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Commissioners:

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Legal Counsel:

Iris Allen
Kimberley Clarke
Harold Dick
Gary Dolovich
Debra Hathaway

Administrator:

Suzanne Pelletier

The Commission offices are located on the 12th floor of the Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6. TEL. (204) 945-2896, FAX (204) 948-2184.

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CHAPTER 1

INTRODUCTION

A. THE REFERENCE

In November of 1990, the Minister of Justice and Attorney General referred to the Manitoba Law Reform Commission the question of the regulation of professions and occupations in the province. The Commission was asked to consider the issue of professional and occupational associations and the role and responsibility of the provincial government regarding the governing of such professions and occupations. More specifically, the reference asked the Commission to consider and report on the following:

- the effectiveness of the present system within Manitoba for the governing of professional and occupational associations, with reference to the policy and practices of the other Canadian provinces;
- the extent to which the provincial government should delegate governing authority to the professional and occupational associations, including the criteria by which self-governing status should be conferred on professions and occupations;
- the necessity of a structure within government to deal with issues pertaining to the governing of professional and occupational associations and the nature of that structure;
- the advisability of enacting general legislation regarding the governing of all occupational and professional associations and the proposed provisions of any legislation recommended;
- the advisability of permitting incorporation of professionals; and
- any other matter which would assist the government in determining an effective policy for the governing of professional and occupational associations.

These terms of reference set out the ambit of this Report. Although, for the sake of convenience, we have referred to our subject as "occupational regulation", it is clear that this Report cannot address all of the ways in which government can regulate occupations. A large number of regulatory forms focus on the activities in which practitioners of an occupation may be engaged and regulate the occupation itself only indirectly. For example, *The Highway Traffic Act* controls the way in which taxi-drivers, truckers and couriers practise their occupations, building codes regulate the activities of architects, engineers, electricians, carpenters and plumbers while health codes affect bakers, cooks and restaurateurs. These sorts of regulations are not the subject of this Report. Our focus is narrower and is centred on the occupational and professional associations mentioned in the terms of reference.

Many occupational and professional associations are private and voluntary organizations, sometimes devoted to achieving benefits for their members. Others, however, are charged by

legislation to wield governmental powers in administering one of two forms of regulation: certification or licensing.[1] These are the associations encompassed by the terms of reference.

In our opinion, a thorough review of the regulation of self-governing bodies cannot take place without a consideration of the certification and licensing regimes which these bodies administer; the two issues are inextricably linked. We have therefore concluded that, in order to discharge the responsibility given to us by the Minister, this Report must address questions associated with the implementation and operation of certification and licensing regimes, whether administered by practitioners or by government.[2]

The result of our consideration of the many issues associated with occupational regulation is a series of recommendations. Taken together, these recommendations amount to a new approach to occupational regulation which differs significantly from the thinking which has characterized occupational regulation in the past. Accordingly, we begin with an overview of the basic philosophical approach we propose.

B. THE COMMISSION'S APPROACH: BREAKING WITH THE PAST

The reference from the Minister of Justice and Attorney General asks the Commission to examine "the effectiveness of the present system within Manitoba for the governing of professional and occupational associations". A distinction between "professions" and "occupations" is drawn in a number of other places in the terms of reference as well. This is not coincidental; a distinction between professions and occupations lies at the heart of the current system of occupational regulation in Manitoba. It is also, in our view, largely responsible for the difficulties faced by governments in determining the future of occupational regulation and is consequently one of the primary reasons for the reference to the Commission. An understanding of this distinction is therefore critical to an understanding of this Report.

Although professions have been be traced to the Middle Ages and even ancient times,[3] the current model of professionalism is more recent and has its roots in the nineteenth and early twentieth centuries. This notion of professionalism is a product of the belief that, properly applied, science and rationality would result in something approaching a perfect world.[4] In the early years of this century, professionals embodied this idea. They were individuals who sought to discover the scientific principles which explained every aspect of life (including the behaviour of humans) and then applied those principles in practical ways for the benefit of humanity.[5]

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[1]We set out, as Appendix A, the results of a survey of Manitoba legislation. Although not intended to be comprehensive, this survey lists 36 bodies which fall into this self-governing category. Of these, 14 administer certification regimes and 22 administer licensing regimes.

[2]Although we note the difficulty in doing so, our survey of Manitoba legislation, set out in Appendix A, categorizes 68 government-administered forms of regulation as licensing regimes and 52 as certification regimes.

[3]S. Rubin, "The Legal Web of Professional Regulation" in R.D. Blair and S. Rubin, eds., *Regulating the Professions* (1980) 29 at 32. See also M.L. Cogan, "Toward a Definition of Profession" (1953), 23 Harv. Educ. Rev. 33 at 33; W. Forsyth, *The History of Lawyers Ancient and Modern* (1875) 20-21; M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (1977) 3; S.D. Young, *The Rule of Experts: Occupational Licensing in America* (1987) 9.

[4]"The idea was to use the accumulation of knowledge generated by many individuals working freely and creatively for the pursuit of human emancipation and the enrichment of daily life. The scientific domination of nature promised freedom from scarcity, want, and the arbitraryness [sic] of natural calamity. The development of rational forms of social organization and rational myths of thought promised liberation from the irrationalities of myth, religion, superstition, release from the arbitrary use of power as well as from the dark side of our own human natures. Only through such a project could the universal, eternal, and the immutable qualities of all humanity be revealed.": D. Harvey, *The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change* (1989) 12, as quoted in W.W. Pue, "'Trajectories of Professionalism?': Legal Professionalism After Abel" in A. Esau, ed., *Manitoba Law Annual 1989-90* (1990) 57 at 80-81.

[5]For a discussion of the connection between this "project of modernity" and the development of professionalism, see Pue, *id.* and B.J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (1978).

In its modern manifestation, then, professionalism became associated with high levels of education and scholarship. A true professional could not be educated through an apprenticeship or at a trade school, which merely provided instruction in practical skills. Instead, a professional required a university or equivalent education where he or she could learn the theory behind the practice of law, medicine, engineering and other activities.[6] At university, aspiring professionals were trained in scientific principles of which a lay person and a tradesperson were unaware. This knowledge resulted in a superior level of skill in performing services and tasks which had not previously been offered to the public or which had been inadequately performed by uneducated people.

Yet, although they were scholars, professionals were not academics who pursued theory without regard for its practical implications. Professionals were responsible for applying their knowledge to practical life. In doing so, they were said to possess a commitment to the public welfare which was uncharacteristic of non-professional occupations and trades. Professionals did not act from selfish motives but were instead devoted to their work as an end in itself. They were only secondarily interested in the financial benefits of their knowledge and skill; instead, they viewed their work as a calling and pursued it for the intrinsic satisfaction it gave them and for the benefit of society.[7]

Early in the twentieth century, professions began establishing written codes of ethics to entrench this commitment to the public interest.[8] All members of a profession were bound by its code of ethics and could be punished for breaching it. These codes frequently encompassed more than the individual's behaviour while conducting his or her practice; in keeping with the notion of a profession as a lifestyle devoted to "good works", codes of ethics also imposed high standards of conduct on the professional's personal life.[9] Any activity which would reflect badly

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[6]See, for example, Bledstein, *id.*, at 86; E. Greenwood, "Attributes of a Profession" (1957), 2 Social Work 45 at 46; United Kingdom, *Report of the Committee on Legal Education* (1971) 35.

[7]Greenwood, *supra* n. 6, at 53 states:

> The term career is, as a rule, employed only in reference to a professional occupation. Thus, we do not talk about the career of a bricklayer or of a mechanic; but we do talk about the career of an architect or of a clergyman. At the heart of the career concept is a certain attitude toward work which is peculiarly professional. A career is essentially a *calling*, a life devoted to "good works". Professional work is never viewed solely as a means to an end; it is the end itself. Curing the ill, educating the young, advancing science are values in themselves. The professional performs his services primarily for the psychic satisfactions and secondarily for the monetary compensations. Self-seeking motives feature minimally in the choice of a profession; of maximal importance is affinity for the work. It is this devotion to the work itself which imparts to professional activity the service orientation and the element of disinterestedness.

Addressing the American Bar Association in 1916, Elihu Root, Dean of Harvard Law School, described the ideal legal profession as one which is "'not commercialized'". A later but equally well known Harvard Law Dean, Roscoe Pound, claimed that ". . . the concept of professionalism involved three ideas: 'organization, learning and the spirit of public service. The remaining idea, that of gaining a livelihood, is incidental.'": W.W. Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" in D. Gibson and W.W. Pue, eds., *Glimpses of Canadian Legal History* (1991) 237 at 237-238. An early version of the American Association of Engineers' code of conduct began with a Vow of Service, adopted in 1927, which stated in part: "We therefore affirm our guiding purpose: . . . To place Service before profit, the honor and standing of the Profession before personal advantage, and the Public Welfare above all other consideration.": H.A. Wagner, "Principles of Professional Conduct in Engineering" (Jan. 1955), 297 The Annals of the American Academy of Political and Social Science 46 at 53.

