and core practice restriction

The current legislation conforms to this model as it restricts who may use certain titles and provide certain services.

The disadvantages and advantages that were canvassed in relation to option 4 are also applicable to this model of registration and will not be repeated. In addition, this review has identified a number of separate advantages and disadvantages that may be associated with the existence of a core practice restriction.

The **advantages** associated with core practice restrictions are as follows.

- The fact that a practice is restricted will provide consumers with information that there is a significant risk of injury associated with it. This information

⁹ The Annual Report for the Year Ended 30.6.98 for the Chiropractors and Osteopaths Registration Board indicated that it received approximately \$180,000 in income and spent approximately \$170,000.

may assist consumers in making informed decisions about their treatment needs.

- Non-registered practitioners would be able to compete with registered practitioners by providing services that do not carry significant risks but which nevertheless fall within the scope of practice of the regulated profession.

The **disadvantages** of core practice restrictions are as follows.

- Core practice restrictions provide a virtual monopoly for the registered group in the performance of certain procedures. This may result in restriction on the availability of services and inflation in cost. The Department's experience with practice restrictions is that there is often more effort expended in seeking to prevent other registered health professional groups gaining access to the restricted practice area than in policing the genuine risks associated with lay persons undertaking restricted practices.
- Practice restrictions can have an adverse impact on competition and result in increased costs. This may occur because:
 - (i) innovation and improved techniques both within the registered group and by other professional groups with closely related areas of practice have been hindered; and
 - (ii) there is a public perception that the restriction is an indication of superior quality on the part of practitioners permitted to perform the procedure over the other practitioners not permitted to perform the procedure.
- Practice restrictions are of limited effect in that they do not apply to instances of members of the registered group practising beyond their level of competence.
- The task of drafting workable definitions of practices which only registered practitioners may provide that do not unnecessarily overlap with the legitimate scope of practice of other service providers is difficult.
- The enforcement of practice restrictions can be difficult as a court must be satisfied that a particular procedure that is proscribed has been performed.

4.4.6 Option 6 - Title and complete practice restriction

This is the most restrictive form of regulation. The immediate impact of such a system would be to confer a monopoly over an entire professional area and substantially reduce competition. This option fails to recognise that there is some overlap between the legitimate scope of practice of most professions. The Department considers that this model offers no advantages over option 5

title and core practice restriction while amplifying the restrictions on competition within that model.

4.5 The Core Practice of Spinal Manipulation

The Issues Paper noted that both serious complications, including death, and less serious forms of injury, have been reported in the literature as being associated with spinal manipulation. The hazard of manipulation is that force is applied to the spine in a ballistic manner whereby it cannot be aborted once initiated. Therefore, to gauge how much force should be applied, the practitioner must first conduct a thorough assessment of the patient. Comprehensive training enables practitioners to identify contraindications to manipulation, whether other treatment may be more appropriate or whether any treatment is required at all.

The Issues paper reported that a literature search from 1932 to 1992, conducted by the Department, identified 78 cases of cerebrovascular accidents associated with spinal manipulation. These accidents included 20 deaths, 5 cases of tetraplegia and 53 cases of residual neurological deficit¹⁰.

A recently published literature review conducted by Professor R P Di Fabio of the Department of Physical Medicine and Rehabilitation at the University of Minnesota found 177 cases of injury associated with cervical manipulation in 116 articles published between 1925 and 1997¹¹. Professor Di Fabio reported injuries ranging from death through to joint dislocation, hearing loss and visual deficits. Cerebrovascular injuries account for over two-thirds of the injuries reported with death the outcome in 18% of cases. The literature search indicated that the injuries were caused by cervical manipulation performed by a very wide range of practitioners including chiropractors, osteopaths, medical practitioners, physical therapists (physiotherapists) and naturopaths.

Most of the individuals and bodies which made submissions on the Issues Paper discussed the Act's practice restriction on spinal manipulation. Many noted that a serious risk of permanent injury or death from misdiagnosis or improper techniques is associated with spinal manipulation when performed by persons without adequate training.

“Spinal manipulation is the primary therapeutic tool of chiropractors and osteopaths. Studies on the level of iatrogenesis (accidents, incidents and complications) associated with manipulation give clear indication that manipulation is a relatively safe procedure, yet may cause catastrophic side effects such as injury, paralysis, stroke and death, if not performed by a practitioner with adequate training in diagnosis and safety procedures.”¹²

“Spinal manipulation can cause exacerbation of a complaint, fracture, paralysis, cerebrovascular infarction and death. Complications are rare but sometimes devastating. These risks can be minimised by intensive training

¹⁰ Department of Health, Review of the Chiropractors and Osteopaths Act 1991 Issues paper, June 1998, page 16

¹¹ RP Di Fabio *Manipulation of the Cervical Spine: Risks and Benefits*, *Physical Therapy* Volume 79 Number 1, January 1999, pages 50 - 65.

¹² Submission – The Sydney College of Chiropractic

and examination of practitioners who manipulate. This training emphasises professional assessment of each patient, taking regard of the recognised contraindications and relative contraindications to manipulation, the use of other appropriate treatment or the decision not to treat at all. Assessment of the patient involves the taking of a detailed clinical history including a clinical examination and specific tests... Such an assessment is beyond the capacities of untrained or semi trained practitioners.”¹³

Several submissions have highlighted the depth of training which applicants for registration must undergo. There are currently five full time Australian university courses, the graduates of which are eligible to be registered as chiropractors or osteopaths. Each course entails a minimum of 4600 hours. For example, students at RMIT University undertaking chiropractic or osteopathic studies (ie B App Sc (Clinical Sciences) & B Chiropractic Science or B Osteopathic Science) must complete 2,935 theory hours, 585 core hours and 1160 clinic hours.¹⁴

Several submissions argued that there is likely to be under-reporting of injuries associated with spinal manipulation.¹⁵

“It is unknown what the exact incidence of complications arising from manipulative therapy is. The most frequently described serious complications are those arising from the compromise of the vertebro-basilar arteries causing posterior circulation stroke. The reported incidence varies between 1 per 400,000 and 1 per million procedures. However, the lack of standardised reporting poses the biggest problem in defining acceptable statistics.”¹⁶

Some submissions have emphasised the importance of protecting the public from less serious forms of injury which are associated with spinal manipulation.

“The Commission agrees that there are risks of serious permanent injury and death from inadequate diagnosis and improper technique associated with manipulations but there is also risk of less serious forms of injury and harm caused by incompetent practices. Accordingly, the rationale for restricting practice should be to protect the public from all injury and not just serious injury. A regulatory model concerned only with serious injury is therefore inappropriate.”¹⁷

“The Board considers that even if the frequency of serious adverse outcomes is regarded as being relatively low, the seriousness of those adverse outcomes is of such a high level that the potential benefits to the community from removal of core practice restrictions are outweighed by the potential costs. The Board is also concerned that reducing or removing core practice restrictions may lead to a large increase in the number of less serious adverse outcomes. These, when

¹³ Submission – Australian College of Physical Medicine

¹⁴ Submission – Chiropractors’ Association of Australia (NSW)

¹⁵ Submissions – Medical Services Committee, Australian Physiotherapy Association

¹⁶ Marchioni G, “Cerebro-Vascular Accidents and Cervical Spine Manipulation”, a paper submitted in part satisfaction of the requirements for a Masters of Medicine in Physical Medicine (musculo-skeletal) at the University of Sydney. Included with the submission from the Australian College of Physical Medicine.

¹⁷ Submission – Health Care Complaints Commission

*taken individually do not impose a significant social cost but taken collectively may impose a greater cost than that of more serious adverse outcomes.*¹⁸

As noted above there was broad based consensus in submissions that improper technique and misdiagnosis in the application of spinal manipulation can result in serious injury. In this regard the submissions are not inconsistent with the results of the literature reviews which demonstrate that the practice of spinal manipulation carries with it a risk of serious injury and death. However, there was debate within the submissions as to whether the restrictions can be better defined to target dangerous practices.

As at the time of the release of the Issues Paper in June 1998 there had not been a successful prosecution of an unregistered person for performing spinal manipulation. Since that time an unregistered person has been successfully prosecuted and the Board has a number of other cases pending. The Chiropractors and Osteopaths Registration Board in its submission stated that the absence of a definition of “manipulate” has made prosecutions difficult to mount and sustain. Three submissions have proposed that “manipulate” should be defined as including any of the following:

“(a) any force which is exerted upon and which takes a joint of the human spinal column beyond its normal range, whether joint separation occurs or not; or

(b) when a person influences the bio-mechanics of a human spinal column or its immediate articulations by his or her direct physical intervention; or

(c) a manual procedure which involves a directed thrust to move a joint of the human spinal column past the physiological range of motion without exceeding the anatomical limit;

*whether there is audible cavitation or not.”*¹⁹

A different perspective has been put forward by a number of professional associations whose members are not registered practitioners. In particular, submissions have expressed concerns about the breadth of the current restrictions.

*“The AMT (NSW) agrees in principle with the concept that untrained non-registered practitioners must not perform manipulations defined as high velocity low-amplitude thrust techniques. This would protect the public from “the two main reasons complications can be associated with spinal manipulation” - misdiagnosis and improper technique and would not restrict other practitioners including massage therapists from their normal overlapping services.”*²⁰

¹⁸ Submission – Physiotherapists Registration Board

¹⁹ Submissions – Chiropractors and Osteopaths Registration Board, Chiropractors’ Association of Australia (NSW), E Devereaux AM, W Bateman OAM, J Bundesen

²⁰ Submission - Association of Massage Therapists

“Massage therapists practice soft tissue mobilisation, the definition should be narrowed to better target the harmful practices and thereby minimise the impact of restrictions on competition.”²¹

The Australian Traditional Medicine Society in its submission noted that spinal manipulation has the potential to cause harm and that its practice must be limited to health care professionals specifically trained in its application. The Society contends that ‘spinal manipulation’ needs to be differentiated from ‘joint mobilisation’ which it argues does not have potential to cause harm and must be available to professionally trained massage and other therapists. The submission advocates ‘spinal manipulation’ being defined as a “high velocity, low amplitude thrust applied to a tractioned joint”. ‘Joint mobilisation’ is defined as “specific passive joint movements applied by a therapist for the purpose of increasing movement within a joint”.²²

The International College of Spinology has argued that a definition of “manipulation” is necessary to emphasise the difference between manipulation and the techniques used by massage therapists, spinologists, naturopaths, bowen therapists, feldenkrais practitioners, reiki therapists, and traditional Chinese medical practitioners. The College argues that the absence of a definition clears the way for the Chiropractors and Osteopaths Registration Board to claim that any of these practitioners are contravening the restriction on spinal manipulation. Such activities may have a detrimental effect on competition in the market.

“One of the greatest problems is that the Chiropractors and Osteopaths Registration Board is calling everything to do with the human body “manipulation”. The costs will always be high as long as the Board continues to pursue this kind of action.”²³

Definitions of “manipulation” that have been put forward by the College of Spinology are as follows.

”The forced passive movement of a joint beyond its active range”.

“An adjustment or manipulation is a passive manual manoeuvre during which the three joint complex is suddenly carried beyond the normal physiological range of movement without exceeding the boundaries of anatomical integrity.”²⁴

In a recent prosecution of a person for breaching the prohibition on spinal manipulation Magistrate Pat O’Shane in her reasons stated that:

“Although it is not defined and it would seem indeed that it is not strictly a term of art, but manipulation is some sort of movement of the body by reason of

²¹ Submission - Association of Remedial Masseurs

²² Submission – Australian Traditional Medicine Society

²³ Submission – International College of Spinology

²⁴ Ibid

some force being applied, then the view of this court is that manipulation has taken place.”²⁵

In view of the range of submissions on this issue, it may be argued that the absence of a definition of the term “manipulate” has meant that the precise scope of the practice restriction has not been sufficiently clear. In addition, it has been noted that the current restriction does not differentiate between the different techniques of spinal manipulation not all of which carry the same degree of risk.

The task of the identification of harmful practices is one which has been undertaken in several other jurisdictions. In Ontario health practitioner legislation has been introduced which identifies 13 harmful activities that only particular health professionals or other identified persons may perform. One such activity is:

“Moving the joints of the spine beyond the individual’s usual physiological range of motion using a fast, low amplitude thrust.”²⁶

The Queensland Draft Policy Paper advocates a similar approach to the regulation of “core restricted practices” rather than statutory definitions that restrict a broad scope of practice to protect the public. It has been proposed that only chiropractors, osteopaths, physiotherapists and medical practitioners should be permitted to “*move the joints of the spine beyond a person’s usual physiological range*”.

The demonstrated risk of harm from spinal manipulation and the valuable contribution received from the wide range of submissions on this issue indicate that the restriction on spinal manipulation is required in the interests of public health and safety but that it can be refined to better target dangerous practices and minimise its adverse impact on competition without compromising patient health and safety.

There are a number of different manual therapeutic techniques that involve treatment of the human spinal column, each of which has particular characteristics, including spinal mobilisation and spinal manipulation. Spinal mobilisation involves the repeated application to a joint of a force that is constant in magnitude or progressively increasing in magnitude in small incremental quanta. In contrast, spinal manipulation involves the single and sudden application of force to overcome resistance to the patient’s normal range of movement. Essentially, spinal manipulation is characteristically singular (even though it might be repeated) and involves a rapid movement whereas spinal mobilisation is characteristically multiple and involves the slow and progressive application of force.