[8]See Pue, *supra* n. 7, at 259-271. This pattern is demonstrated in the United States where, for example, written codes of conduct were first adopted in 1908 by lawyers, in 1909 by architects, in 1917 by public accountants and in 1918 by engineers. Medicine is an exception in that the doctors adopted a code of ethics in 1847: Bledstein, *supra* n. 5, at 108; G.B. Cummings, "Standards of Professional Practice in Architecture" (Jan. 1955), 297 The Annuals of the American Academy of Political and Social Science 9 at 12; J.L. Carey, "The Ethics of Public Accounting" (Jan. 1955), 297 The Annals of the American Academy of Political and Social Science 1 at 1; Wagner, *supra* n. 7, at 56.

[9]An early version of the code of conduct adopted by the American Association of Engineers included a provision enjoining engineers to ". . . scrupulously avoid connection . . . with any illegal or questionable undertaking in any enterprise inimical to the public welfare.": Wagner, *supra* n. 7, at 53. It is still not unusual for entry standards to require proof of "good moral character" of applicants. See, for example, *The Manitoba Institute of Registered Social Workers Incorporation Act*, R.S.M. 1990, c. 96, s. 8(2)(a); *The Ophthalmic Dispensers Act*, C.C.S.M. c. O60, s. 13(a); *The Naturopathic Act*, C.C.S.M. c. N80, s. 6(1)(b).

The term "conduct unbecoming" was and is commonly used with respect to practice: Bledstein, *supra* n. 5, at 108; *Re Patmore and British Columbia Council of Association of Professional Engineers* (1963), 39 D.L.R. (2d) 486 (B.C.C.A.); *Re Patsoy and*

on the profession was prohibited and could be punished.[10]

While the profession as a whole was committed to acting in the public's interest, an individual professional primarily served the public by committing himself or herself to the best interests of the client or patient. Because of a professional's special skills and knowledge, clients or patients were often forced to trust him or her with very important matters: their finances, intimate personal information and even their health and lives. Professionals were ethically and legally bound to respect this trust and were prohibited from revealing confidences or making personal use of the information imparted to them. They were to be completely dedicated to the welfare of their patients or clients, even when this commitment infringed on their own interests.[11]

This, then, is the model of professionalism which emerged around the turn of the century and which remains the image of professionalism for many (and perhaps most) people today: high levels of education (almost invariably obtained at a university), a commitment to the public welfare enshrined in a code of ethics and a higher level of dedication to the interests of individual clients or patients than to one's own interests.

Our description of the attributes of professions and professionals is not of mere academic interest; it has important implications for government policy. Historically, groups which fit the profile of a profession have been able to argue convincingly that only individuals who have completed the requisite years of university or equivalent education and are engaged in practice are capable of setting and enforcing appropriate standards for practitioners. They have contended, with success, that non-professionals are not able to identify improper conduct on the part of professionals and so cannot be trusted to control the activities of practitioners. Therefore, they have taken the position that, while government is able to administer regulatory regimes for other occupations, its only option when it comes to professions is to delegate to professionals the power to administer their own affairs.[12] Moreover, they have argued, since professionals are individually and collectively devoted to the best interests of the public, a delegation to them of the power to set and enforce their own standards is justifiable. Accordingly, professional bodies have typically been granted the authority by legislatures in Canada to set and enforce standards for initial membership in the professional body and for standards of professional conduct after entry.

Professional bodies have historically been given one of two regulatory regimes to administer. Frequently, they have been granted a *licensing* regime. This gives the members of the profession the exclusive right to provide a particular service to the public; any non-member who offers that service can be prosecuted and punished by the courts.[13] Some professions have

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Registrar, Architectural Institute of British Columbia (1980), 113 D.L.R. (3d) 439 (B.C.S.C.). This phrase is often contained in Manitoba statutes regulating occupations; see, for example, *The Agrologists Act*, C.C.S.M. c. A50, s. 13(1); *The Dental Association Act*, C.C.S.M. c. D30, s. 27.5; *The Registered Psychiatric Nurses Act*, C.C.S.M. c. P170, s. 38(1).

[10]Bledstein, *supra* n. 5, at 108. An example of the emphasis on preserving the reputation of the profession and other professionals may be found in an early American Medical Association code of conduct for physicians which prohibited disparaging comments or insinuations respecting other physicians. "Such comment or insinuation tends to lower the confidence of the patient in the medical profession and so reacts against the patient, the profession and the critic.": American Medical Association, *Principles of Medical Ethics of the American Medical Associaton* (1953) ch. VI, s. 4, as reproduced in W.T. Fitts, Jr. and B. Fitts, "Ethical Standards of the Medical Profession" (Jan. 1955), 297 The Annals of the American Academy of Political and Social Science 17 at 34.

[11]See, for example, The Canadian Medical Association, *Code of Ethics* (1990); Canadian Psychological Association, *A Canadian Code of Ethics for Psychologists* (1986); The Law Society of Manitoba, *Code of Professional Conduct* (1992).

[12]J.T. McLeod Research Associates Ltd., *Consumer Participation; Regulation of the Professions; Decentralization of Health Service* (Report submitted to the Minister of Public Health, Saskatchewan, 1973) 61. See also J. Rose, "Professional Regulation: *The Current Controversy" (1983), 7 Law and Human Behaviour 103 at 104; M.J. Trebilcock, "Regulating Service Quality in* Professional Markets" in D.N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (1983) 83 at 101; C.J. Tuohy, "Professional Power: Sunset or Dawn?" (1980), 37 Can. Library J. 299 at 303.

[13]This is the form of regulation which governs, for example, architects, engineers, lawyers and physicians and surgeons.

been given a *certification* regime, which does not prohibit non-professionals from providing the service but gives members of the profession the exclusive right to use a name or title.[14]

In addition to the power to determine who may enter the profession and the power to control the behaviour of members, licensed professions have often been given a great deal of authority in defining the services which their members have the exclusive right to perform. Legislation is often vague in describing these services and, in these cases, a profession has the ability to expand its scope of practice by prosecuting non-members who perform services which the professional group believes are reserved exclusively for its members.

The power of self-government, especially in a licensing regime, gives practitioners of an occupation a great deal of incentive to achieve professional status. By controlling the number of new practitioners, a profession can control the competition faced by its members. It can further restrict competition by implementing anti-competitive measures, such as fee schedules and restrictions on advertising. Restricting competition in any or all of these ways tends to increase the income of its members. In addition to power and financial benefits,[15] obtaining professional legislation also represents status and respect; it places the occupation and its members in the same category as respected groups like doctors, lawyers and other professionals.[16]

For practitioners who wish to obtain professional legislation, the professionalization process is well-established. Typically, a voluntary group of practitioners is formed which is dedicated to creating a profession from a group of practitioners who may have no common educational background and little or no previous contact with one another.[17] The primary object of the group is usually to raise the standards of service of the occupation. If no university program exists for the study of the group's occupational service, efforts are made to establish one; if such a program exists, links to the university are developed.[18] Continuing education programs are begun and members are encouraged to attend. A code of conduct is designed and members are expected to commit themselves to it. If a group is successful, membership in the group often becomes prestigious and may be necessary in order to obtain a job, despite the fact that membership is not legally required in order to practise.

After it is well-established, the group begins to lobby legislators for a form of regulation and self-government.[19] It emphasizes that, unlike other occupations, its members act on the basis of a body of knowledge which has been organized into a systematic theory and is taught at a

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[14]This is the form of regulation which governs, for example, chartered accountants and psychologists.

[15]The Professional Organizations Committee in Ontario recognized that granting occupational regulation, especially more restrictive forms such as licensing "... is to grant to individuals valuable economic rights.": Ontario, Professional Organizations Committee (H.A. Leal), *The Report of the Professional Organizations Committee* (1980) 22. See also W.D. White, "Labor Market Organization and Professional Regulation: A Historical Analysis of Nursing Licensure" (1983), 7 Law and Human Behavior 157 at 157; W.D. White, "Why is Regulation Introduced in the Health Sector? A Look at Occupational Licensure" (1979), 4 J. of Health Politics, Policy and Law 536 at 540ff.

[16]When the Bill dealing with respiratory technologists was brought into the Manitoba Legislature, the MLA introducing the legislation stated: "Mr. Speaker, the respiratory technologists are a vital component of the modern health-care team. This Bill will give them the recognition they deserve ....": Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. 29, No. 72A at 3379 (5 May 1981). On second reading of the Bill governing home economists, it was said: "A number of years ago ... home economists began the long process of seeking professional status through legislation .... This Act represents an important step in strengthening the profession in the eyes of the public.": Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. 38, No. 142A at 5862 (12 March 1990).

[17]Québec, Commission of Inquiry on Health and Social Welfare (G. Nepveu), *Report: The Professions and Society* (Part 5, Vol. VII, Tome I, 1970) 27; D.W. Gullett, *A History of Dentistry in Canada* (1971) 41.

[18]L.S. Bohnen, "The Sociology of the Professions in Canada" in Consumer Research Council Canada, *Four Aspects of Professionalism* (1977) 1 at 10. See also P. Eliot, *The Sociology of the Professions* (1972) 42.

[19]T.H. Marshall, "The Recent History of Professionalism in Relation to Social Structure and Social Policy" (1939), 3 Can. J. Econ. & Pol. Sci. 325 at 327; B. Shimberg, B.F. Esser and D.H. Kruger, *Occupational Licensing: Practices and Policies* (1973) 12-13.

university.[20] It also stresses its members' commitment to high standards of competence and ethics and points to its own efforts in this regard. In other words, it makes the case that it is similar to other groups which have already been given professional status and is dissimilar to mere occupations.[21]

In many cases, professional legislation is obtained without serious difficulty. The occupational group is often well organized and well financed; it can command the attention of legislators. Moreover, unless a significant group opposes the legislation, there is little reason not to grant it. On those occasions when the request for regulation is opposed, opposition typically arises from other occupational groups whose interests are threatened by the regulation being sought. Although both groups typically claim to represent the public interest, the public interest is not clearly defined and the public is rarely heard from directly. The result is a political struggle which is usually resolved either by an accommodation between the groups or by a legislative choice as to which group to satisfy.[22]

This traditional approach to occupational regulation has resulted in the proliferation of professions, especially since the Second World War.[23] In the past fifty years, a university education has become much more accessible. Universities offer increasingly specialized courses of studies which reflect an explosion of knowledge and technological changes unparalleled in history. Coupled with the advantages of professional status, the result has been "a veritable cornucopia of occupational groups seeking professional status. . . ."[24]

Despite granting professional status to many occupational groups in recent decades,[25] governments continue to face large numbers of requests for legislation from unregulated occupational groups. At the same time, however, doubts have surfaced about the wisdom of granting self-government and either licensing or certification to a group simply because it can point to a university program and a code of ethics. Academics have pointed out that regulation,

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[20]W.J. Goode, "The Theoretical Limits of Professionalization" in A. Etzioni, ed., *The Semi-professions and their Organization* (1969) 266 at 281. When their governing statute was being debated in the Manitoba Legislature, the Interior Designers Association asked that members be referred to as "professional interior designers" rather than "registered interior designers" because ". . . the bulk of their members are university graduates similar to professional engineers, professional agrologists and so on . . . .": Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. 29, No. 86B at 3863 (26 May 1981). In fact, the statute now governing interior designers is *The Professional Interior Designers Institute of Manitoba Act*, C.C.S.M. c.157.

[21]A review of a sample of recent legislative debates in Manitoba over the last 25 years leading to new occupational legislation granting self-governing powers is instructive. The debates preceding legislation for occupational therapy (1971), respiratory technology (1981), interior design (1981) and home economics (1990) confirm that creating provincial associations, developing links to university programs, promising to monitor the ethical behaviour of practitioners and lobbying government ministers are still the steps followed to gain legislative recognition.

[22]For example, in Manitoba, the legislation recognizing interior design introduced in 1980 did not proceed past the first reading stage. The objection of Manitoba's Architects Association to some of the Bill's provisions was one of the reasons that the legislation was unsuccessful. When a new Bill was introduced in 1981, the concerns of the Architects Association had been addressed and the Bill was passed into law: Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. 29, No. 69A at 3204 (30 April 1981). Ontario's Professional Organizations Committee also noted interdisciplinary conflicts in 1981 stating that there ". . . was tension between architects and engineers in the field of building design; tension among associations of the accounting profession over what constitutes public accounting, and who should license it . . . . There was tension, especially in engineering and architecture, between university-educated licensed professionals and highly trained technical personnel . . . .": Ontario, Professional Organizations Committee (H.A. Leal), *supra* n. 15, at 4.

[23]Economic Council of Canada, *Reforming Regulation* (1981) 109.

[24]The Professional Organizations Committee of Ontario states in its Report: "[W]e became increasingly struck both by the number of occupational groups which came forward to make submissions to us seeking some form of legally recognized professional status and by the difficulties posed in evaluating such widely varied claims for special expertise and special status." Among the 22 groups coming forward were such diverse groups as The American Institute of Cost Engineers, the Association of Early Childhood Education, Ontario, and The Ontario Professional Foresters Association: Ontario, Professional Organizations Committee (H.A. Leal), *supra* n. 15, at 4-5. Québec's Commission of Inquiry on Health and Social Welfare speaks of ". . . a race towards professional status in circles which do not have it.": Québec, Commission of Inquiry on Health and Social Welfare (G. Nepveu), *supra* n. 17, at 27.

[25]Economic Council of Canada, *supra* n. 23, at 109.

especially restrictive forms such as licensing, results in greater inefficiencies, fewer practitioners and higher prices than would be the case without regulation.[26] Criticisms have also been levelled at professional bodies for their inability to ensure the competence of practitioners and for the way in which they handle complaints from the public. The public has become more dubious about the claim that professionals are solely concerned about the interests of their clients and patients and not in their own financial advantage.[27] Complaints have also been heard about the means by which professional legislation is obtained; critics wonder whether the interests of the public are being heard and protected in a process which involves extensive lobbying of legislators by occupational groups but little public consultation.[28]

These concerns, criticisms and doubts have led several governments in Canada to initiate studies of occupational regulation.[29] In some provinces, notably Québec, Alberta and Ontario, legislation has been enacted which alters the traditional approach.[30] The Manitoba government has also commissioned studies of this issue; a Special Committee of the Legislature reported in 1972 and a Report from Saul Cherniack was completed in 1978.[31] The reference to the Manitoba Law Reform Commission is the latest in this series of government studies.

Our approach to this assignment was to begin with first principles and to think through the purpose of occupational regulation. What emerged was a tentative framework which we believed was both theoretically sound and practical. We recognized, however, that our approach was significantly different from the logic which has historically produced occupational legislation and that it could result in important changes to the status quo. We believed that it was important to test our new approach by subjecting it to public scrutiny. Accordingly, we released a Discussion Paper in which our thinking was outlined and invited public response.[32] We were most gratified by the response to the Discussion Paper. We received requests for over 750 copies of the Discussion Paper and received 78 written submissions, a larger number of responses than any public consultation document in our history. These submissions were invaluable in the formulation of the recommendations set out in this Report and we gratefully

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[26]S. Ostry, "Competition Policy and the Self-Regulating Professions" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 17 at 19 and 21-22; L. Benham and A. Benham, "Prospects for Increasing Competition in the Professions" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 41 at 42; K.W. Clarkson and T.J. Muris, "The Federal Trade Commission and Occupational Regulation" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 107 at 108; S.L. Carroll and R.J. Gaston, "Occupational Licensing and the Quality of Service: An Overview" (1983), 7 Law and Human Behavior 139 at 143-145; C.J. Tuohy and A.D. Wolfson, "The Political Economy of Professionalism: A Perspective" in Consumer Research Council Canada, *Four Aspects of Professionalism* (1977) 47 at 77; S.L. Carroll and R.J. Gaston, "State Occupational Licensing Provisions and Quality of Service: The Real Estate Business" in R.O. Zerbe, Jr., ed. (1979), 1 Research in Law and Economics: A Research Annual 1 at 2.

[27]See, for example, S.M. Cherniack, "Governing professional bodies", *Winnipeg Free Press*, May 4, 1979, 6. See also United Kingdom, Royal Commission on Legal Services (H. Benson), *Final Report* (1979); Ostry, *supra* n. 26, at 22; A. Paul, "Disgruntled clients urge lawyer accountability", *Winnipeg Free Press*, January 28, 1990, 1 at 4.

[28]Young, *supra* n. 3, at 32; G.S. Becker, "A Theory of Competition Among Presssure Groups for Political Influence" (1983), 98 Quarterly J. of Economics 371; M.J. Fulton and W.T. Stanbury, "Comparative lobbying strategies in influencing health care policy" (1985), 28 Canadian Public Administration 269.