The Department supports the restriction on spinal manipulation being refined to better target harmful practices by clarifying that it does not encompass other techniques such as spinal mobilisation. Accordingly, it is proposed that a “manipulation” should be defined to mean a directed thrust applied to a joint of the spine to take it beyond:

²⁵ 27 August 1997

²⁶ Regulated Health Professions Act 1991 (Ontario)

- (i) the person’s usual physiological range of motion; or
- (ii) what could reasonably be expected to be the physiological range of motion of a person with a similar physical condition.

The core practice restriction would be complemented by continuing the existing exemptions from the prohibition, that is for chiropractors, osteopaths, physiotherapists and medical practitioners. By retaining the existing power to exempt new categories of persons by regulation, the process for considering whether other professional groups should be conferred an exemption will be open and transparent.

4.6 Core Practice Restrictions – Public Health Act 1991

Any analysis of a core practice restriction is not complete without consideration being given to the context and manner of its enforcement. It has previously been noted that the only justification for any restrictions on spinal manipulation is the existence of risks to public health and safety. In this context, in circumstances where several professions are able to lawfully undertake the core practice, and to ensure objectivity and transparency in enforcement of practice restrictions, the Department recommends core practice restrictions, including that of spinal manipulation be re-located to the *Public Health Act 1991*. This legislative framework already plays a key role in regulating practices that are associated with risks to public health and safety. For example, under the *Public Health Regulation 1991* a person other than a medical practitioner or dentist (or a person under their supervision) must not carry out acupuncture, tattooing, ear piercing, hair removal or any other procedure that involves skin penetration unless certain requirements which are set out in the Regulation are met.

4.7 Conclusion

Having assessed the respective advantages and disadvantages of each option, the Department concludes that option 5 most effectively achieves the objective of the Act whilst minimising any impact on competition subject to the core practice of spinal manipulation being more precisely defined.

Recommendation 2 – Registration by title

That chiropractors and osteopaths should continue to be registered by title.

Recommendation 3 – Core practice restriction on spinal manipulation

That the restriction on spinal manipulation should be revised to provide that unless performed by a person who is exempt it is an offence to manipulate the spine. “Manipulate” means a directed thrust to a joint of the spine to take it beyond the person’s usual physiological range of motion or what could reasonably be expected to be the physiological range of motion of a person with a similar physical condition.

That core practice restrictions including the restriction on spinal manipulation be re-located to the Public Health Act.

5. SHOULD THERE BE ONE BOARD OR TWO?

The Issues Paper canvassed whether chiropractors and osteopaths should continue to be registered under one Act by one registration board. Organisations advocating the introduction of a separate registration board for osteopaths were invited to address the following questions:

- How would the option better serve consumers and practitioners?
- Would the option enhance professional standards?
- Can separate Acts and boards be achieved at no extra cost or at a lower cost?

The key proponents for a separate registration board for osteopaths are the Australian Osteopathic Association, the Osteopathic Steering Group and the University of Western Sydney.

The Australian Osteopathic Association has raised the following issues in its submission.

- Osteopathy is a separate and distinct health care profession.
- Historically the two professions in Australia shared common educational institutions. However, the professions have outgrown these origins with no combined courses in chiropractic and osteopathic now being offered in Australia.
- In no other country is there a conjoint osteopathic and chiropractic system of professional registration.
- In a survey conducted by the Association, 81 per cent of its members indicated support for a separate registration board notwithstanding the increase in registration fees.²⁷
- One example of the problems of “inequity and anti-competitiveness” with the current arrangements concerns the accreditation of the Sydney College of Osteopathy qualifications “Diploma of Osteopathy and “Doctor of Osteopathy“. According to the Association’s submission:

“the legal representative, consumer representative, medical representative and the chiropractic educational representative all abstained from voting. Thus three Chiropractic representatives voted in favour of recognising these qualifications whilst the Osteopathic representative voted against... This decision discriminated against the Osteopathic profession and highlighted the inequity of Osteopathic representation on the current Board.”²⁸

- Costs associated with the establishment of an osteopathic registration board can be minimised by sharing administration under the Health Professional Registration Boards. Any increase in costs will be borne by the profession. (The Health Professionals Registration Boards (HPRB) is an administrative unit of the Health Administration Corporation that provides administrative support to

²⁷ Figures provided by the Australian Osteopathic Association suggest that approximately 70 per cent of registered osteopaths in NSW are members of the Association.

²⁸ Submission – Australian Osteopathic Association

the various registration boards with the exception of the Dental, Medical and Pharmacy Boards which are independent. Each Board within the HPRB is self funding, although there are inevitable cross-subsidisations in terms of the costs associated with rent, equipment and senior staff.)

Other issues that have been raised in submissions in favour of a separate registration board are as follows.

- The introduction of separate registration boards would enable greater consistency of standards to be achieved within each profession.
- The fact that common techniques are employed by chiropractors and osteopaths cannot be used to justify a joint Board as the logical extension of this argument would require all health professionals with common techniques to have joint registration boards. (eg chiropractors, osteopaths, physiotherapists and medical practitioners can all perform spinal manipulation)²⁹

“Given that Health Registration Boards maintain professional standards, not professional identity and, in the interests of equitable treatment of all registered health professions, logically there ought to be either one Board for all health professions or a separate Board for each. Health professions currently regulated by individual Boards are unlikely to agree to surrender to a single Board. Therefore, it is inequitable to maintain a common Board for osteopaths and chiropractors.

University-based osteopathic and chiropractic courses of education are clearly different in many ways, including the underlying professional philosophy and the profile of the graduate (“the product”). While there are some similarities between the two types of courses, similarities also exist with other health professional courses such as medicine, dentistry, nursing, podiatry, occupational therapy and physiotherapy. Nevertheless, involvement of members of any of the other professions in the regulation/accreditation of, say an osteopathic course could be seen as inappropriate, as other health professional cannot be assumed to have any osteopathic educational standing. Furthermore, chiropractors, the professionals who compete most directly with osteopaths, are the least acceptable in the regulation/accreditation of an osteopathic course.”³⁰

- The Osteopaths are separately registered in Western Australia (legislation is yet to commence) and Victoria. It is understood that the Queensland Minister for Health has publicly supported the establishment of a separate registration board for osteopaths in that State.
- Separate registration boards will encourage competition between two different approaches to the assessment and manual treatment of musculoskeletal complaints.³¹

²⁹ Submission - Osteopathic Steering Group

³⁰ Submission – University of Western Sydney

³¹ Submission – Australian College of Physical Medicine

Submissions that oppose the creation of a separate board for osteopaths have raised the following issues.

- Essentially the two professions offer an identical service.³²
- The risks, dangers and threats to the health consumer are ostensibly the same for each profession. The safety issues, professional conduct and regulations that a board could impose are identical.
- The similarities between chiropractic and osteopathy are such that both professions benefit from a singular board rather than two boards developing in separate directions.³³
- *The association has a serious concern about an allegation that there already exists a potential for lessening of standards of professional education. We are led to believe that the Victorian Osteopathic Board has recently approved the graduates of a new Osteopathic course at the Victoria University, without subjecting the course to the rigorous assessment that all other courses have been subjected to prior to their Act being formed.*³⁴
- The osteopathic lobby does not represent practitioners with dual registration. The proposal would significantly increase the registration fees for dual registrants with no apparent benefit.³⁵
- The Sydney College of Chiropractic, which has trained 392 graduate with dual qualifications, has conducted a survey of all its osteopathic graduates in NSW and they are unanimously in agreement that there should be only one registration board for chiropractors and osteopaths in NSW.³⁶

According to the Annual Report for the Chiropractors and Osteopaths Registration Board for 1998 there was a significant increase in the number of persons registered as chiropractor-osteopaths and a reduction in the number of persons who were registered as chiropractors during the 12 months ending 30 June 1998.

Registered chiropractors	As at 1 July 1997	1058
“	As at 30 June 1998	868
Registered osteopaths	As at 1 July 1997	196
“	As at 30 June 1998	197
Registered chiropractor-osteopaths	As at 1 July 1997	101
“	As at 30 June 1998	212

It would appear that the increase in the number of persons registered as chiropractor-osteopaths is attributable at least in part to the approval of qualifications awarded by the Sydney College of Osteopathy for the purposes of registration as osteopaths. The Annual Report of the Board states that it

³² Submission – Macquarie University – Centre for Chiropractic

³³ Submission – Hills District Chiropractic Society

³⁴ Submission - Chiropractors' Association of Australia (NSW)

³⁵ Submission – Hills District Chiropractic Society

³⁶ Submission – Sydney College of Chiropractic

“received a list of recipients of the awards by the Sydney College of Osteopathy and advised the practitioners concerned by direct mail of the change in the Regulation pertaining to Sydney College of Osteopathy awards.”³⁷

On balance, the Department supports the establishment of a separate registration board for osteopaths for the following reasons.

- Osteopathy is a separate and distinct health profession.
- Whilst osteopathy and chiropractic share some common techniques, both osteopathy and chiropractic share a number of techniques with other professions, for example physiotherapy which has a separate registration board.
- Different courses of education by different institutions are offered for registration as a chiropractor or osteopath. No combined courses are currently offered.
- The establishment of a separate registration board will enhance competition between the two professions.
- The general approach to the registration of health professionals in NSW is that separate boards regulate separate professions.

The Department does acknowledge that the establishment of a separate registration board will increase registration fees for osteopaths and potentially for chiropractors. The Issues Paper considered the respective implications of a joint board or two separate boards on registration fees. Those figures have been updated to take into account the registration figures and financial information contained in the Annual Report for the year ended 30 June 1998:

- if the professions were jointly registered the fee would be \$235;
- if chiropractors are registered separately the fees for chiropractors would be in the range of \$218 to \$272; and
- if osteopaths are registered separately the fees for osteopaths would be in the range of \$334 to \$695.

The fee variations in the separate board option are attributable to the different assumptions that may be made about the registration patterns of chiropractor-osteopaths.

However, by operating the new board as part of the Health Professional Registration Boards, the new board will be able to benefit from a shared resources pool with other boards. The Issues Paper states that this would result in cost savings of at least \$119,790. One submission has argued that if separate registration boards were established within the Health Professional Registration Boards, the registration fees would be \$126 for chiropractors and \$197 for osteopaths.³⁸ When setting registration fees for the two boards the Department would support special consideration being given to the level of fees paid by persons who wish to register as both chiropractors and osteopaths.

³⁷ NSW Chiropractors and Osteopaths Registration Board, Annual Report for the year ended 30 June 1998

³⁸ Submission – Australian Osteopathic Association

The Department supports the introduction of parallel legislation for the regulation of chiropractors and osteopaths, with each profession being administered by a separate board. The matters raised in the following chapters are in the context of the Chiropractors and Osteopaths Act which should be viewed as a template for the regulation of both chiropractors and osteopaths. The issue of the composition of each board is discussed in Chapter 10.

Recommendation 4 – Separate boards for chiropractic & osteopathic professions

That the Chiropractors and Osteopaths Act and the Chiropractors and Osteopaths Registration Board be replaced with two separate acts and two separate boards for the registration of chiropractors and osteopaths respectively.

6. ENTRY REQUIREMENTS

6.1 Introduction

The Chiropractors and Osteopaths Act contains a number of criteria for registration. The Board may also refuse registration on a number of specific grounds. Failure to gain registration prevents a person from holding him or herself out to be a chiropractor or osteopath and from performing spinal manipulation.³⁹ If entry level requirements are set artificially high, this may restrict the number of people able to seek registration, with a resultant impact on competition. Alternatively, although the barriers may not be high or onerous, there may be limited access to appropriate educational courses and supervision opportunities creating a barrier to entry for intending practitioners.

The current criteria have been assessed in accordance with the Competition Principles Agreement.

6.2 Registration Procedures

For a person to be eligible for registration as a chiropractor he or she must have:

- received a diploma, certificate or other academic award for the successful completion of a course of training prescribed by the regulations; or
- satisfied the Board at an examination arranged by the Board that he or she is fit to practise chiropractic in NSW; or
- registered elsewhere as a chiropractor.

The criteria for registration as an osteopath mirror the requirements that apply to chiropractors.

The Issues Paper sought comment on whether other accreditation procedures should be recognised as entitling a person to be registered as a chiropractor or osteopath.

The Chiropractors and Osteopaths Registration Board and Macquarie University have argued that the current system for accrediting courses is appropriate.

“The Board has developed accreditation procedures in consultation with other registration Boards in Australia and New Zealand. The accreditations are based on agreed entry-level competency standards in the case of chiropractic, and the attributes expected of a registered osteopath in the case of osteopathy... The national competency standards for the chiropractic profession list the skills, knowledge and attributes which an entry-level chiropractor needs to be able to practise at an appropriate standard.”⁴⁰

³⁹ Medical practitioners and physiotherapists are exempt from this latter prohibition.

⁴⁰ Submission – Chiropractors and Osteopaths Registration Board

The Sydney College of Chiropractic has in its submission noted that:

“Unlike the sophisticated and widely respected process of local accreditation, this College believes that there is not feasible means of accrediting for prescription the quality of foreign schools of osteopathy and chiropractic (excepting New Zealand). Plainly, it is impossible to inspect each of the overseas schools offering chiropractic or osteopathic qualification. Further, little faith can be held in reciprocal accreditation agreements which exist at present.”⁴¹

A larger number of submissions have been critical of the mutual recognition principle being extended to overseas trained practitioners with several also advocating the introduction of more stringent processes for assessing such applicants for registration.