[29]See, for example, Ontario (J.C. McRuer), *Royal Commission Inquiry into Civil Rights* (1968); Ontario, Professional Organizations Committee (H.A. Leal), *supra* n. 15; Ontario, Health Professions Legislation Review (A.M. Schwartz), *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions* (1989); Québec, Commission of Inquiry on Health and Social Welfare (G. Nepveu), *supra* n. 17; Alberta, *Principles and Policies Governing Professional Legislation in Alberta* (1990); Saskatchewan, *Towards the Development of a Professions Policy for Saskatchewan* (Discussion Paper, 1990); British Columbia, Royal Commission on Health Care and Costs, *Closer to Home* (Report, 1991).

[30]The legislative structure which has been adopted in these provinces was summarized in Chapter 2 of our Discussion Paper: Manitoba Law Reform Commission, *The Future of Occupational Regulation in Manitoba* (Discussion Paper, 1993).

[31]Manitoba, Professional Associations Study Group (F.C. Muldoon), *Report to the Special Committee on Professional Associations* (1972); Manitoba (S.M. Cherniack), *Report on the Legal Status of Professionals in Manitoba; Proposals for a Legislative Framework Governing Professional and Occupational Associations in the Province* (1978).

[32]Manitoba Law Reform Commission, *supra* n. 30.

acknowledge the important contribution made by all respondents. After reassessing our tentative proposals in the light of these submissions, we are now in a position to provide advice in the form of this Report.

Like the Discussion Paper, this Report does not address specific occupations or professions. While reference may be occasionally made to particular groups for purposes of example, our aim has been to develop a rational and practical system applicable to all occupational groups rather than to apply that system to specific groups. We believe that this task can be more adequately accomplished by the government decision-making body the establishment of which we recommend later in this Report.

As we developed principles of occupational regulation, we became increasingly aware of the flaws and inadequacies of the traditional approach to occupational regulation. One of the major logical flaws in the current approach to professional regulation is found in the link between the existence of a voluntary group devoted to raising the standards of education, competence and ethical behaviour of practitioners and the decision to grant this group the powers of self-government in either a licensing or certification regime. This connection has been allowed to exist almost unquestioned, likely because governments have assumed that the costs of regulation are primarily administrative in nature. By this reasoning, so long as the practitioners of an occupation are prepared to assume the costs of its administration, the public can only benefit from the high levels of competence and ethical behaviour demanded of members. As we demonstrate in this Report, however, the costs of regulation are not restricted to administration and may exceed its benefits.

Because of a failure to take these non-administrative costs into account, governments have tended to determine first whether or not the practitioners of a regime are capable of self-government and later to consider the appropriate form of regulation (licensing or certification) for that occupation. When the non-administrative costs of regulation are considered, however, it is clear that this sequence reverses the proper order of decision-making. Only after the need for a particular form of regulation is established (that is, only when it is determined that the benefits exceed its costs) should the administration of that regulatory regime be considered. Accordingly, rather than an afterthought, the form of regulation and its potential costs and benefits are treated in this Report as the first issue to be considered; the manner in which the regulatory regime is administered (self-governing or not) is viewed as following only upon a positive decision on the first issue. The result is that forms of regulation which are needless or which do not produce a net benefit for the public will not be implemented simply because practitioners are capable of administering them.

Our approach therefore severs the historical connection between the attributes which are used to describe a "professional" and the form of regulation under which that person conducts his or her practice. Our Report recommends that regulation should not be used to reward a university education, a code of ethics or the admirable traits of individual practitioners. Nor should regulation be used to bestow social status or financial benefits on a particular occupational group. Instead, it should be implemented only to the extent that it provides a net benefit to the public; its impact on practitioners should be disregarded.[33]

Because our Report treats the qualities of "professionalism" as distinct from the form of regulation under which a practitioner or an occupational group may operate, we have tried to avoid the use of terms such as "professional" and "profession" in describing individuals or groups whose services may be regulated in a certain way. These terms suggest qualities which have been traditionally associated with regulated individuals and which have historically been

[33]We adopted this position in the Discussion Paper and it was endorsed by all respondents who addressed the issue; none of the submissions suggested that the benefits of a particular course of action for practitioners should be taken into account when considering the implementation or design of a particular form of regulation or the method by which it should be administered.

used to justify professional legislation. They may therefore serve to obscure rather than enlighten. Instead, we have adopted the use of the more neutral terms "occupation" and "practitioner" to describe the group or individual being regulated.

In examining the traditional rationale for occupational regulation, we also noted the enormous level of faith it requires in the selflessness of professionals, both as individuals and as a group. For example, we noted that many self-governing bodies are entitled to set standards for membership in the profession. These standards have almost invariably tended to rise over time, likely on the theory that longer periods of education and training will produce more competent practitioners and higher levels of service to the public. As we point out in the Report, however, this theory is not always evident in practice. Studies have revealed cases where individuals with a lower level of education and training have performed as well as or better than more highly educated professionals.[34] In cases like this, consumers are forced to pay for superfluous education and training. Moreover, the existence of more competent practitioners does not always result in a higher quality of service received by the public. To the extent that regulation reduces the number of practitioners or raises the price of the service, some consumers will not be able to obtain the service and will either go without the service, obtain it from unqualified practitioners or perform it themselves. In this case, the overall level of service received by the public may actually fall.

We also noted that practitioners have a financial interest in various aspects of occupational regulation. For example, practitioners benefit from rising entry standards, particularly when they are not personally required to comply with the new standards. By raising entry standards, the number of new competitors is reduced and, by forcing new practitioners to pay a higher price for entry, higher standards also encourage them to charge more for the service. These effects of higher standards tend to raise the price existing practitioners can charge for the service. The financial interest of practitioners is not always acknowledged by the traditional view of occupational regulation. However, to the extent that it is recognized, trust is placed in practitioners to set aside their own interests and that of their colleagues to act only for the benefit of the public.

The view that professionals must be trusted to act in the public's interest is based on the argument that government has no other choice; only professionals can properly administer their own regulatory regime. The contention is that an individual who has not undergone the education and training of a professional is incapable of setting and enforcing appropriate standards for entry into the professional group or for conduct thereafter. As a result, substantial powers (such as the power to set entry standards) are routinely delegated to occupational groups with little or no supervision as to their use.

After considering the matter, we have come to the view that the position that only professionals can govern professionals is untenable. Governments currently regulate a huge variety of activities; the regulators of these activities, whether departmental employees or independent boards and agencies, are not invariably educated and trained in the same way as the individuals they regulate. Where special training is required, these bodies are able to hire or retain individuals with this training to provide advice. Moreover, we believe that non-practitioners, while they may be ignorant concerning technical aspects of a particular occupational service, are not incapable of considering expert evidence and coming to a reasonable conclusion.

This is not to suggest that self-government is never appropriate; indeed, our Report takes the position that self-government can continue to serve as a cost-effective and efficient method of administration in many instances in which licensing or certification are deemed appropriate.

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[34]D.T. Scheffman and E. Appelbaum, *Social Regulation in Markets for Consumer Goods and Services* (1982) 83-86.

However, the Report also suggests that some functions which have been delegated to professional bodies in the past should be retained by government, that those powers which are delegated should be supervised and that public representatives should assist practitioners in administering a regulatory regime by ensuring that the public interest is always paramount.

The traditional view also places great reliance on the selflessness and dedication to the public interest of the individual practitioner. For example, many professional codes of ethics enjoin a practitioner to remain competent and to avoid acting in areas in which his or her level of competence is inadequate.[35] Many professional bodies rely almost exclusively on the self-discipline of individual members to meet these standards; they require no mandatory proof of competence after a practitioner has entered the profession and take few proactive steps to detect incompetent practice.[36] Instead, they rely primarily on consumer complaints to bring incompetence and other inappropriate conduct to their attention.[37] We have concluded that this level of trust in individual practitioners and in the ability of the public to identify and report improper conduct is unwise and does not serve the public well; we have made recommendations which address these concerns.

Although the issues dealt with in this Report are often closely connected, we have attempted to divide them into manageable portions. In Chapter 2, we set out broad principles for policy in the area of occupational regulation by outlining the costs and benefits of licensing and certification regimes. Chapters 3 and 4 are more specific and focus on setting scopes of practice (the services to which a regime will apply) and entry and practice standards for regulatory regimes. The administration of regulatory regimes, and especially the option of self-government, is explored in Chapter 5. Chapter 6 contains specific recommendations to ensure that self-government operates in the public interest. Chapter 7 focuses on the enforcement of practice standards and proposes that a standard disciplinary system be adopted for all regulatory regimes. The current prohibition on incorporation for members of "professional" bodies is addressed in Chapter 8 while Chapter 9 sets out the method we propose for implementing our recommendations, including the creation of a governmental body specifically concerned with occupational regulation. Chapter 10 summarizes the effect and implications of our recommendations. Although a list of the recommendations contained in each Chapter is set out at the conclusion of that Chapter, a complete list of our recommendations can also be found in Chapter 10. Finally, we have attached two appendices: Appendix A sets out the results of a survey of Manitoba legislation and includes the current licensing and certification regimes in the province, while Appendix B provides the names of the organizations and individuals to whom our Discussion Paper was sent and the names of those who responded to it.