The Health Care Complaints Commission has expressed the view that a complete mutual recognition principle should not be adopted in respect of foreign qualified practitioners:

“The recognition of all foreign qualifications is likely to have a significantly detrimental impact upon the standards of practice in this State and upon public health and safety.”⁴²

Two submissions have expressed the view that all overseas trained practitioners should be required to undertake an assessment of their clinical competence. The Sydney College of Chiropractic has in its submission noted that whilst virtually all existing American chiropractic qualifications are prescribed for the purposes of registration, in the United States graduates exiting the chiropractic schools are required to sit a national board examination and the relevant state examination prior to gaining a licence in any state.⁴³

Submissions on this issue have been overwhelmingly supportive of the current examination process.

“The Association believes that the NSW Board has in the past set a fair and acceptable standard of examination that has not prevented anyone with proper training and skills from entering practice.”⁴⁴

Only one submission has advocated the development of a mechanism for evaluating and approving qualifications conferred by overseas tertiary institutions. The Ethnic Affairs Commission has proposed that such a system should be complemented by the facilitation of provisional registration while a person is undertaking an approved bridging course and an appeals mechanism whereby a board’s decision can be judicially reviewed.⁴⁵

⁴¹ Submission – Sydney College of Chiropractic

⁴² Submission – Health Care Complaints Commission

⁴³ Submission – Sydney College of Chiropractic

⁴⁴ Submission – Chiropractors’ Association of Australia (NSW)

⁴⁵ Submission – Ethnic Affairs Commission

It should be noted that provisional registration is only available in limited circumstances where an applicant can satisfy the Board that he or she meets the requirements for registration in the Act in substance but not form. For example, a person who has satisfactorily completed a course of training prescribed by the regulations may not have his or her qualification formally conferred for a number of months after completing the course. Provisional registration is not available to allow practice so as to assist persons in being able to meet the Act's substantive requirements.

The Department can see considerable merit in the introduction of an additional method of accrediting courses for the purposes of registration provided that the graduates of such courses have a sufficient level of competence. Accordingly, the Department recommends that in addition to the criteria set out in the current Act, each board should have the power to accredit courses based on criteria that are prescribed by regulation. Under this proposal each board is to develop accreditation criteria which will ensure that graduates of those approved courses are competent to practice in New South Wales. Educational institutions would be able to apply to the appropriate Board to have a course of study accredited according to the prescribed criteria and an appeal against the Board's decision would lie to the Administrative Decisions Tribunal.

As part of this process and in view of concerns that have been raised about some courses of training which are currently prescribed in the Regulation, the Department recommends that the relevant registration board review the courses which are currently prescribed to ensure that they are all of a sufficient standard. In the event that the relevant board forms the view that one or more courses of training should no longer be prescribed, the Department would recommend to the Minister that they be removed from the Regulation on the condition that any action taken was of a prospective nature only. Practitioners who are currently registered on the basis of qualifications that are removed would continue to be eligible to be registered.

Under the mutual recognition principle a practitioner who is registered in an occupation in one state can be registered to carry out the equivalent occupation in any other state without any additional requirements to be met. The mutual recognition principle has been incorporated into the Chiropractors and Osteopaths Act. The Chiropractors and Osteopaths Registration Board has said that:

“Administrative difficulties arise when the Board is required to accept applicants with qualifications which it otherwise would not approve of or has not had the opportunity to accredit. This is the case with the osteopathy course conducted by the Victoria University of Technology. The Board is concerned about being obliged to accept the ‘lowest common denominator’.”⁴⁶

Whilst the Issues Paper noted that the issue of mutual recognition is strictly outside the scope of the paper, the experiences of the Board would appear to underscore the importance of all registration boards adopting a co-operative approach in relation to the accrediting of qualifications for registration.

⁴⁶ Submission – Chiropractors and Osteopaths Registration Board

Recommendation 5 – Courses of training

That:

- both the Chiropractors Registration Board and the Osteopaths Registration Board should have the power to approve courses of training for the purposes of registration;
- the Regulations set out criteria under which educational institutions can apply to have their courses approved for registration; and
- educational institutions which are aggrieved by a board decision not to approve a course of training have a right of appeal to the Administrative Decisions Tribunal.

That each of the Boards review courses that are currently prescribed for the purposes of registration.

6.3 Good Character

The Act currently provides that “good character” is a prerequisite to registration as a chiropractor or osteopath. The Issues Paper raised for consideration whether the requirement should be retained and, if so, whether more “objective” criteria should be developed.

The proposition that character requirements can unnecessarily restrict entry to the profession must be balanced against the important role which good character plays in minimising the risk of harm posed by inappropriate or unethical conduct through ensuring that disreputable people are precluded from registering as chiropractors or osteopaths.

Submissions to the review overwhelmingly supported the criteria of good character on the basis it is essential for minimising the risks of harm from inappropriate or unethical conduct.

“The requirement of good character is an effective screening process in registrations to ensure that only persons of good character are afforded the privileges and opportunities that membership of the profession gives. It is very much in the public interest to retain this requirement for registration.”⁴⁷

The Department does not support the narrowing of the “good character” requirement on the ground that courts may be inclined to interpret it narrowly and that such an outcome would not be in the public interest. The Department strongly supports the retention of the “good character” requirement as an essential part of satisfying the legislative objective of protecting the public by ensuring that chiropractors and osteopaths are fit to practise.

⁴⁷ Submission – Health Care Complaints Commission

6.4 Age

The Chiropractors and Osteopaths Act currently provides that a person may not be registered as a chiropractor or osteopath unless he or she is 18 years of age.

Most submissions expressed the view that the age requirement should be removed on the ground that it is unnecessary.

“As qualifying courses are generally five years duration the minimum age clause is superfluous.”⁴⁸

The Sydney College of Chiropractic has in its submission argued that:

“individuals at the age of 18 generally would not have acquired the requisite skills or sufficient training experience to properly assume the responsibilities of the manipulative therapist.”⁴⁹

When considering this restriction it must be acknowledged that:

- local graduates must complete five year courses to be eligible for registration; and
- graduates from overseas who do not have prescribed qualifications must satisfactorily complete an examination which is pitched at the level expected of a local graduate.

The Department does not consider that the continuation of the restriction on age is warranted.

Recommendation 6 – Minimum age

That the requirement that applicants for registration be not less than 18 years of age be removed.

6.5 Grounds for Refusal of Registration

The Issues Paper noted that a transparent and impartial disciplinary process established by legislation is necessary to provide effective protection for consumers and to ensure consumer confidence in that process. It is essential that the grounds for refusing registration complement the grounds for taking disciplinary action. If they do not there will be anomalies because conduct will be treated differently depending upon whether it is being considered:

- in the course of an application for registration; or
- for the purposes of determining if disciplinary action should be taken against a person who is already registered.

⁴⁸ Submission – E Devereaux AM, W Bateman OAM, J Bundesen

⁴⁹ Submission – Sydney College of Chiropractic

The disciplinary machinery for handling complaints about chiropractors and osteopaths is discussed in Chapter 8.

The Chiropractors and Osteopaths Act currently sets out three grounds upon which the Board may refuse an applicant registration. These grounds are listed in Chapter 2.

6.5.1 Competence to practise

The grounds for refusing an applicant registration should be directed to ensuring that consumers have appropriate information about whether a practitioner is an appropriate person to be practising chiropractic or osteopathy. The Issues Paper noted that the current registration criteria may not adequately address the issue of potential harm which is posed by persons applying for registration a number of years after graduating with the necessary qualifications. Similar concerns may also be associated with applicants for registration who do not have sufficient physical or mental capacity to practise chiropractic or osteopathy.

There was overwhelming support in submissions for the introduction of strategies for ensuring that applicants for registration are competent to practise.

Under the Medical Practice Act the Medical Board is prevented from registering an applicant for registration unless it is satisfied that the person “*is competent to practise medicine (that is, the person has sufficient physical capacity, mental capacity and skills to practise medicine...)*”.⁵⁰ If the Board is not satisfied as to the eligibility of an applicant for registration it must conduct an inquiry which may consider whether the applicant is competent to practise medicine. An applicant who is aggrieved by a decision of the Board may appeal to the Medical Tribunal.

In the interests of enabling the registration Boards to protect the public, the Department supports the relevant Board having the power to refuse to register or restore the registration of persons who are not sufficiently competent to practise chiropractic or osteopathy. The relevant Board would be able to conduct an inquiry into a person’s fitness to practise at the time of application for registration or restoration of registration. Where an inquiry determines that a person is not competent to practise the Board is to have the power to refuse registration. If the inquiry reveals concerns about an applicant’s competence but refusal of registration is not warranted the Board will be able to confer a period of conditional registration. For example, if the inquiry indicates that an applicant does not have sufficient physical or mental capacity appropriate conditions might include that the applicant undergo treatment to address a particular condition which would affect the person’s competence to practise. There would be a right of appeal to the Tribunal against a decision to refuse registration or to impose conditions. This

⁵⁰ section 13 Medical Practice Act

amendment will make section 18(7), which provides that a practitioner whose name has been removed from the register for more than five years may not have his or her name restored unless the Board is satisfied that he or she is of good character and able to demonstrate sufficient skills to practise, unnecessary.

The introduction of such a system would not alter the position that competence would be established primarily through satisfying the qualification or examination requirements. The overall impact on market entry is likely to be minimal. The benefits in terms of improved information to consumers and reduced costs (the amendment will overcome the problem of the Board having to register the person and then lodge a complaint where there are well founded concerns about the applicant's competence) justify the amendment.

6.5.2 Conduct in another jurisdiction

The Chiropractors and Osteopaths Registration Board may refuse to register a person otherwise entitled to be registered if the person's name has been removed from any register kept under any law in any country for the registration or certification of chiropractors or osteopaths. The *Mutual Recognition (New South Wales) Act 1992* and the *Trans-Tasman Mutual Recognition (New South Wales) Act 1996* have the effect that a person registered to practise chiropractic or osteopathy in another Australian jurisdiction or New Zealand is entitled to registration in New South Wales on the same terms. The Mutual Recognition Acts also provide that where a practitioner who is already registered in New South Wales has their registration in another participating jurisdiction cancelled, suspended or made subject to conditions their registration in New South Wales is automatically effected in the same way, although the Board may decide to remove the cancellation, suspension or conditions at a latter date.

However, there is currently no scope to allow the Board to impose conditions on registration (rather than refuse registration) where the applicant has engaged in professional misconduct in an overseas jurisdiction to which mutual recognition does not apply. Such conditions would be similar to conditions imposed following a disciplinary hearing. Examples include requirements that a practitioner complete additional training or supervision, that they attend counselling, that they refrain from practice in certain settings or attending certain clients, that they submit to rehabilitative treatment or that they only attend clients with another person present.

By enabling the relevant Board to impose conditions similar to those imposed in an overseas jurisdiction, in the same manner as they may be imposed on applicants from inter-state under the mutual recognition principle, consumers will receive additional assurances that measures are in place to protect the public from practitioners who have engaged in inappropriate practice (eg sexual misconduct) in other jurisdictions.

6.5.3 Criminal convictions

The criminal justice system can provide information relevant to whether a person should be conferred registration. Currently, the Chiropractors and Osteopaths Registration Board can refuse to register a person who is otherwise entitled to be registered where the person has been convicted of a criminal offence which renders the person unfit in the public interest to practise chiropractic or osteopathy. In order to make this assessment the Board is obliged to have regard to the nature of the offence and the circumstances in which it was committed. Criminal convictions may be relevant to whether an applicant is of good character or has sufficient physical and mental capacity to practise. Clearly, the Board when determining whether a conviction renders a person unfit in the public interest must act in a manner which is fair, consistent, unbiased and not base its decisions on irrelevant considerations.

Under section 556A of the *Crimes Act 1900* a court may find a charge proved but not record a conviction. In reaching such a decision the court is to have regard to a range of factors including “the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed”. As one of the main purposes of criminal proceedings is punitive, a judicial officer making an order under section 556A does not have his or her paramount consideration whether the practitioner is unethical or incompetent.

However, the jurisdiction of health professional registration boards is a protective rather than punitive one. The Department believes that the public would be better protected by conferring on the boards the power to refuse registration, or restoration of registration, where an applicant is the subject of a section 556A order (or equivalent provision) and it is of the view that the person has been rendered unfit in the public interest to practise chiropractic and/or osteopathy.

Recommendation 7 – Refusal of, or conditions on, registration

That the Chiropractors Registration Board and the Osteopaths Registration Board should have the power to:

- conduct inquiries into the eligibility of applicants for registration where the Board is concerned that an applicant is not competent;
- refuse to register or restore the registration of an applicant where he or she is not competent to practise or impose conditions on registration in appropriate cases;
- impose conditions where an applicant has been the subject of disciplinary action in a foreign jurisdiction; and
- refuse registration, or restoration of registration, where an offence has been proven which renders the applicant unfit in the public interest to practise chiropractic or osteopathy.

That the specific power to require an applicant for restoration of registration who has not practised for five years to demonstrate their competence be deleted.

6.6 Appeals

Currently there is a right of appeal to the District Court against decisions to refuse to register an applicant as a chiropractor and/or osteopath. Given that the Chiropractors and Osteopaths Tribunal currently has jurisdiction to hear appeals against decisions of Professional Standards Committees in disciplinary proceedings, in the interests of consistency the Department supports a right of appeal against decisions to refuse to register a person or the imposition of conditions on registration being available to the Chiropractors Tribunal/Osteopaths Tribunal.

Recommendation 8 – Appeals

That appeals against a decision to refuse to register a person; restore the registration of a person; or impose conditions on a person's registration as a chiropractor or osteopath should be made to the Chiropractors Tribunal or the Osteopaths Tribunal respectively.

6.7 Provisional Registration

The Chiropractors and Osteopaths Act provides that the President of the Chiropractors and Osteopaths Registration Board has the power to confer provisional registration in circumstances where an applicant is entitled to a qualification that has not been formally conferred and he or she meets the other criteria for registration. Provisional registration can be granted for a period not exceeding six months and it is understood that this has caused difficulties as there have been several cases where more than six months has elapsed between an applicant being entitled to a qualification and it being formally conferred.

To address this problem, the Department recommends, in line with the provisions of the Medical Practice Act, removing the statutory time limit on provisional registration.

Recommendation 9 – Provisional registration

Provisional registration may be granted for such period of time as the President of the Board considers appropriate in each case.

7. REQUIREMENTS FOR CONTINUING REGISTRATION

7.1 Introduction

One of the primary objectives of the Chiropractors and Osteopath Act is to provide patients with information about the ongoing competence of practitioners. In the case of ongoing registration there is heavy reliance on the initial registration criteria, the complaints/disciplinary system and the practitioner's professional obligations to maintain his/her skills.

It has been suggested that strategies need to be developed in connection with registered health professionals to enable health professional registration boards to play an active role in the ongoing maintenance of professional standards. Possible strategies include:

- annual competency testing;
- continuing professional education; and
- the development of a more comprehensive annual renewal process for practitioners.

7.2 Annual Competency Testing

One way of ensuring that practitioners maintain their skills and remain up to date with developments in their profession is through routine performance assessments. In cases where a practitioner's practice is thought to be sub-standard, the Board could direct a practitioner to undertake a specified training program. The Issues Paper invited submissions seeking the introduction of annual competency assessments to provide evidence demonstrating there is a problem with the ongoing competency of practitioners and to consider the costs and benefits associated with any such system.

The Health Care Complaints Commission in its submission put forward the following view.

*"The Commission strongly supports the introduction of annual or other regular competency assessment of chiropractors and osteopaths for renewal of registration. Consideration should also be given to the introduction of mandatory continuing education. These measures would ensure that standards are maintained, provision of quality health care to consumers is facilitated and substandard practitioners are identified."*⁵¹

Most submissions have not supported the introduction of annual competency assessments.

*"The AOA is not in favour of annual competency assessments, but supports continuing professional education. Annual competency examinations could be difficult to administer and have not been shown to increase standards of proficiency."*⁵²

⁵¹ Submission – Health Care Complaints Commission

⁵² Submission – Australian Osteopathic Association

“The Association does not support an argument to introduce annual competency assessments due to the significant associated costs and administrative burden...”⁵³

“The College does not believe in annual competency assessments. We know of no evidence that suggests that such a system would alter patient outcome in any respect.”⁵⁴

If a system of regular performance assessments was introduced, there would be additional costs to the profession and the community. The Chiropractors and Osteopaths Registration Board is self funding so that the cost of an assessment system and its administration would be recouped through registration fees which will in turn be passed on to patients. Such a scheme would also involve delays in the processing of registration renewals, which in itself is an intangible cost. No evidence has been put forward to demonstrate that practitioners are failing to maintain their competence to the extent that the introduction of a performance assessment system is justified. Accordingly, the Department does not support this particular option for the reasons given above.

7.3 Continuing Professional Education

Practitioner participation in continuing professional education is desirable and can be seen as an essential component of professionalism. A number of submissions have addressed the issue of whether a mandatory or voluntary system of continuing education should be introduced.

Several submissions argued continuing education should be a mandatory requirement for registration to ensure that practitioners maintain their standards in an environment where there are rapid changes which practitioners must keep abreast of.

“Consideration should also be given to the introduction of mandatory continuing education... It is very important that chiropractors and osteopaths continue to upgrade their knowledge and skills and remain competent due to the nature of the services they provide. Practitioners have a professional responsibility to maintain their knowledge and skills but many practitioners without some sort of coercion may not voluntarily undertake ongoing education and training to achieve this... Introduction of competency assessment and mandatory continuing education does involve additional costs for practitioners and the Board but the benefits to the community and the profession in maintaining standards outweighs any cost consideration.”⁵⁵

The Chiropractors’ Association of Australia (NSW) has argued that mandatory continuing education would not be *“an unreasonable burden for all registered persons to bear”*.⁵⁶

⁵³ Submission – Australian Physiotherapy Association

⁵⁴ Submission – Chiropractic & Osteopathic College of Australasia

⁵⁵ Submission – Health Care Complaints Commission

⁵⁶ Submission – Chiropractors’ Association of Australia (NSW)

Many more submissions have supported voluntary continuing education.

“The Board supports the concept of continuing education, but does not support mandatory continuing education. The Board considers that mandatory continuing education is anti-competitive as it increases a practitioner’s operating costs with no evidence of it producing any benefit to public health and safety.”⁵⁷

Two submissions have noted the role professional associations can and do play in the continuing education of their members. The Statement of Ethical Principles of the Chiropractors' Association of Australia (NSW) provides that

“post graduate continuing education for practicing members, and which is in accordance with the continuing education guidelines established by the State executive from time to time, is mandatory.”

By making continuing professional education mandatory for the purposes of registration, a barrier to registration is created as the cost of training programs would have to be borne by individual chiropractors and osteopaths on an annual basis. Clearly programs will be of varying quality and usefulness for practitioners. Practitioners in rural/remote areas may experience difficulties accessing educational opportunities. It is noted that professional associations already play a role in this area.

The Department is proposing that as part of the process for annual renewal of registration practitioners should be required to make a declaration about continuing professional education activities undertaken in the previous 12 months. By requiring practitioners to consider the amount of professional education they have undertaken, the profile of continuing education will be increased. Declarations will also give the Chiropractors Registration Board and the Osteopaths Registration Board data on the types of practitioners who are receiving professional education, its standard, relevance to practice and the types of organisations delivering education. This information will provide an improved basis for evaluating whether the current system is adequate or if it could be improved and for formulating effective strategies to address any areas of concern that are identified.

7.4 Annual Renewal

Currently the Chiropractors and Osteopaths Act only requires an applicants for renewal of registration to pay a fee. Should additional information be provided to enable a proper assessment of the practitioner’s character and competence? Clearly, a board can only take action to protect the public on information received. Relevant information may come from a range of sources and is not limited to complaints.

The Department supports a more comprehensive process for renewing registration to enable a board to assess whether any action needs to be taken by it in the

⁵⁷ Submission – Chiropractors and Osteopaths Registration Board

interests of protecting the public. Accordingly, the registration renewal form should include declarations on the following:

- criminal convictions (recorded and unrecorded);
- charges for serious sex or violence offences where the allegations relate to conduct occurring in the course of practice (this matter is discussed in more detail at **8.7** below);
- refusal, suspension or deregistration in other jurisdictions;
- significant illness, for the purpose of identifying whether the applicant has sufficient physical and mental capacity to practise; and
- continuing professional education activities.

Recommendation 10 – Annual renewal

That applicants for renewal of registration be required to make declarations on:

- criminal convictions (recorded and unrecorded);
- charges for serious sex or violence offences where the allegations relate to conduct occurring in the course of practice;
- refusal of registration, suspension or deregistration in other jurisdictions;
- significant illness; and
- continuing professional education activities.

8. DISCIPLINARY SYSTEM

8.1 Introduction

The current Chiropractors and Osteopaths Act contains a three tier disciplinary system involving the Chiropractors and Osteopaths Board, Professional Standards Committees and the Chiropractors and Osteopaths Tribunal. An effective disciplinary system plays a central role in securing the underlying objective of the Act, which is to protect the public from incompetent and unethical practitioners. As noted at **2.2** complaints about chiropractors and osteopaths may be made to the Chiropractors and Osteopaths Registration Board or the Health Care Complaints Commission (HCCC).

A statutory disciplinary system can where it is independent, transparent, accountable to the public and fair to all parties, protect the public by facilitating the taking of action against incompetent or unethical practitioners. However, disciplinary arrangements can, in practice, operate against the interests of patients where they impinge on the legitimate commercial and competitive conduct of practitioners. No evidence of such activities has been identified in the case of chiropractors and osteopaths.

Clearly disciplinary investigations and hearings involve costs for the HCCC, the Board and chiropractors and osteopaths. However, these costs are far outweighed by the benefits produced from removing incompetent or unethical practitioners from the market or imposing conditions on their practice.

The Chiropractors and Osteopaths Act contains a single definition of “professional misconduct”. (See **Appendix C**)

Alternatives to the disciplinary system include professional associations monitoring standards, or legal action at common law or under the Trade Practices Act or the Fair Trading Act. However, in both cases, neither system would achieve the protective objectives of the Act because there is no ability to prevent practitioners who have been found to have practised unethically or incompetently from using the title “chiropractor” or “osteopath”. Furthermore, legal action depends upon the individual effected being prepared to invest time and/or money in pursuing his or her cause of action.

8.2 Two Tier Definition of Misconduct

The Issues Paper canvassed the introduction of a two tier definition of “professional misconduct”. The Medical Practice Act has a two tier definition in which:

- “unsatisfactory professional conduct” is defined in similar terms to the definition of “professional misconduct” in the Chiropractors and Osteopaths Act; and
- “professional misconduct” is defined as unsatisfactory professional conduct of a serious nature which may lead to suspension or de-registration of the practitioner.

The introduction of a two tier definition would distinguish between serious and less serious matters and limit the potential for the provision to be narrowly interpreted. In addition, the availability of a wide range of graded protective orders under the Chiropractors and Osteopaths Act facilitates this distinction.

All submissions that have addressed this issue have supported the introduction of a two tier definition of “professional misconduct” modelled on the Nurses and Medical Practice Acts.

“The Commission supported the introduction of a two tier definition of misconduct with the structure under the Medical Practice Act 1992 and the Nurses Act 1991. The two tier definition is effective and captures substandard practice as well as serious malpractice that provides grounds for suspension or de-registration of a practitioner.”⁵⁸

The Department supports the introduction of a two tier definition of misconduct.

Recommendation 11 – Two tier definition of misconduct

That a two tier definition of misconduct be introduced whereby:

- “Unsatisfactory professional conduct” is defined in similar terms to the definition of “professional misconduct” in the current Act.
- “Professional misconduct” is defined to mean “unsatisfactory professional conduct of a serious nature which may lead to suspension or de-registration of a practitioner”.

8.3 Disciplinary Structures

8.3.1 Introduction of a Dental Care Assessment Committee type model?

The Issues Paper did not specifically discuss possible changes to the Professional Standards Committee (PSC)/Tribunal structure, which currently exists under the Chiropractors and Osteopaths Act, and submissions did not address the point. However, in developing issues papers for reviews of other health professional legislation the Department has given consideration to the complaints handling and disciplinary model which exists under the *Dentists Act 1989*. The disciplinary structure in the Dentists Act provides, amongst other things, for the Dental Care Assessment Committee (DCAC) to conciliate and investigate complaints about dentists and make recommendations to the Board for their resolution.

The DCAC provides a forum for independent expert assessment of concerns raised by patients as to the standards of dental services provided to them, and to dispute fees charged for those services. The DCAC also provides a means for the Board to receive a more detailed assessment of a complaint before determining how to proceed. In this regard, the Committee can refer a patient for an independent

⁵⁸ Submission – Health Care Complaints Commission

examination and obtain such other evidence, professional reports and advice, as it considers desirable.

The experience of the Dental Board is that the DCAC performs a useful function for consumers. It is considered to be efficient, responds to claims in a prompt manner, and is a less costly alternative for consumers than pursuing legal action through the courts or tribunals. In respect of dental services it represents an effective way of dealing with consumer complaints, the vast majority of which relate to the less serious end of the misconduct scale or to disputes as to whether consumers have received treatment of value.

It is useful to contrast the utilisation of the DCAC with PSCs under the Chiropractors and Osteopaths Act. The Dental Board receives around 80 complaints each year and about 80% are referred to the DCAC for consideration.⁵⁹ By way of comparison in the seven reporting years 1991/2 to 1997/8 the Chiropractors and Osteopaths Registration Board received over 220 complaints and the Board's complaints screening committee considered 59 complaints regarding treatment provided by registrants or the conduct of registrants. Of these complaints only one proceeded to a PSC hearing, with 10 matters being heard by the Tribunal.⁶⁰ Accordingly if DCAC type bodies were to be established within the legislation for the registration of chiropractors and osteopaths the Department envisages them replacing PSCs on the basis that this structure provides a more flexible consumer claims oriented mechanism for less serious complaints.