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[35]See, for example, Association of Professional Engineers of the Province of Manitoba, *Professional Engineers Code of Ethics* (1992) Canon 2a; The Law Society of Manitoba, *supra* n. 11, at 3.

[36]C. Fooks, M. Rachlis and C. Kushner, *Assessing Concepts of Quality Care: Results of a National Survey of Five Self-Regulating Health Professions in Canada* (1990) 13 and 15; Ontario, Professional Organizations Committee (H.A. Leal), *supra* n. 15, at 180-181. See also J. Swan, "Regulating Continuing Competence" in R.G. Evans and M.J. Trebilcock, eds., *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (1982) 351 at 360.

[37]This reliance on consumers to identify improper behaviour by practitioners contradicts a basic tenet of the traditional view of professions: that a non-professional is incapable of judging the behaviour of a professional.

CHAPTER 2

LICENSING AND CERTIFICATION

Most human activity involves costs or disadvantages as well as benefits or advantages. A wise decision-maker will consider both sides of the ledger and will weigh all the consequences of a particular course of action to determine if it will produce greater net benefits than acting in another way or doing nothing at all.

Similarly, government activity, including the regulation of occupational services, involves both benefits and costs. Prior to acting, government should consider whether a particular form of regulation will produce the desired benefits, whether or not these benefits will outweigh the costs of the regulation and whether another form of regulation or taking no action will produce greater net benefits.[1]

In considering occupational regulation, then, it is important to identify all the effects of a particular regulatory form - both positive and negative - before taking action. "We should recognize that in some instances where licensing would seem warranted the costs may not justify it";[2] the same is true of certification.

As one might expect, the identification of costs and benefits of occupational regulation is often a difficult process and is especially problematic because it is impossible to quantify with complete accuracy the consequences on society and the economy of a specific form of regulation. However, a significant and growing literature has emerged which deals with occupational regulation and a general consensus concerning the potential effects of licensing and certification is apparent.

A. BENEFITS OF CERTIFICATION AND LICENSING

Certification and licensing are designed to address harm which may result from the improper provision of an occupational service. The causes of improper performance may be loosely categorized as "incompetence" and "unethical behaviour". Licensing and certification are intended to address both.

For our purposes, "incompetence" may be considered to be a lack of the ability needed to perform an occupational service at an acceptable level. This inability may be due to insufficient

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[1] An analysis of costs and benefits is endorsed by Alberta's *Principles and Policies Governing Occupational Regulation in Alberta* (1990) 1. Although our point here is not to suggest that a formal cost-benefit analysis is in fact required before any action can be taken by government, it is worthwhile to note that the Economic Council of Canada recommended in 1979 that such a process be made central to an evaluation of every government regulation before and after implementation. Moreover, in 1981, Executive Order 12291, issued by the United States' Office of Management and Budget, required the use of a cost-benefit analysis in most regulatory decisions made by the United States government. See D.N. Dewees, M.J. Trebilcock and C.J. Tuohy, "Summary and Conclusions" in D.N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (1983) 325 at 332.

[2] S. Ostry, "Competition Policy and the Self-Regulating Professions" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 17 at 23.

education, training and practice or it may be the result of a physical or mental incapacity. "Unethical behaviour" is a more amorphous term. It may be considered to be unacceptable conduct which arises in the context of the performance of a particular service. Unethical behaviour need not only include criminal activities (for example, theft or fraud); non-criminal activities may also be viewed as unethical. For example, misrepresentations, prescribing a service needlessly in order to obtain more work, revealing information given in confidence or failing to properly apply one's abilities to the service in question could all be considered unethical. In some cases, the conduct which will be considered unethical is peculiar to the specific service being performed. For example, some services place practitioners in a position of trust with respect to patients or clients and, in this position, it would be considered unethical to become involved in a sexual relationship with them.

Certification and licensing regimes can raise practitioners' levels of competence and ethical behaviour by the use of entry and practice standards. Entry standards generally take the form of a mandatory period of education and training (which is often both theoretical and practical in nature) as well as a test or series of tests (which may also have both practical and theoretical components) which are designed to ensure that the aspiring practitioner has the knowledge and skills necessary to perform the service in a satisfactory manner. Although entry standards are focused on ensuring competence, they can also test the entrant's knowledge of the ethical standards to which he or she will be held.

We use the term "practice standards" to refer to the rules which govern the behaviour of practitioners after they have been admitted to a licensing or certification regime. Practice standards are often set out in codes of conduct and can address both the need for continuing competence on the part of practitioners and the need for ethical conduct. Unlike entry standards, which focus only on the potential of applicants to perform the service properly, practice standards are designed to ensure that practitioners actually practise competently and ethically.

Compliance with practice standards can be encouraged or enforced in a variety of ways. Continuing competence of practitioners is a concern in most regulated occupations especially when the proper practice of an occupation requires the constant acquisition of new knowledge and skills. Competence can be maintained by the use of voluntary programs (such as continuing education, peer counselling or practice assistance) and mandatory measures (such as periodic retesting or practice audits).

Similarly, most regulated occupations must deal with the fact that, although a practitioner may have the skills and knowledge needed to perform competently and ethically, this does not mean that he or she will apply that ability in practice. Fatigue, distractions, laziness or a desire to "cut corners" may result in improper performance of the service despite the fact that the practitioner possesses the requisite abilities.[3] In the same way, knowledge of ethical standards will not necessarily prevent practitioners from acting unethically. Greed, an inflated ego or an addiction can cause practitioners to behave unethically even when they are aware that their conduct is wrong. Counselling programs, confidential addiction assistance and methods of detection and discipline can help to discourage unethical behaviour and encourage practitioners to apply their abilities to practice.

Methods of detection range from complaints by consumers or fellow practitioners to "audits" of a practitioner's practice.[4] Punishments may include censure by colleagues, fines, suspensions or expulsion from the regime. The threat of detection and punishment is intended to

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[3]S. Kelman notes that ". . . human performance is dependent not just on ability but on motivation." As a result, a practitioner's performance of an occupational service will depend upon his or her motivation and responsiveness to incentive systems seeking to affect performance as well as his or her skill and knowledge: S. Kelman, *Improving Doctor Performance* (1980) 29.

[4]A practice audit may be financial but may equally involve an examination of the non-financial aspects of a practitioner's dealings with various consumers.

provide a practitioner with an incentive to apply his or her abilities in practice and to act ethically.

Even if properly designed and administered, entry and practice standards can never guarantee that a practitioner will always perform in a competent and ethical manner. Entry standards can never be fully effective in predicting future behaviour and practice standards are expensive and difficult to apply.[5] In addition, even conscientious and committed practitioners will inevitably make occasional errors in practice. Nevertheless, certification and licensing can be effective in raising the overall level of competence and ethical conduct of practitioners. It follows, then, that these forms of regulation should be considered for use in situations where harm results from incompetence or unethical behaviour on the part of practitioners. This harm may be direct, affecting consumers of the service, or it may be indirect, affecting society at large or individuals ("third parties") who are not party to the transaction between practitioner and consumer.

So long as consumers have the knowledge necessary to make an informed judgment as to their need for the service, the form of the service they need and the ability and ethics of the practitioner, they are able to protect themselves from incompetence and from unethical practices. In this situation, there is little need for regulation because both consumers and practitioners can achieve a fair bargain based on sufficient information. For example, in some cases, the only consumers of a service are large institutions with access to expert advice about the quality of services they receive.[6] In others, consumers know what sort of service they need and recognize the quality of the service provided. Moreover, even when they are not personally knowledgeable about an occupational service, consumers may have access to sources of information concerning the service which minimize the effects of their lack of knowledge.[7]

However, when consumers lack the necessary knowledge to make an informed decision, they are vulnerable to practitioners who prescribe unnecessary services, who overcharge for the quality of work being performed, who perform the service improperly or who are otherwise unethical or incompetent.[8] In these circumstances, certification or licensing can often be of assistance. By allowing only qualified practitioners to use a designated title, certification acts as a quality signal for consumers, informing them of the education and training which certified practitioners have received and the ethical standards to which they are bound.[9] A lack of certification does not necessarily mean that the practitioner will provide an unacceptable level of service. However, assuming that the entry and practice standards of a certification regime are closely related to the proper performance of the service, a consumer who opts for a certified

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[5]Because of the costs and difficulty in assessing "outputs" (that is, the actual performance of the service in question), most certification and licensing regimes tend to concentrate on "inputs" (the practitioner's education, knowledge, ability and other factors). For further information on this distinction, see M.J. Trebilcock, "Regulating Service Quality in Professional Markets" in D.N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (1983) 83 at 92ff.; D.T. Scheffman and E. Appelbaum, *Social Regulation in Markets for Consumer Goods and Services* (1982) 82; W.D. White, "Labor Market Organization and Professional Regulation: A Historical Analysis of Nursing Licensure" (1983), 7 Law and Human Behavior 157 at 160; A.D. Wolfson, M.J. Trebilcock and C.J. Tuohy, "Regulating the Professions: A Theoretical Framework" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 180 at 203ff.