The DCAC is made up of three dentists and a consumer representative, and provides the Board with a mechanism through which complaints can be investigated and/or conciliated. The DCAC is able to consider complaints that involve both treatment and fees charged for treatment. Where a complaint concerns fees section 41 of the Dentists Act sets out a list of specific matters that must be considered by the DCAC⁶¹. Where a matter cannot be resolved by the DCAC with the consent of the parties involved or there are issues which the DCAC considers should be brought to the attention of the Board, the Committee refers the matter back to the Board with a recommendation for action. As well as making recommendations with respect to fees and charges the DCAC can recommend that a practitioner be cautioned or reprimanded, or may make any other recommendation it considers necessary. The Board does not have to accept the DCAC's findings or recommendations and may in appropriate cases refer a matter for a disciplinary hearing notwithstanding the DCAC's successful conciliation of a complaint.

8.3.2 Application of the two tier definition of misconduct

⁵⁹ Dental Board of NSW Information Bulletin (October 1997) p.5

⁶⁰ Chiropractors and Osteopaths Registration Board Annual Reports 1991/2 to 1997/8.

⁶¹ Under section 41, the Committee is to have regard to :

- (i) the time occupied in performing and the nature of the dental treatment rendered;
- (ii) the distance between the consulting room or residence of the dentist and the place at which the dentist rendered the dental treatment;
- (iii) the hours of the day or night at which the dental treatment was rendered;
- (iv) the degree of skill, knowledge or experience required or given in rendering the dental treatment;
- (v) whether the dentist rendered the dental treatment in the capacity of specialist, consultant or dentist in ordinary practice;
- (vi) what amount, if any, was paid by the dentist to any other person in respect of any dental prosthesis used in the dental treatment;
- (vii) any other matter which appears relevant to the Committee.

The Department proposes that the recommended two tier definition of misconduct be applied through a two tier Board inquiry/Tribunal structure that incorporates a DCAC type body. If such a structure were adopted then complaints of unsatisfactory professional conduct would be considered by the relevant Board after investigation by the DCAC type body, the HCCC or the Board's own inspector, and complaints of professional misconduct would be considered by the Tribunal.

The Board would be able to make the following orders:

- counsel or reprimand the practitioner;
- order the practitioner to seek medical or psychiatric treatment or counselling;
- order the practitioner to undertake additional training;
- order the practitioner to seek advice on the management of their practice;
- order the practitioner to report on the status of their practice to the Board, or its nominee; and
- impose conditions on the practitioner's practice.

A practitioner who is aggrieved by a decision of the Board would be able to appeal by way of re-hearing to the Tribunal in all cases.

The Tribunal would be able to make all the orders available to the Board as well as:

- suspend or de-register the practitioner.

Notwithstanding the fact that the Tribunal would hear complaints of professional misconduct it will be able to make a finding of unsatisfactory professional conduct.

Currently an exception to suspension or de-registration being limited to the Tribunal is found in section 40 of the Chiropractors and Osteopaths Act. Section 40 provides that where the Professional Standards Committee considers a complaint that a practitioner does not have sufficient physical or mental capacity to practice chiropractic or osteopathy it can recommend suspension or de-registration of the practitioner. In such a case the recommendation of the Committee must be referred to the Chair or Deputy Chair of the Tribunal who may make an order in the terms recommended by the Committee, or such other order regarding suspension or de-registration, as thought appropriate or impose any other protective order available to the Committee. This exception mirrors section 63 of the Medical Practice Act. Under the revised disciplinary structure it is proposed to retain this exception with the relevant Board being substituted for the Professional Standards Committee.

The current Act gives both PSCs and the Tribunal the power to fine a practitioner a maximum of 50 penalty units (\$5,500). The Department is of the view that this is a punitive power that is inconsistent with the protective jurisdiction exercised by the Board and its disciplinary bodies. The Department therefore recommends that the power be removed.

8.3.3 Role of the Health Care Complaints Commission

In considering changes to the disciplinary structure it must be remembered that the Health Care Complaints Commission (HCCC) is the independent body created by the *Health Care Complaints Act 1993* to receive and investigate complaints about health care providers and institutions. The HCCC should therefore have a role in whatever disciplinary structure is adopted. If a DCAC/Tribunal system were adopted in the legislation regulating chiropractors and osteopaths the HCCC would have a role not dissimilar to the role it has under the current disciplinary system. The Board and the HCCC would continue to consult each other on the action to be taken regarding each complaint and if either body considers that a complaint requires investigation by the HCCC it must be so investigated. Following an investigation the HCCC may decide whether to prosecute the complaint before the Board, in the case of unsatisfactory professional conduct, or the Tribunal, in the case of professional misconduct.

Where a complaint is referred to the Assessment Committee the Board would provide the HCCC with a copy of the Committee's recommendations and notify it of any action taken by the Board.

As the Board is the relevant adjudicative body on complaints involving conduct that may constitute unsatisfactory professional conduct, there may be a perceived lack of transparency and a conflict in roles if the Board is able to dismiss a complaint that the Assessment Committee has recommended be the subject of an inquiry into unsatisfactory professional conduct. It is therefore proposed that where the Committee recommends that the Board inquire into unsatisfactory professional conduct the Board must inquire into the matter or refer it to a Tribunal for hearing. In the interests of accountability, in such cases the Board would also be required to notify the HCCC of that action and give it the opportunity to make a written submission to the inquiry/hearing or in Tribunal matters actually conduct the prosecution.

8.3.4 Further consultation

In recommending the introduction of a DCAC-Board/Tribunal structure the Department is aware that additional consultation is required in order to allow stakeholders the opportunity to have their views considered. The Department proposes to undertake further consultation with stakeholders prior to drafting legislation that incorporates this recommendation.

Recommendation 12 – Revised disciplinary structure

That a revised disciplinary structure be introduced whereby:

- An Assessment Committee will be established to consider and investigate complaints, referred from the relevant Board, regarding professional fees and standards of professional services. The Assessment Committee will be able to conciliate and investigate consumer complaints and to make recommendations to the relevant Board for the resolution of those complaints or any further action the Committee considers should be taken. When a Committee recommends that there be an inquiry into unsatisfactory professional conduct or professional misconduct the Board must conduct an inquiry or refer the matter to the Tribunal for a hearing.
- The relevant Board will hear complaints of unsatisfactory professional conduct following investigation of a complaint by an Assessment Committee, the Health Care Complaints Commission or the Board's own inspector.
- A Tribunal will be required to hear complaints of professional misconduct.

8.4 Power to Compel a Practitioner to Respond to a Complaint

The Chiropractors and Osteopaths Act does not confer on the Board the power to compel the subject of a complaint to respond. In the course of the review of the Medical Practice Act this was identified by the Medical Board and the Health Care Complaints Commission as an important issue. The Medical Board advised that a significant number of complaints had been unnecessarily delayed and taken further than their gravity warranted because of the failure of the practitioner to respond. It is understood that three inter-state medical registration boards already have the power to compel a practitioner to respond to inquiries.

In the interests of assisting the relevant registration board to discharge its responsibilities in a timely and efficient manner, the Department supports the Boards having the power to compel the subject of a complaint to respond to a request for information within a reasonable time frame. Failure to respond to a request without reasonable cause would be a breach of the Act and therefore constitute "unsatisfactory professional conduct".

Recommendation 13 – Failure to respond to Board request for information

That the definition of "unsatisfactory professional conduct" should include failure to respond to a Board request for information without reasonable excuse.

8.5 Grounds for Making a Complaint

As noted previously, it is essential that the grounds for making a complaint complement the grounds for refusing registration, which were discussed in Chapter 6. If they do not there will be anomalies because conduct will be treated differently depending upon whether it is being considered:

- in the course of an application for registration; or
- for the purposes of determining if disciplinary action should be taken against a person who is already registered.

Accordingly, in view of Recommendation 7, the Department supports the grounds of complaint being amended to include cases where a practitioner's conviction is subject to section 556A of the Crimes Act (or its equivalent).

A complaint will therefore be able to be made that a practitioner:

- has been found guilty of an offence, whether or not a conviction has been recorded, which in the circumstances of the offence renders the person unfit to practice chiropractic or osteopathy in New South Wales;
- has been guilty of unsatisfactory professional conduct or professional misconduct;
- does not have sufficient physical or mental capacity to practice chiropractic or osteopathy;
- is an habitual drunkard or addicted to any deleterious drug; or
- is not of good character.

Recommendation 14 – Unrecorded convictions

That the grounds for complaint be amended to include unrecorded convictions.

8.6 Composition of Disciplinary Bodies

The Chiropractors and Osteopaths Tribunal has four members:

- a Judge, or former Judge, or a legal practitioner of at least seven years standing appointed by the Governor;
- two registered practitioners having such qualifications as may be prescribed, appointed by the Board; and
- one lay person appointed by the Board from a panel of lay persons nominated by the Minister.

Board members may be appointed to sit on the Tribunal provided they have not dealt with the matter before the Tribunal in their capacity as Board members.

For all boards for which the Health Administration Corporation provides administrative support the Department supports the creation of a single panel from which can be drawn lay persons for disciplinary bodies. A similar approach could

be taken in relation to the legal members of Tribunals who are appointed by the Governor. Neither of these initiatives requires legislative amendment. These measures will facilitate the achievement of consistency of approach in disciplinary proceedings across a number of health professions and reduce administrative costs associated with the establishment of separate panels.

If the Department's recommendation to establish DCAC-Board/Tribunal system is adopted it is recommended that, in order to emphasise the transparency of the disciplinary process, members of the relevant Board would not be eligible to sit on an Assessment Committee or the Tribunal and lay members could be appointed from the same general panel as would be established to provide lay members for all health professional disciplinary bodies.

Recommendation 15– Composition of disciplinary bodies

That Board members should not be eligible to sit on Assessment Committees (if established) or on Tribunals.

8.7 Codes of Conduct

Section 27 of the Act provides that the Chiropractors and Osteopaths Board may develop codes of professional conduct that set out the rules of conduct to be observed by chiropractors and osteopaths respectively. Ministerial approval is not required. The Issues Paper sought comments on a number of matters including the desirability of codes of professional conduct, their impact on competition and whether they should be subject to an alternative approval process.

Codes of conduct have been given a statutory basis in several health professional registration Acts to assist the relevant health professional registration board ensure that registered practitioners are competent to practise. The codes established by the Chiropractors and Osteopaths Registration Board cover a range of issues including but not limited to standards of conduct, professionalism, privacy and confidentiality, research and relations with other members of their professions.

Codes of professional conduct can play an important role in protecting the public from harm by establishing standards to be observed by practitioners in the course of their professional practice. They can be used by disciplinary bodies to assist in defining standards of acceptable practice. Most importantly they serve as a guide for practitioners as to the expected standard of conduct or practice.

However, codes can be used to restrict competition by altering the behaviour of individual practitioners and may also impose compliance costs on the profession. To this extent, the review has considered whether codes with a statutory basis are consistent with the requirements of the Competition Principles Agreement. Obviously, whether such a code has such an impact will depend on the content of the code itself.

In the absence of codes, the standards that are expected of chiropractors and osteopaths are derived from the definition of “professional misconduct” and the

common law. Codes represent a pro-active method of establishing clear standards to be observed by practitioners.

While the need for standards could be addressed by the profession itself through professional associations it can be difficult for the practitioner to determine exactly what is the appropriate standard to be observed. This is particularly evident where there are a range of conflicting guidelines on particular issues. A code can provide a single reference point for both patients and practitioners.

Of greater concern is the fact that codes developed by professional associations may give undue emphasis to protecting certain forms of commercial conduct by the profession and may not be consistent with the public interest. In particular, the deeming of matters as “unprofessional conduct” by an association may have an adverse impact on legitimate commercial conduct (eg restrictions on advertising). Practitioners may feel obliged to observe such standards even though they are not legally binding, although their use by courts in determining what constitutes accepted professional practice may de facto give them legal recognition.

The benefits and costs of a code can only be determined where the precise content of the code is known. While concerns that codes can restrict competition or can impose unnecessary compliance costs on practitioners are noted, in the absence of a statutory code, standards could be set by other bodies which may result in greater restrictions on competition and compliance costs for practitioners.

Nearly all submissions on this issue have been broadly supportive of the concept of statutory codes of conduct. A number of views were expressed about whether the codes should be approved by an independent body.

“The Board considers that the Codes play an important educative role both for registered practitioners and the public at large, and should be retained. The Board considers that a breach of the proposed Code should constitute grounds for a complaint.”⁶²

“The Commission supports the desirability of professions publishing Codes of Professional Conduct for the educative value to consumers and the profession and the benefit in declaring acceptable professional conduct.

...

The Commission does see merit in Codes of Professional Conduct being approved by an appropriate independent body. However, it should be appreciated that such a process may undermine the evidentiary value of Codes of Professional Conduct in that it would then be open to suggest that such a Code does not represent the standards accepted within the profession but rather are standards imposed from outside the profession which may or may not have general acceptance.”⁶³

⁶² Submission – Chiropractors and Osteopaths Registration Board

⁶³ Submission – Health Care Complaints Commission

“The association understands that the current Board has always drawn up its Code of Professional Conduct after careful and full input from our Association and the final code fully accepted. In this way it is the Code of the Profession and we believe this should continue to be the way such codes are arrived at. The approval of the Code by an outside body could possibly show that it is a code not of the profession but one that is imposed on the profession and as a result cause a problem of an evidentiary nature. Breach of a Code of Professional Conduct does not by itself form the sole basis for a complaint under s.28 of the current Act.”⁶⁴

“The AOA supports the current code of professional conduct and was involved in the development of such code... Moreover the codes provide some reference point for both practitioners and the public with regard to the sort of professional behaviour that can reasonably be expected. The AOA supports review of the code of professional conduct by either the Minister or the Department or another nominated appropriate body. The AOA further, has no objection to the establishment of a formal system for developing codes...”⁶⁵

“The NSW Health Funds Association agrees that as the Codes of Professional Conduct could adversely affect the rights of practitioners and the level of competition in the market, there needs to be some check on the content of the Codes to ensure the provisions are not unfair or to the detriment of the public.”⁶⁶

On balance, the Department supports the retention of statutory codes of conduct as they:

- are a valuable tool for directing practitioners on the standards to be adopted;
- can be used by disciplinary bodies to assist in defining standards of acceptable practice;
- are readily accessible and provide information to consumers as to the standards of practice expected of practitioners; and
- provide information to assist consumers in selecting a practitioner whose practice complies with acceptable standards.

A range of options were canvassed in the paper including requiring the codes to be approved by the Minister for Health, the Department or another appropriate body; subjecting the codes to the potential for disallowance by Parliament under the *Interpretation Act 1987*; and establishing a formal system for developing the codes involving a process similar to the RIS process under the *Subordinate Legislation Act 1989*.

To ensure that any codes of conduct for chiropractors and osteopaths do not sanction anti-competitive conduct or contain trivial matters, and serve the interests of consumers, the Department supports codes being made by regulation under the Act, following consultation with the Board. As a result the regulation/code could proceed through the Regulatory Impact Statement process which involves public

⁶⁴ Submission – Chiropractors’ Association of Australia (NSW)

⁶⁵ Submission – Australian Osteopathic Association

⁶⁶ Submission – NSW Health Funds Association

consultation and a full assessment of the respective advantages and disadvantages of its provisions. As it has been recommended that codes be made by regulation, a breach will clearly form grounds for complaint.

Recommendation 16 – Codes of conduct

That codes of conduct are to be made by regulation following consultation with the relevant Board.

8.8 Notification of Criminal Convictions and Relevant Serious Criminal Charges

The criminal justice system can provide information relevant to whether disciplinary action should be initiated against a practitioner. The Department has been considering all health professional registration Acts to ensure that they continue to reflect the high standards expected by the community by adequately addressing questions of character and criminal conviction. The Department has identified a number of strategies that would be of assistance in this regard. They are as follows:

- Courts are to be required to notify the registration board of any practitioners who are convicted of an offence. Currently only the Medical Practice Act and the *Physiotherapists Registration Act 1945* contain such provisions. Under the Medical Practice Act courts are required to notify the Medical Board if a practitioner is convicted of an offence unless it is one prescribed by regulation. The Regulation prescribes all traffic offences except the most serious such as negligent and reckless driving, driving under the influence of alcohol or other drugs, and failing to stop and give assistance or particulars after an accident.
- Practitioners are to be under a positive obligation to notify their registration board if they are convicted of an offence of a type reportable by the courts. This will provide an additional means for obtaining relevant information in a timely manner and will emphasise to practitioners the potential seriousness with which criminal convictions should be regarded.
- Practitioners are to be under an obligation to notify their registration board within seven days if charged with a “serious sex or violence offence” where the allegations relate to conduct occurring in the course of practice. A “serious sex or violence offence” means an offence involving sexual activity, acts of indecency, physical violence or the threat of physical violence that would be punishable by imprisonment for 12 months or more.

Requiring practitioners to notify the Board about charges for offences that occur in the course of practice is an attempt to balance the presumption of innocence (a criminal law concept) with the Act's objective of protecting the public. The criminal charge per se would not constitute the basis for disciplinary action. Rather, the charge and the circumstances surrounding it can be relevant to a practitioner's overall ability to practise and to questions of character.

Self-reporting of serious sex or violence charges is not unprecedented in the health system. For example the *Health Services Act 1997* requires visiting practitioners who have been charged with a serious sex or violence offence to report that fact to the chief executive officer of the relevant public health organisation.

Recommendation 17 – Criminal convictions

That:

- courts be required to notify the relevant registration board of any practitioners who are convicted of an offence (irrespective of whether it is recorded or not) unless it is an offence of a type that is not required to be reported to the Board concerned;
- practitioners be required to notify the relevant registration board if they are convicted, whether that conviction is recorded or not, of an offence which is reportable by the courts; and
- practitioners be required to notify the relevant registration board within seven days if charged with a “serious sex or violence offence” where the allegations relate to conduct occurring in the course of practice. A “serious sex or violence offence” means an offence involving sexual activity, acts of indecency, physical violence or the threat of physical violence that would be punishable by imprisonment for 12 months or more.

8.9 Statutory Declarations

Section 28(3) of the Chiropractors and Osteopaths Act currently requires complaints to be verified by a statutory declaration.

Very few submissions considered whether the requirement for a statutory declaration should be dispensed with. The Department considers that by deferring the requirement for a statutory declaration until a matter is to be referred for disciplinary action, the Health Care Complaints Commission will be able to promptly investigate matters but ensure that the details of the complaint are verified to protect the interest of the practitioner should the complaint proceed to disciplinary action.

Recommendation 18 – Statutory declarations

That the requirement for statutory declarations be deferred until the point where a matter is to be referred for disciplinary action.

8.10 Withdrawal of a Complaint

The Chiropractors and Osteopaths Act makes no provision for the withdrawal of a complaint once disciplinary action commences. The Issues Paper invited comments on whether the Act should be amended to allow a complaint to be withdrawn in circumstances where the complaint should not be proceeded with.(eg frivolous or vexatious complaints).

The Department supports the Chiropractors and Osteopaths Act being amended to enable a complaint to be withdrawn once an investigation or disciplinary action has commenced, following consultation between the relevant Board and the Health Care Complaints Commission. This amendment has no impact on competition.

Recommendation 19 – Withdrawal of a complaint

That a complaint be able to be withdrawn once an investigation or disciplinary action has been commenced, following consultation between the relevant Board and the Health Care Complaints Commission.

9. RESTRICTIONS ON COMMERCIAL CONDUCT

9.1 Advertising

The current Act provides that regulations may be made about “*the manner in which and the extent to which a chiropractor or osteopath is authorised to advertise*”.⁶⁷ The *Chiropractors and Osteopaths Regulation 1997* provides that a registered chiropractor or osteopath is not to advertise (in respect of the practice of chiropractic or osteopathy) in a manner which:

- “(a) *is false, misleading or deceptive, or*
- “(b) *creates an unjustified expectation of beneficial treatment, or*
- “(c) *promotes the unnecessary or inappropriate use of the services of the registered practitioner, or*
- “(d) *claims or implies superiority for the registered practitioner in the practice of chiropractic or osteopathy.*”⁶⁸

The maximum penalty for contravening the provision is 5 penalty units (ie \$550). In addition, any breach of the regulation constitutes “professional misconduct” as currently defined.

The Issues Paper sought submissions on specific options canvassed in the Paper. Should the power to regulate advertising be deleted from Act? Should the scope of the regulation making power be expanded to cover any corporation engaged or associated with the practice of chiropractic or osteopathy?

If the power to regulate advertising was deleted from the Act, advertising would be controlled by the Trade Practices and Fair Trading Acts which prohibit misleading and deceptive conduct. It is noted with interest that as a result of recent amendments to the Trade Practices Act there is now scope for the introduction of enforceable industry codes of practice.

Restrictions on advertising can exacerbate fundamental disparities in market information by denying consumers access to information about the availability, quality and price of services provided by competing practitioners. Restrictions can eliminate or constrain normal forms of competitive behaviour. Obviously the extent to which restrictions impact on competition will depend on the precise terms of the regulation. It should be noted that the restrictions in the Medical Practice Regulation are quite closely modelled on consumer protection legislation (ie the Trade Practices and Fair Trading Acts). This issue is considered below.

Nearly all submissions to the Issues Paper supported the retention of the power to regulate advertising under the Chiropractors and Osteopaths Act.

The Health Care Complaints Commission expressed the view that the regulation of professional standards in relation to advertising is necessary for the following reasons:

- “1. *For the protection of health care consumers and for the professions;*

⁶⁷ section 62(2)(j)

⁶⁸ clause 14

- II *Demonstrably false, misleading or deceptive advertising is by no means the only conduct in this area from which members of the public and the professions require protection;*
- III *For the reasons advanced above, Fair Trading and other similar legislation is inaccessible to most health care consumers and accordingly, is not an appropriate mechanism for the maintenance of professional standards.*⁶⁹

A view was also expressed that:

*“Fair Trading and Trade Practices legislation is not an appropriate mechanism for the maintenance of professional standards, especially as it is not readily accessible to health care consumers.”*⁷⁰

Only two submissions advocated the dropping of the power to regulate advertising from the Act. One of these submissions raised the following points.

*“The purpose of regulating advertising is to protect the consumer from misleading and deceptive practitioners. I see this as a benefit to the consumer, but it is superfluous legislation because it is handled in Consumer protection legislation today. I would say that the Australian Competition and Consumer Commission would handle these matters more efficiently. Why should the Registration Board have to spend time on these matters when it could do so on other important ones. The Board could take the position where complaints could be referred to the Australian Competition and Consumer Commission.”*⁷¹

On balance, the Department supports the Chiropractors Registration Board and the Osteopaths Registration Board continuing to have a role in the area of advertising for the following reasons.

- If Trade Practices and Fair Trading legislation provided the only regulation of advertising the Australian Competition and Consumer Commission is unlikely to be able to devote significant resources, if any, to prosecuting cases where chiropractors or osteopaths have engaged in false, misleading or deceptive advertising. In such a case consumers, or the Board, may be placed in the position of having to take private legal action to seek redress for loss caused by unlawful advertising, and possibly an injunction to prevent its recurrence. This may be considered to be a waste of court time as well as the consumer's, or Board's, resources.
- Removal of the power to regulate advertising would mean that in circumstances where evidence was available of advertising that was false, misleading or deceptive and there was direct evidence of an adverse patient outcome that warranted disciplinary action, the matter would have to be dealt with in two different forums.

⁶⁹ Submission – Health Care Complaints Commission

⁷⁰ Submission – E Devereaux AM, W Bateman OAM, J Bundesen

⁷¹ Submission – T Notaras

- Prosecution of advertising breaches involves an assessment of the veracity of any claims made. The Chiropractors and Osteopaths Board is well placed to undertake this task.
- The Chiropractors and Osteopaths Act contains a broad range of sanctions which range from counselling to de-registration. The penalties provided for under the Fair Trading and Trade Practices Acts are numerous but do not include the power to order de-registration of a practitioner.
- The Chiropractors and Osteopaths Regulation prohibits advertising that promotes the *unnecessary or inappropriate* use of the services of a chiropractor or osteopath. Without this restriction in place there would be greater scope for resources to be used unnecessarily, potentially at the expense of more beneficial uses.

As noted above, the extent to which restrictions will impact on competition will depend on the precise terms of the regulation. Submissions have focused on:

- specific restrictions on advertising in a regulation; and
- extending the regulation making power to cover corporations involved in the provision of chiropractic and/or osteopathic services.

For the most part the advertising restrictions in the Chiropractors and Osteopaths Regulation are modelled on consumer protection legislation. The only restriction in the Regulation that does not conform to this model is the prohibition on registered practitioners claiming or implying “superiority for the registered practitioner in the practice of chiropractic or osteopathy.”⁷²

Two organisations have in their submissions supported the continuation of this restriction.

*“Advertising claiming superiority of a practitioner in one area or another are likely to further confuse consumers attempting to make health care choices. This is particularly so when the area of claimed superiority may be of dubious relationship to the reason the person is seeking care.”*⁷³

In the Issues Paper the view was expressed that if advertising restrictions were to continue, the Department supports their being modelled on consumer protection legislation. One organisation stated in its submission that:

*“The Association supports the Departmental approach of modelling advertising restrictions on consumer protection legislation. That is, conduct which is “false, misleading or deceptive” is to be prohibited.”*⁷⁴

The prohibition on claims of superiority results in less informed consumers and constrains normal forms of competitive behaviour and must be considered in the context of the prohibition on advertising which is “*false, misleading or deceptive*”

⁷² Clause 14, Chiropractors and Osteopaths Regulation 1997

⁷³ Submissions – E Devereaux AM, W Bateman OAM, J Bundesen, Chiropractors’ Association of Australia (NSW)

⁷⁴ Submission – NSW Health Funds Association

which facilitates consumers making informed choices. It should also be noted that the prohibition on advertising claims of superiority has been progressively removed from regulations governing other registered health professionals.⁷⁵ The Department supports the removal of the prohibition on claims of superiority for registered practitioners in the practice of chiropractic or osteopathy.

Many submissions argued that the power to regulate advertising under the Chiropractors and Osteopaths Act should be extended to include corporations advertising the practice of chiropractic or osteopathy. Currently, the regulation making power only covers advertising by chiropractors and osteopaths. Such an amendment would ensure that uniform requirements would apply to all advertising of the practice of chiropractic and osteopathy and ensure a “level playing field” for individuals and corporations. It is also noted that several other health professional registration Acts contain such provisions.⁷⁶ The Department supports the extension of the regulation making power to include corporations advertising the practice of chiropractic or osteopathy.

In addition, to ensure that directors and those involved in the management of corporations can be held accountable for contraventions of the Regulation, the Act will be amended to provide that when a body corporate commits an offence every director and person who takes part in the management of the body corporate is taken to have committed the same offence unless he or she proves that:

- the offence was committed without his or her consent or connivance; and
- he or she exercised all such due diligence to prevent the commission of that offence as he or she ought to have exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.