[6]Economic Council of Canada, *Reforming Regulation* (1981) 115.

[7]Sources of information may include knowledgeable friends and acquaintances or consumer information services, such as consumer magazines, the Better Business Bureau or the Consumers' Association of Canada.

[8]A consumer's inability to make informed choices due to lack of sufficient information is a common "market failure" for many occupational services: D.N. Dewees, G.F. Mathewson and M.J. Trebilcock, "Policy Alternatives in Quality Regulation" in D.N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (1983) 27 at 28-31. An attempt to deal with this form of market failure can be found in *The Business Practices Act*, C.C.S.M. c. B120. However, it is unclear whether the Act applies to occupational services.

[9]For a more complete discussion of certification, see Trebilcock, *supra* n. 5 at 92 ff; C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation* (Bureau of Economics, Federal Trade Commission, Staff Study, 1990) 43-46; Wolfson, Trebilcock and Tuohy, *supra* n. 5, at 203ff.

practitioner usually stands a better chance of receiving competent and ethical service than a consumer who chooses an uncertified practitioner. Depending on a consumer's appreciation of the risk of harm and the cost differential between certified and uncertified service, he or she may choose to utilize a certified practitioner, even though the price of this service may be higher than that of an uncertified practitioner.

A licensing regime will often be even more effective than certification in solving the problem of a lack of consumer information. Like certification, licensing requires competence and ethical behaviour of its members although, like certification, competent and ethical behaviour cannot be guaranteed. However, licensing goes further than certification by prohibiting anyone other than qualified individuals from performing the occupational service.[10] Whereas certification relies on consumers to apprise themselves of the existence of the certification regime, to form judgments on the degree of risk and extent of harm resulting from improper practice and to determine the extent to which the certified service will reduce that risk, licensing offers no option to consumers and therefore eliminates the opportunity for consumers to choose unwisely. Licensing may also raise the likelihood that a practitioner will practise ethically and competently because the consequences of expulsion from a licensing regime are more severe than the consequences of expulsion from a certification regime.[11]

While a lack of consumer information is a common failure in the market for occupational services, another is the impact of the service on third parties. Individuals who are not a party to the transaction between the practitioner and the consumer may still suffer harm as a result of the transaction. For example, poorly repaired brakes on a vehicle pose a threat to other motorists or pedestrians as well as to the consumer of the brake service. The harm caused to third parties may be a consequence of a consumer's lack of information (the motorist may not realize that the brakes have been poorly repaired) or may be a result of a consumer's deliberate decision to purchase an inadequate form of the service (the motorist, intent on selling the vehicle shortly, may have decided to accept the risk of badly repaired brakes in exchange for a low price). In either case, third parties may be vulnerable to the effects of a transaction in which they had no part.[12]

When third parties cannot protect themselves from harm caused by the improper performance of an occupational service, certification is an inadequate remedy.[13] Because a certification regime does not prevent consumers from obtaining an inadequate form of the service, third parties would remain vulnerable to a consumer's poor choice or deliberate risk-taking. Of the two, licensing offers a better solution because it forces consumers to use the services of a practitioner who has met certain levels of competence and is bound by codes of ethical conduct. This reduces the likelihood that third parties will be harmed as a result of incompetent or unethical service.[14]

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[10]For a more complete discussion of licensing, see Trebilcock, *supra* n. 5, at 95ff.

[11]In a certification regime, an expelled practitioner can continue to practise on an uncertified basis, while in a licensing regime he or she would be prohibited from practising at all.

[12]Third parties are sometimes able to protect themselves against third party effects of an occupational service. For example, it is possible to inquire as to the qualifications of the individual who has performed an audit or given a legal opinion prior to relying upon the audit or the opinion.

[13]Trebilcock, *supra* n. 5, at 94-95.

[14]If third parties are to be protected, a licensing regime must address the dilemma caused by consumers who knowingly demand an inadequate level of service which may put third parties at risk. This problem may be dealt with by way of a code of ethics which prohibits practitioners from providing inadequate service, even when consumers insist upon it.

B. DISADVANTAGES OR COSTS OF CERTIFICATION AND LICENSING

Although certification can be effective in addressing a lack of consumer information and although licensing can address both a lack of consumer information and third party harm, the costs associated with these forms of regulation must also be taken into account if the public interest is to be served.

The most obvious costs of a licensing or certification regime are the expenses associated with administering it. These may include expenses involved in operating an office, developing entry and practice standards, testing applicants, receiving and hearing complaints, conducting practice audits and holding disciplinary hearings. However, other costs, at least as significant as these, may not appear at first glance. These include the costs to consumers and the general public resulting from the regulatory scheme's intervention in the competitive market for that service.[15]

By their nature, licensing and certification reduce competition.[16] Economic theory suggests that such intervention in a competitive marketplace will

> . . . result in higher prices, less efficient use of resources, discouragement of new developments and a tendency towards rigidity in the structure and trading methods of those businesses. Such collective restrictions tend to reduce the pressures upon those observing them to increase their efficiency. They may also delay the introduction of new forms of service and the elimination of inefficient practitioners.[17]

One well-known Canadian economist has stated:

> . . . we have found that performance is considerably improved in an environment that rewards superior productivity and penalizes waste and inefficiency. We have seen that effective competition encourages the development of new products and improved patterns of production, and generally helps promote the most efficient use of the economy's scarce resources.[18]

Both licensing and certification affect the competitive market for an occupational service but, of the two, licensing will usually restrict competition more substantially and is therefore usually more costly for consumers. While certification merely provides information to consumers but allows them to use the services of uncertified practitioners if they wish, licensing prevents consumers from obtaining the services of anyone but licensed practitioners. By imposing entry and practice standards and preventing those who fail to meet the standards from practising, licensing tends to reduce the number of practitioners who are allowed to offer the

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[15]The costs associated with a regulatory intervention into a market may be skewed when the market is not competitive due to peculiarities of the market for that occupational service or due to the fact that government has intervened earlier in that market. The "fee for service" offered for some services by the medicare system is an example of earlier government intervention.

[16]Licensing reduces competition by restricting the number of people who can provide the service; certification gives a competitive advantage to certain practitioners who provide the service to the public.

[17]United Kingdom, Monopolies Commission, *Part I: The Report* (1970) 69 cited in Ostry, *supra* n. 2, at 19. Benham and Benham also note the "higher prices to consumers, less specialization, reduced efficiency and lower levels of innovation" associated with "professional control" and assert that ". . . all the evidence we have seen suggests substantial benefits from increased competition.": L. Benham and A. Benham, "Prospects for Increasing Competition in the Professions" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 41 at 42. K.W. Clarkson and T.J. Muris conclude: "In short, what economists assert is that a relatively unregulated marketplace, because of its advantages in allocating resources and promoting consumer welfare, should be the norm": K.W. Clarkson and T.J. Muris, "The Federal Trade Commission and Occupational Regulation" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 107 at 109. They are supported by Cox and Foster, *supra* n. 9, at 4.

[18]Ostry, *supra* n. 2, at 19. The Economic Council of Canada stated in 1981: "From a social perspective, unnecessary restrictions lead to waste and inefficiency, and thus to unnecessarily high prices for services provided by some occupational groups": Economic Council of Canada, *supra* n. 6, at 116.

service to the public. This has the effect of reducing competition, with the likelihood that prices will be higher and inefficiencies greater than in the absence of licensing.