Recommendation 20 – Advertising

That the prohibition on advertising which “claims or implies superiority for the registered practitioners in the practice of chiropractic or osteopathy” be deleted.

That the scope of the regulation making power be extended to include corporations advertising the practice of chiropractic or osteopathy.

That when a body corporate commits an offence, every director and person who takes part in its management will be taken to have committed the same offence unless he or she proves that:

- the offence was committed without his or her consent or connivance; and
- he or she exercised all such due diligence to prevent the commission of that offence as he or she ought to have exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.

⁷⁵ Eg Medical Practice Regulation 1998, Dental Technicians Registration Regulation 1998

⁷⁶ See Medical Practice, Physiotherapists and Podiatrist Acts

9.2 Restrictions on use of Qualifications

The Chiropractors and Osteopaths Act currently prohibits registered practitioners from using any certificate, membership, licence, letters, testimonial or other title in relation to him or herself or in the practice in which the practitioner is registered unless the particulars are recorded in the register. The maximum penalty is 20 penalty units (ie \$2,200). The policy of the Chiropractors and Osteopaths Registration Board has been to decline to record in the register qualifications other than those related to chiropractic or osteopathy. As a result, chiropractors and osteopaths have not been permitted to use adjunctive qualifications.(eg qualifications in homoeopathy and acupuncture) The Issues Paper canvassed whether these restrictions should be removed. Submissions have addressed the use of both adjunctive (ie other disciplines) and chiropractic and osteopathic qualifications in the context of the provision of chiropractic and or osteopathic care.

Most submissions have supported the easing of the restrictions on the use of adjunctive qualifications by chiropractors and osteopaths. Several have noted that the removal of restrictions would result in a public benefit for consumers as they would have increased information about the qualifications of practitioners and would be able to make more informed decisions about their care. Other submissions have argued that the restrictions are anti-competitive as consumers are often unaware that chiropractors/osteopaths are able to provide additional services (eg acupuncture) and as a result end up accessing the services of other practitioners.

Only one submission has argued that the current restrictions should remain.

“3.2 The current restriction in limiting adjunctive qualifications is justified and is in the interests of public safety and must be maintained. A chiropractor/osteopath who has completed a short course in another health care discipline eg acupuncture, will give the consumer the false and misleading impression that their training in acupuncture is equal to their training in chiropractic/osteopathy, even though it is clearly not.

3.3 Chiropractors/osteopaths using other qualifications creates unfair and restrictive competition against unregistered health care professions.

3.4 It is in the interests of consumers for chiropractors/osteopaths to only use the chiropractic/osteopathic title so as to avoid confusion.”⁷⁷

The expertise of the Chiropractors and Osteopaths Registration Board is focused in the areas of chiropractic and osteopathic. Nevertheless, the Department considers that the current restrictions operate in an anti-competitive manner by limiting the ability of practitioners to communicate to patients their qualifications in other disciplines and thereby denies patients access to information which may be relevant to their treatment choices. In addition registered practitioners have demonstrated at the time of initial registration that they hold appropriate qualifications for safe practice.

⁷⁷ Submission – Australian Traditional Medicine Society

Any discussion of this issue is not complete without consideration of the restrictions in the Act on the use of chiropractic and osteopathic qualifications. The Department supports the relevant registration board having the power to record additional qualifications in chiropractic and osteopathy as consumers will benefit from having an independent source of information of appropriate and inappropriate qualifications. At issue however is whether there should be any sanctions against a practitioner who uses qualifications that have been duly conferred in the context of his or her chiropractic and or osteopathic practice that the relevant Board has refused to recognise. Currently, a practitioner who uses qualifications in chiropractic or osteopathy other than those recorded in the register will be committing “professional misconduct”.

This issue has been recently considered in the context of the review of the Medical Practice Act which concluded that restrictions on the use of additional qualifications should be removed. In view of the diversity of professional qualifications the task of preparing and policing a list of “acceptable” qualifications is extremely difficult. The prohibition is anti-competitive because it limits consumer access to information about practitioners. Any harm can be minimised by the general prohibitions on false, misleading and deceptive conduct under the Chiropractors and Osteopaths Regulation, the Trade Practice Act and the Fair Trading Act. In serious cases where practitioners mislead the public, it may form grounds for a complaint of unsatisfactory professional conduct on the grounds that falsely claiming to hold qualifications may be considered “improper or unethical conduct”.

Recommendation 21 – Restrictions on use of qualifications

That the current prohibitions on registered practitioners using certain diplomas, titles and descriptions etc, unless they are recorded in the register, be deleted.

9.3 Restrictions on the Title “Doctor”

The Chiropractors and Osteopaths Act currently prohibits a chiropractor or osteopath from using a title or description which infers or is capable of inferring that the person is a medical practitioner unless the person is registered as a medical practitioner under the Medical Practice Act. The maximum penalty is 20 penalty units (ie \$2,200).

The Issues Paper identified the potential for the removal of the prohibition to result in the public being misled. The following reasons were cited.

- The nature of the services provided and the use of the prefix “Dr” is likely to mislead consumers into believing they have received comprehensive medical treatment.
- Once the term is used by chiropractors and osteopaths, the professions could seek to create additional barriers to entry in order to justify increased “confidence” in the term “Dr” in the minds of the public.

- Allowing the use of the term would confer a competitive advantage on the professions over other groups that may treat similar conditions (eg acupuncturists and physiotherapists). Use of the title alone or with “Chiropractor” or “Osteopath” would create a perception that chiropractic or osteopathic services are somehow superior.

A substantial number of submissions addressed this issue.

The Chiropractors and Osteopaths Registration Board, the Chiropractors’ Association of Australia (NSW), the Australian Osteopathic Association, educational institutions and a number of individual registrants have in their submissions supported the use of the title “Dr” in circumstances where appropriate academic qualifications (ie Doctor of Chiropractic, Doctor of Osteopathy and Doctor of Philosophy) are held. Most have argued that the prohibition is anti-competitive.

“The Board considers that the Medical Practice Act affords adequate protection of the public with respect to the use of the prefix “Dr”, and the current restriction represents an unreasonable restraint on competition... The Board has received advice from the Crown Solicitor’s Office that use of the prefix “Dr” by a chiropractor or osteopath would breach s5(4) of the Act, even if the practitioner had “Doctor of Philosophy”, or “Doctor of Chiropractic”, or “Doctor of Osteopathy” degrees. The Board has sought to ensure compliance with s5(4) of the Act, but has not been assisted in that endeavour by the reality of legislation in other jurisdictions of Australia and the World that permits use of the prefix. This has created confusion on the part of practitioners entering NSW, and difficulties for the Board in regulating cross-border practitioners. Difficulties have also arisen from chiropractic and osteopathy educational institutions and professional associations routinely using the prefix in discourse within the professions and the wider community.”⁷⁸

“Correspondence from the Medical Board and the Australian Medical Association implies that the appropriate use of the title “Dr” is not misleading... Attempts to stop chiropractors using the courtesy title “Dr” are nothing more than further anti-competitive obstructions to the chiropractic profession’s integration within the community’s health care system and have little to do with concern for the public’s health... The existing restriction on practitioners of equal academic standing from using particular titles according to their discipline is not only discriminatory but also gives the discipline with unrestricted use of titles a competitive advantage... Chiropractors are free to use the courtesy title “Dr” in all other jurisdictions in Australia... This suggests that the claim that consumers would be misled about the qualifications and area of expertise of chiropractors cannot be supported... The association is aware that there seems to be an onset of complaints about chiropractors using the courtesy title “Dr” each time that the Act has come up for review. The association “is of the opinion that this phenomenon is likely to be malicious.”⁷⁹

⁷⁸ Submission – Chiropractors and Osteopaths Registration Board

⁷⁹ Submission – Chiropractors’ Association of Australia (NSW)

“We believe that the NSW consumer is every bit as sophisticated as those in other States and are not as naive as to believe that chiropractors or osteopaths are medical doctors... In jurisdictions where there are no perceived restrictions on the use of the title “Dr” by chiropractors or osteopaths there have been negligible complaints made to either medical or chiropractic/osteopathic registration boards... The restriction on the use of titles by chiropractors & osteopaths seems to have more to do with bias existing towards chiropractors & osteopaths from within elements of the health bureaucracy than for reasons proposed that it will ‘mislead the public’... Further we believe it could act as a deterrent to those considering proceeding to further studies and research. We repeat that this is discriminatory and anti-competitive...”⁸⁰

A number of submissions have argued that the removal of the prohibition on the use of the title “Dr” would confuse the public.

“There are strong arguments against removing the prohibition on the use of the title “Dr” as outlined in the paper. Removal of the prohibition would be likely to mislead consumers as to the qualifications and areas of expertise of chiropractors and osteopaths.”⁸¹

“The Board is of the view that such a restriction is appropriate, as even though it may be possible to require Chiropractors or Osteopaths who hold a relevant doctorate to display the descriptor “Chiropractor” or “Osteopath” after the reference to their doctorate, the outright prohibition is simpler to administer and less likely to mislead the public.”⁸²

“The use of the title “Dr” in connection with health services is strongly connected in the public mind with the comprehensive services provided by medical practitioners including prescription of pharmaceuticals. The Board is of the opinion that to allow use of the title by chiropractors or osteopaths could lead to significant public confusion.”⁸³

“The use of the title “Dr” by a chiropractor or osteopath would mislead many persons into believing that the person using the title was a registered medical practitioner.”⁸⁴

Macquarie University has in its submission argued that chiropractors who hold PhD doctorate degrees should be able to use the title “Dr” and that the current prohibition is a disincentive to chiropractors engaging in formal research study at the highest level.

The Department supports the current restrictions being narrowed so as not to prevent a person who has a PhD from using the title “Dr” on the condition that the title “Dr” is accompanied by PhD and the person’s profession. (eg Dr Bloggs, PhD,

⁸⁰ Submission – E Devereaux AM, W Bateman OAM, J Bundesen

⁸¹ Submission – Health Care Complaints Commission

⁸² Submission – NSW Medical Board

⁸³ Submission – Physiotherapists Registration Board

⁸⁴ Submission – Medical Services Committee

Chiropractor) However, the Department does not support the removal of the restrictions in their entirety for the following reasons.

- Consumers may be misled and believe they have received comprehensive medical treatment.
- The profession could seek to create additional barriers to entry in order to justify increased confidence in the term "Dr" in the minds of the public.
- A competitive advantage over other groups that may treat similar conditions (eg physiotherapists) would be conferred.

Both misleading information and an increase in restrictive practices are inconsistent with principles of competition policy and lay the foundation for the protection of market share and a lack of price competition within the industry.

Recommendation 22 – Prohibition on use of "Doctor"

That the current prohibition on the use of the title "Doctor" should be retained but narrowed so that it does not prohibit the use of that title by a person with a Doctor of Philosophy provided that the title is accompanied by "PhD" and the person's profession.

10. BOARD ISSUES

10.1 Composition

The Chiropractors and Osteopaths Act provides that the Chiropractors and Osteopaths Registration Board is to have 9 members nominated by the Minister and appointed by the Governor. Section 23 provides that the Board is to consist of the following members:

- 1 is to be a registered chiropractor experienced in chiropractic education;
- 3 are to be registered chiropractors nominated by the Chiropractors' Association of Australia (NSW Branch);
- 1 is to be a registered osteopath nominated by the Australian Osteopathic Association (NSW Branch);
- 1 is to be an officer of the Department of Health or the public health system;
- 1 is to be a medical practitioner;
- 1 is to represent the community; and
- 1 is to be a solicitor or barrister.

The Issues Paper canvassed whether any changes were needed to the current composition of the Board.

- Most submissions have argued that a medical practitioner on the Board is not required as the Board can procure medical advice when required.
- Several submissions touched upon the issue of consumer representation with most arguing that the current arrangements are adequate.
- A significant number of submissions have advocated that there should be increased representation for osteopaths.

Very few submissions discussed the method for nominating persons to the Chiropractors and Osteopaths Registration Board. Of those that did the following issues were raised.

- The current system whereby the nominees of the Chiropractors' Association of Australia (NSW) are elected by the membership ensures that the nominees "have an awareness of who is who in the profession".⁸⁵
- "The College is of the strong view that the Registration Board should not be made up of persons nominated by Associations... Accordingly, the Board recommends that both chiropractic and osteopathic appointments be at Ministerial discretion... We oppose the introduction of elections for chiropractors and osteopaths on the Board as this has been tried and failed in the State of Victoria."⁸⁶
- *The three chiropractors on the Board should be elected as there is a shift away from membership of professional associations.*⁸⁷

⁸⁵ Submission – E Devereaux AM, W Bateman OAM, J Bundesen

⁸⁶ Submission – Chiropractic & Osteopathic College of Australasia

⁸⁷ Submissions – S Cashman & S Bolton

The Department supports both the Chiropractors Registration Board and the Osteopaths Registration Board having seven members. It is considered that the appointment of a medical practitioner is not required in view of the ability of each of the boards to call on medical advice as and when required. In addition, a more flexible approach to the appointment of members of the profession to each Board is advocated. Whilst it is acknowledged that the Chiropractors' Association of Australia (NSW) and the Osteopathic Association of Australia are the largest professional associations, it is questionable whether a specific association should be given a legislative monopoly on the nomination of Board members. New associations may emerge which could seek such a role in the nomination of Board members. Further, legislative recognition of direct nomination by a specific association may tend to reinforce a view that the nominees are appointed to represent the interests of the nominating association. Clearly, board members have a duty to serve the interests of the Board as a whole and not those of the association. Alternative processes may be available to ensure that a better and fairer mix of nominees can be appointed. To overcome this problem, the Department supports an approach whereby the Minister is given the flexibility to seek nominations from more than one professional association.

Recommendation 23 – Board composition

That the Chiropractors Registration Board be constituted as follows:

- three chiropractors selected by the Minister from nominations provided by one or more professional chiropractic bodies;
- one chiropractor selected by the Minister from nominations provided by educational institutions providing chiropractic education in NSW;
- one barrister or solicitor nominated by the Minister;
- one officer of the Department of Health or an Area Health Service nominated by the Minister; and
- one person (not being a chiropractor) nominated by the Minister to provide consumer and community perspective.

That the Osteopaths Registration Board be constituted as follows:

- three osteopaths selected by the Minister from nominations provided by one or more professional osteopathic bodies;
- one osteopath selected by the Minister from nominations provided by educational institutions providing osteopathic education in NSW;
- one barrister or solicitor nominated by the Minister;
- one officer of the Department of Health or an Area Health Service nominated by the Minister; and
- one person (not being an osteopath) nominated by the Minister to provide consumer and community perspective.

10.2 Terms of Board Members

The Chiropractors and Osteopaths Act provides that members of the Chiropractors and Osteopaths Registration Board are to hold office for terms not in excess of three years. The Issues Paper canvassed whether a limit should be introduced on the number of consecutive terms a person may serve as a member of the Board. It was noted that under the Medical Practice Act a person may not be appointed to the Medical Board for consecutive terms totalling more than 12 years. Each term is not to exceed four years.

Submissions in favour of the status quo have argued that the introduction of limits on the number of terms a person may serve would diminish the amount of expertise on the Board and have noted the limited sizes of the professions from which to select suitable candidates.

“Our experience is that for a new appointee to the Board it takes 12 or 18 months to really come to grips with procedural knowledge and the legal thinking patterns required to make effective individual input. The greatest productivity is usually after the first term and we can see no real benefit, in fact a loss of great expertise and experience in restricting the number of terms a member may serve on the Board.”⁸⁸

Two submissions have argued there should be a limit of 2 or 3 consecutive terms a person should be able to serve.

The Department considers that by limiting the number of consecutive terms of office a person may serve to a total of eight years with each term not to exceed four years, a board’s ability to benefit from fresh perspectives that a new member can bring to an organisation would be enhanced but at the same time provide sufficient scope for the retention of the corporate memory of the organisation. Accordingly, the Department supports this proposal.

Recommendation 24 – Terms of Board members

That:

- a person may not hold office as a member of a board for more than two consecutive terms;
- each term of office as a board member is not to exceed four years.

10.3 Delegation

The Chiropractors and Osteopaths Registration Board has suggested that it should have the power to delegate some of its activities. It is noted that both the Medical Board and the Nurses Registration Board have such a power.

The Department supports the Chiropractors Registration Board and the Osteopaths Registration Board having powers of delegation.

⁸⁸ Submission – E Devereaux AM, Bateman OAM, J Bundesen

Recommendation 25 – Delegation

That the Chiropractors Registration Board and the Osteopaths Registration Board each have the power to delegate any of its functions (other than this power of delegation and the power to approve expenditure from the Education and Research Account) to:

- the President;
- the Deputy President;
- a committee of two or more members of the Board; or
- the Registrar or any other member of staff of the Board.

However, a Board must not delegate any of its functions in relation to complaints or disciplinary proceedings (ie Part 5) to the Registrar or any other member of staff of the Board.

11. OTHER ISSUES

11.1 Record Keeping Practices

The Issues Paper sought submissions on whether the Chiropractors and Osteopaths Act should be amended to include a specific regulation making power. The Medical Practice Act has such a regulation making power and a regulation has been made that requires medical practitioners and corporations providing medical services to make and keep specified medical records.

A small number of submissions have advocated the introduction of a regulation that imposes minimum standards for the form and content of clinical records. The Health Care Complaints Commission has argued that the focus of regulations should be upon the benefits for the patient or client and the safe effective delivery of services.⁸⁹ One submission has suggested that record keeping practices could be addressed in the codes of professional conduct⁹⁰, and that further intervention is not necessary.

When considering the regulatory regime under the Medical Practice Act it should be noted that under that Act there is no scope for the creation of a professional code of conduct with a statutory basis. The focus of submissions was the Medical Practice Regulation rather than the adequacy of the existing codes of professional conduct. Having duly considered all submissions on this issue, the Department is of the view that it has not been demonstrated that record keeping practices cannot be adequately dealt with under the codes of professional conduct.

11.2 Access to Clinical Records

Another issue identified for consideration in the Issues Paper was whether the Chiropractors and Osteopaths Act should be amended to give patients a right to access their clinical records. Submissions were divided on the issue of whether a statutory right of access should be included in the Act.

Submissions in favour of a statutory right of access raised the following issues.

“As records are to serve as a history of the care of the patient and to facilitate care, the records should also be available for access by the patient. Accessibility to the records will enhance patient confidence and the quality of communication and care between the patient and practitioners.”⁹¹

“Not having a provision in the Act which enables consumers to obtain access to their records during and after their treatment strongly disadvantages them. It diminishes their power as the decision maker in the process of choosing the most appropriate means of obtaining Chiropractic/Osteopathic treatment. It could also expose them to have unnecessary treatments, thus leaving them open to unnecessary costs and potential risk of injury... Practitioners can use

⁸⁹ Submission – Health Care Complaints Commission

⁹⁰ Submission – Chiropractors’ Association of Australia

⁹¹ Submission – Health Care Complaints Commission

it as a ‘safety check’ to ensure their records are accurate and they have not misunderstood information forwarded to them by their patients...’’⁹²

Submissions opposed to patient access to clinical records have focused on opportunities for the chiropractor or osteopath to provide a report of their findings and management of any individual.⁹³

The Department is of the view that the issue of access to records should be dealt with in a consistent manner for all professions. This is more appropriately considered separately from any review of legislation covering a particular profession.

11.3 Professional Indemnity Insurance

The Chiropractic and Osteopathic codes of professional conduct approved by the Board under section 27 provide that:

“A chiropractor/osteopath in practice, and for a minimum of seven years after retiring from practice, must maintain a minimum of \$5,000,000 in Professional Indemnity Insurance coverage.”

It is understood that the Board recently reviewed its annual roll fee procedures to require chiropractors and/or osteopaths to advise the Board whether they had professional indemnity insurance as required by the codes of professional conduct. The Board has determined that from next year practitioners practicing without professional indemnity insurance will be the subject of a complaint of professional misconduct.

A number of submissions have noted that there would be significant public benefits associated with mandatory professional indemnity insurance as consumers would be able to obtain compensation for injury caused by a practitioner.

It is proposed to leave detailed consideration of professional indemnity insurance until such time as the code of professional conduct is made. In addition the Department of Health is currently considering, in conjunction with the Attorney-General’s Department, a range of issues concerning health professional indemnity.

11.4 Mandatory Disclosure of Fees

The issue of whether the Chiropractors and Osteopaths Act should be amended to compel practitioners to disclose their scale of fees to patients prior to commencing treatment was canvassed in the Issues Paper.

Very few submissions addressed this issue. Submissions in favour of mandatory fee disclosure have put forward the following arguments.

⁹² Submission – Medical Benefits Fund of Australia Ltd

⁹³ Submissions- Chiropractic & Osteopathic College of Australasia, Australian Osteopathic Association

*“Patients have a right to know the fees to be charged so they can make an informed decision about the costs of services in the market place before commencing treatment with the practitioner concerned”*⁹⁴

*“Fee disclosure should also be accompanied with a treatment plan that is sufficient for the consumer to make an informed choice of treatment efficacy”*⁹⁵

One submission has put forward the contrary view.

*“The AOA feels that the disclosure of fees should not be mandatory as it is anti-competitive. The AOA currently have a suggested schedule of fees and most practitioners display their fee structure in their reception area and provide the information to any potential patient upon request.”*⁹⁶

Whilst the Department supports the concept of practitioners providing information to patients on the cost of any proposed care, it is appreciated that there may be practical difficulties with enforcing a duty to provide full fee disclosure to patients prior to the commencement of treatment and that this is not the only strategy for achieving the desired outcome. For example, this is an issue which could be addressed in a code of conduct that encourages practitioners to disclose their fees or through a publicity campaign directed at consumers which encourages them to be more pro-active about such matters.

⁹⁴ Submission – Health Care Complaints Commission

⁹⁵ Submission – Medical Benefits Fund of Australia Ltd

⁹⁶ Submission – Australian Osteopathic Association

APPENDIX A

Terms of reference

1. The NSW Department of Health will review the Chiropractors and Osteopaths Act in accordance with the terms for legislative review set out in the Competition Principles Agreement. The guiding principles of the review are that legislation should not restrict competition unless it can be demonstrated that:
 - (i) the benefits of the restriction to the community as a whole outweigh the costs; and
 - (ii) the objectives of the legislation can only be achieved by restricting competition.
2. Without limiting the scope of the review, the Department shall:
 - (i) clarify the objectives of the legislation and their continuing appropriateness;
 - (ii) identify the nature of the restrictions on competition;
 - (iii) analyse the effect of the identified restrictions on competition on the economy generally;
 - (iv) assess and balance the costs and benefits of the restrictions; and
 - (v) consider alternative means for achieving the same results including non-legislative approaches.
3. When considering the matters in (2), the review should also identify potential problems for consumers seeking to use chiropractic and osteopathic services which need to be or are being addressed by the legislation.
4. In addition to considering the matters identified above, the Department will consider:
 - (i) the effectiveness of the current Act, in particular registration requirements and disciplinary arrangements; and
 - (ii) consistency with the Health Care Complaints Act 1993.
5. The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions, and any recent reforms or reform proposals, including those relating to competition policy in those jurisdictions.
6. The review shall consult with and take submissions from the professions, relevant industry groups, Government and consumers.

APPENDIX B

Submissions were received from the following individuals and organisations

Acupuncture Association of Australia
Association of Massage Therapists
Association of Remedial Masseurs
Australian College of Physical Medicine
Australian Osteopathic Association
Australian Physiotherapy Association
Australian Traditional Medicine Society
Stanley Bolton
S Cashman
Chiropractic & Osteopathic College of Australasia
Chiropractors and Osteopaths Registration Board
Chiropractors' Association of Australia (NSW)
E Devereaux AM, W Bateman OAM, J Bundesen
Ethnic Affairs Commission
David Goodrich
Health Care Complaints Commission
Hills District Chiropractic Society
International College of Spinology
Macquarie University – Centre for Chiropractic
MBF
Medical Services Committee
Terry Notaras
NSW Health Funds Association
NSW Medical Board
Osteopathic Steering Group
Keith Phillips
South Eastern Sydney Area Health Service
JH Stanmore
Sydney College of Chiropractic
Peter Tuchin
University of Western Sydney
Pearl Varcin
RJ Varcin

APPENDIX C

“Professional misconduct”

Under the Chiropractors and Osteopaths Act, “professional misconduct” in relation to a registered practitioner includes any of the following:

- (a) any conduct that demonstrates a lack of adequate:
 - (i) knowledge; or
 - (ii) experience; or
 - (iii) skill; or
 - (iv) judgment; or
 - (v) care,by the practitioner in the practice in which the practitioner is registered;
- (b) a contravention by the practitioner of a provision of this Act or the regulations;
- (c) a failure by the practitioner to comply with a condition of registration;
- (d) the practitioner holding himself or herself out as having qualifications in chiropractic or osteopathy other than those recorded in the register in respect of the practitioner;
- (e) any other improper or unethical conduct relating to the practice of chiropractic or osteopathy;

APPENDIX D

Features of Legislation Regulating Chiropractors in Other States and Territories

	Register	Restricts use of title	Restricts practice	Restricts advertising	Discipline Carried out by:
NSW	Yes	Yes	Yes	Yes	PSC/COT
VIC	Yes	Yes	No	Yes	Board/VCAT
SA	Yes	Yes	Yes	Yes	Board
QLD	Yes [^]	Yes	Yes	Yes	Board
TAS	Yes	Yes	Yes	Yes	Board
WA	Yes	Yes	No	Yes	Board

Key

COT Chiropractors and Osteopaths Tribunal**PSC** Professional Standards Committee**VCAT** Victorian Civil and Administrative Tribunal[^] Common Register for Chiropractors and Osteopaths

Features of Legislation Regulating Osteopaths in Other States and Territories

	Register	Restricts use of title	Restricts practice	Restricts advertising	Discipline Carried out by:
NSW	Yes	Yes	Yes	Yes	PSC/COT
VIC	Yes	Yes	No	Yes	Board/VCAT
SA	Yes	Yes	Yes	Yes	Board
QLD	Yes [^]	Yes	Yes	Yes	Board
TAS	Yes	Yes	Yes	Yes	Board
WA#	Yes	Yes	Yes	Yes	Board

Key

COT Chiropractors and Osteopaths Tribunal**PSC** Professional Standards Committee**VCAT** Victorian Civil and Administrative Tribunal[^] Common Register for Chiropractors and Osteopaths[#] Osteopaths Act 1997 is yet to commence