The impact of licensing on prices for occupational services has been borne out by empirical research. Little data is available for Canada,[19] but one study conducted in the United States found that the price of eyeglasses was 25% to 40% higher in states with licensing than those with less restrictive regulation.[20] Another study found that the cost of television repairs was 20% higher in a state with a licensing regime for television repairers than in a state without regulation.[21] Research also revealed that the median incomes of licensed occupations in the United States were 50% higher than those of unlicensed occupations.[22] After reviewing nine such studies, Carroll and Gaston concluded: ". . . licensing has been shown repeatedly to have an upward price effect."[23]

Licensing tends to drive up prices, not only by restricting the supply of practitioners, but also by increasing the costs of obtaining or maintaining a licence. High standards for entry or continuing practice force practitioners to invest heavily in their own education and training.[24] In order to recoup this investment, practitioners will tend to charge higher prices than would have been the case if obtaining or maintaining a licence had been less costly.[25]

Higher prices for an occupational service are negative in themselves but they have the added disadvantage of restricting or preventing access to the service by those who cannot afford the higher price. Studies have demonstrated that higher prices will discourage some people from obtaining services, even when the service is necessary. For example, the study which showed that eyeglass prices were 25% to 40% higher in jurisdictions with more restrictive licensing also showed a corresponding reduction in the number of consumers purchasing eyeglasses.[26]

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[19]One study has been conducted on the trucking industry in Canada. It came to the same general conclusions as the studies in the United States: Ostry, *supra* n. 2, at 21-22.

[20]Benham and Benham, *supra* n. 17, at 42.

[21]United States, Federal Trade Commission, *Regulation of the Television Repair Industry in Louisiana and California - A Case Study* (Staff Report, 1974) cited in Ostry, *supra* n. 2, at 21. The same study is cited by Clarkson and Muris, *supra* n. 17, at 108. Interestingly, instances of fraud and over-prescription were no lower in the state which utilized a licensing system than in those which adopted a different system of regulation or no regulation at all.

[22]G. Stigler, "The Theory of Economic Regulation" (1971), 24 Bell J. of Economics and Management Science 3 cited in Clarkson and Muris, *supra* n. 17, at 108.

[23]S.L. Carroll and R.J. Gaston, "Occupational Licensing and the Quality of Service: An Overview" (1983), 7 Law and Human Behavior 139 at 140. Researchers conducting an extensive review of studies of licensing for the Federal Trade Commission in the United States concluded: "While the magnitude of the costs observed varies to some extent, these studies show that price increases as a result of licensing are well documented and widespread.": Cox and Foster, *supra* n. 9, at 30.

Many academics and researchers go further, suggesting that self-governing powers have been deliberately used by practitioners in a licensing regime to reduce competition artificially. See, for example, T.R. Muzondo and B. Pazderka, *Professional Licensing and Competition Policy: Effects of Licensing on Earnings and Rates-of-Return Differentials* (Research Monograph No. 5, Consumer and Corporate Affairs Canada, 1979) 180; D.B. Hogan, "Is Licensing Public Protection or Professional Protectionism?" in P.S. Pottinger and J. Goldsmith, eds., *Defining and Measuring Competence* (1979) 13 at 16; E. Rayak, "Medical Licensure, Social Costs and Social Benefits" (1983), 7 Law and Human Behavior 147 at 150-154. However, M. Spence found no evidence that self-governing powers had been used to artifically restrict supply and thereby raise prices in the professions of accounting, architecture, engineering and law in Ontario: M. Spence, *Entry, Conduct and Regulation in Professional Markets* (Working Paper for the Professional Organizations Committee, Ontario, 1978) 7-8.

[24]The cost to aspiring practitioners of years of mandatory training prior to obtaining a licence would include, for example, the time and effort involved in studying, out-of-pocket expenses (such as tuition fees, books, etc.) and the loss of income which they could have obtained had they not been in training.

[25]M. Friedman and S. Kuznets, *Income From Independent Professional Practice* (1945) 83; D.A. Dodge, "Occupational Wage Differentials, Occupational Licensing, and Returns to Investment in Education: An Exploratory Analysis" in S. Ostry, ed., *Canadian Higher Education in the Seventies* (1972) 147. The price they are able to obtain will depend to some extent on the ability and willingness of consumers to pay the higher price and this will depend on their need or desire for the service.

[26]Benham and Benham, *supra* n. 17, at 42. See also S.L. Carroll and R.J. Gaston, "State Occupational Licensing Provisions and Quality of Service: The Real Estate Business" in R.O. Zerbe, Jr., ed. (1979), 1 Research in Law and Economics: A Research Annual 1 at 2; Cox and Foster, *supra* n. 9, at 31-35.

Besides raising prices, licensing can also reduce access to a service by restricting the number of practitioners who would otherwise be available to meet public demand.[27] A scarcity of practitioners can mean a complete lack of access for some potential consumers (especially in remote areas), delays in service for other consumers and lower levels of quality when the service takes place because the practitioner is rushed and overworked.[28]

Consumers who are denied access to a service (whether because of high prices or due to an inadequate supply or distribution of practitioners) are left with a choice between three unpalatable options: performing the service themselves (which may be illegal and dangerous), obtaining the service illegally (which may expose the consumer and others to danger) or going without the service entirely.[29] Whichever option consumers select, they are unlikely to obtain the necessary service at acceptable levels of performance. In this case, ironically, although regulation may have succeeded in raising the quality of service offered by licensed practitioners, it may not have raised the quality of service actually received by the public as a whole and may have diminished it.[30] To the extent that high entry and practice standards erect a barrier to the service, then, they undermine the purpose of a licensing regime and may in fact be counterproductive.[31]

Because it does not restrict the number of practitioners who can provide an occupational service, certification offers greater consumer choice than a licensing system (a considerable benefit in itself). Moreover, since uncertified practitioners are allowed to compete for business with certified practitioners, certification will usually also impact less significantly on the competitive market for a service than licensing. Although certified practitioners have a competitive advantage over other practitioners, economic theory suggests that the greater competition in a certification scheme will result in greater efficiencies, lower prices and greater access for consumers than a licensing regime.

However, although certification is less interventionist and therefore less costly than licensing, its disadvantages must also be recognized. Certification can be ineffective as a source of information if consumers remain unaware of the training which certified practitioners have received, the practice standards to which they are bound or the tasks which they are qualified to perform.[32] Without this information, consumers may fail to utilize certified practitioners when their service would be beneficial or may over-estimate the value of certified service.

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[27]Carroll and Gaston, *id*, at 2. Dussault and Borgeat cite the danger of improper distribution of services in a licensing regime in their article, R. Dussault and L. Borgeat, "Reform of the Professions in Québec" (1974) (English translation [obtained from E.K. Williams Library, University of Manitoba] of "La réforme des professions au Québec" (1974), 34 R. du B. 140), as does C. Castonguay in "The Future of Self-Regulation: A View From Quebec" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 61.

[28]Carroll and Gaston, *supra* n. 26, at 2.

[29]A.R. Maurizi, "The Impact of Regulation on Quality: The Case of California Contractors" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 26 at 26; Cox and Foster, *supra* n. 9, at 28-29; Carroll and Gaston, *supra* n. 26, at 2.

[30]"[A]lthough [professional] ideologies and interests have favoured the development and maintenance of generally high standards of technical quality in the provision of professional services, they have militated against a cost-effective and equitable distribution of services. . . .": C.J. Tuohy and A.D. Wolfson, "The Political Economy of Professionalism: A Perspective" in Consumer Research Council Canada, *Four Aspects of Professionalism* (1977) 47 at 77. See also Economic Council of Canada, *supra* n. 6, at 115; Carroll and Gaston, *supra* n. 26, at 2.

[31]The concern that licensing will result in reduced access to a service due to higher prices or a scarcity of practitioners has also been borne out in research. Studies in the United States of real estate brokers, dentists, electricians, plumbers, optometrists, veterinarians and sanitarians showed that licensing produced a lower level of service for the population as a whole in at least some states: Carroll and Gaston, *supra* n. 23, at 143-145.

[32]M.J. Trebilcock and J. Shaul, "Regulating the Quality of Psychotherapeutic Services: A Canadian Perspective" (1983), 7 Law and Human Behavior 265 at 273; Trebilcock, *supra* n. 5, at 94.

On the other hand, certification regimes, especially those established by government, can be very successful in convincing consumers that only a certified practitioner can perform a certain service properly. Whether right or wrong, once this conviction becomes embedded in the minds of consumers, uncertified practitioners will find it very difficult to compete in the market for that service and the certification regime will begin to resemble a licensing regime.[33] The likely result may be a reduction in efficiency and an increase in the cost of the service to consumers.

Another disadvantage of certification is the tendency, noted by many academic writers, for self-governing certification regimes to be granted licensure as a result of successful lobbying efforts by practitioners.[34] This tendency has been attributed to the fact that practitioners have an interest in reducing competition by securing greater levels of regulation.[35] In addition to this source of motivation, their association in self-governing bodies gives them an advantage over less organized groups which may wish to resist their attempts to obtain a more restrictive form of regulation.[36] Granting a certification regime may appear relatively harmless in comparison to licensing but, if it eventually results in licensing, the costs may be more substantial.

C. PRINCIPLES OF OCCUPATIONAL REGULATION

With the costs and benefits of licensing and certification in mind, we recommend a series of principles for use by government decision-makers when assessing applications for new forms of occupational regulation and when reviewing existing forms of occupational regulation.

1. NO FORM OF OCCUPATIONAL REGULATION SHOULD BE IMPLEMENTED UNLESS ITS BENEFITS OUTWEIGH ITS COSTS

We do not intend by this recommendation to suggest that a formal economic cost-benefit analysis be required before occupational regulation can be introduced. Nor are we recommending that only economic factors ought to be taken into account. However, this recommendation requires that decision-makers identify and weigh the potential effects and consequences of a particular form of occupational regulation prior to deciding to introduce it. No action should be taken unless the regulation will substantially reduce the risk of harm to the public and unless decision-makers are convinced that the effect of implementing the regulatory form will result in greater benefits for the public than costs. These costs go beyond the costs of

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[33]It should be noted, however, that a *de facto* monopoly which exists because consumers are convinced of the need to use a certified practitioner for a particular service is different from one which is supported by law. The beliefs of consumers are often more easily changed than legislation. In a certification system, when the prices of certified practitioners rise too high or their level of service drops, consumers can revise their beliefs and can turn to uncertified practitioners as an alternative. By contrast, once implemented, the anti-competitive elements of a regulatory regime (such as licensing) may be difficult to remove because they will negatively affect the position of practitioners. Practitioners therefore have a reason to vigorously resist changes to a regulatory regime. This is sometimes referred to as the "ratchet effect". See Trebilcock, *supra* n. 5, at 94; W.D. White, "Mandatory Licensure of Registered Nurses: Introduction and Impact" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 47 at 47; W.D. White, "Dynamic Elements of Regulation: The Case of Occupational Licensure" in R.O. Zerbe, Jr., ed. (1979), 1 Research in Law and Economics: A Research Annual 15 at 25.

[34]Wolfson, Trebilcock and Tuohy, *supra* n. 5, at 206. See also W.D. White, "Why is Regulation Introduced in the Health Sector? A Look at Occupational Licensure" (1979), 4 J. of Health Politics, Policy and Law 536 at 544-545; B. Shimberg, B.F. Esser and D.H. Kruger, *Occupational Licensing: Practices and Policies* (1972) 1; Cox and Foster, *supra* n. 9, at 19-20; White, "Mandatory Licensure of Registered Nurses: Introduction and Impact", *supra* n. 33, at 70; White, "Dynamic Elements of Regulation: The Case of Occupational Licensure", *supra* n. 33, at 26.

[35]Ontario, Professional Organizations Committee (H.A. Leal), *The Report of the Professional Organizations Committee* (1980) 22. See also White, *supra* n. 5, at 157; White, "Why is Regulation Introduced in the Health Sector? A Look at Occupational Licensure", *supra* n. 34, at 540ff.

[36]White, "Why is Regulation Introduced in the Health Sector? A Look at Occupational Licensure", *supra* n. 34, at 538-539; White, "Dynamic Elements of Regulation: The Case of Occupational Licensure", *supra* n. 33, at 24.

administering a regulatory form (although these costs should be taken into account) and include the cost to the public of reduced competition.

In analyzing costs and benefits, care should be taken by decision-makers to avoid the inclusion of irrelevant factors. For example, it is not particularly relevant that an occupational group is university-educated, has been in existence for some time, has developed its own code of ethics or that similar groups have obtained occupational regulation in other provinces.[37] These facts are peripheral to the central questions decision-makers should address: Is there a manifest need on the part of the public for protection from the improper performance of this service? If so, will licensing or certification provide an adequate level of protection from this harm and will it do so at a cost which is less than the benefits of protection? In short, we propose that the purpose of occupational regulation should be to protect consumers and third parties from harm. It should not be used to reward or recognize practitioners for their educational and ethical achievements. Indeed, its purpose should not be to serve the interests of practitioners at all but should only be implemented when it is in the public interest to do so.

An approach which disregards the interests of practitioners in favour of consumers and third parties has been adopted in the stated objectives of legislation and legislative policy in Québec and Alberta.[38] It is also the position of several reports prepared for provincial governments. For example, in 1989, the Health Professions Legislation Review of Ontario stated: "Professional regulation is aimed at advancing the public interest, not the interests of the professions."[39] In 1991, the British Columbia Royal Commission on Health Care and Costs stated: "The purpose of regulating members of a profession is to protect the public from preventable harm."[40] This position also received the unanimous support of all the respondents to our Discussion Paper who addressed the issue. We therefore recommend that this view of the purpose of occupational regulation be adopted by government decision-makers.[41]

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[37]The existence of a good organization may be relevant if and when the question of self-government is to be considered and the existence of occupational legislation in other jurisdictions may have an impact on scopes of practice and entry and practice standards. In this indirect manner, they may have an effect on the costs and benefits of a particular form of regulation.

[38]*Professional Code*, R.S.Q. c. C-26, s. 23 and Alberta, *Principles and Policies Governing Professional Legislation in Alberta* (1990) 1.

[39]Ontario, Health Professions Legislation Review (A.M. Schwartz), *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions* (1989) 2.

[40]British Columbia, Royal Commission on Health Care and Costs, *Closer to Home* (Report, 1991) D-29. In 1978, a member of the Commission of Inquiry on Health and Social Welfare, whose recommendations resulted in the Québec *Professional Code*, warned that "[t]he excessive multiplication of professional corporations . . . under the pretense of protection of the public, with the real purpose being to gain the advantages associated with [professional] status, would sooner or later bring about the demise of the self-regulation of the professions.": C. Castonguay, *supra* n. 27, at 67.

[41]This is not to suggest that government cannot or should not provide benefits or advantages to occupational groups. Government can benefit various segments of society, including occupational groups, and in fact does so regularly (for example, the recent home renovation tax rebate offered by the provincial government was explicitly designed to benefit occupations associated with home renovations, among other groups). However, in our view, decisions to benefit particular segments or groups in society lie at the heart of the political process and ought to be made by our elected representatives; therefore, this Report will not recommend the use of occupational regulation to assist or benefit occupational groups.

2. *IN GENERAL, LICENSING WILL BE JUSTIFIED ONLY IF IT WILL SUBSTANTIALLY REDUCE THE THREAT OF SERIOUS HARM TO THE PUBLIC*

> [A]ll activities in society involve some risk. This is not itself a reason for regulation. Only where it can be shown that an unacceptable degree of risk results from the unregulated activity are regulatory controls justifiable.[42]

Our earlier discussion noted the costs which are associated with licensing: higher prices for consumers, reduced numbers of practitioners available to meet public demand, greater inefficiencies and a resistance to innovation. These costs are largely a function of the scope of practice and the entry and practice standards adopted for a particular regime; they cannot be fully assessed until after a determination concerning these standards is made.[43] However, in general, it is fair to say that licensing will result in substantial costs. It follows that a licensing regime can only be justified if it produces substantial benefits. Since the only benefit of licensing is the reduction or elimination of harm to the public due to the improper performance of the occupational service, licensing will only be justified if the potential harm is real, serious and can be cured or significantly ameliorated by the regime. Because of its substantial costs, we believe that government should be very reluctant to use a licensing regime to regulate an occupational service.

Québec has endorsed this principle by taking the position that licensing should not be granted unless it is the only regime adequate for the protection of the public.[44] A 1990 Discussion Paper from the Saskatchewan government echoes this view[45] and the Law Reform Commission of Victoria (Australia) proposed that "Licensing should only be used when the probability of serious loss to the public, or the danger to public health and safety is shown to be sufficiently serious to warrant the additional costs that licensing imposes."[46] The Professional Organizations Committee in Ontario stated in 1980: "We believe that no claim to licensure should be granted unless the proponents have established beyond reasonable doubt that their claim is in the public interest. . . ."[47]

Prince Edward Island has also adopted the policy of restricting the use of licensing and will only permit the introduction of a licensing regime where there is a "serious risk" of harm to the public. A "serious risk" is defined as:

> (a) Risk in the sense of demonstrable harm that may be done to clients because of the nature of the procedures or the circumstances under which the service is performed;

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[42]Law Reform Commission of Victoria, *Principles for Occupational Regulation: Occupational Regulation Report No. 2* (1988) 8.

[43]Chapter 3 will deal with the question of delineating appropriate scopes of practice; Chapter 4 will address entry and practice standards.

[44]*Professional Code*, R.S.Q. c. C-26, s. 26. Dussault and Borgeat, defending the Code, argue that an exclusive licence must ". . . be restricted only to those cases where the protection of the public absolutely requires that the services rendered by the members of this group be exclusive.": Dussault and Borgeat, *supra* n. 27, at 13.

[45]Saskatchewan, *Towards the Development of a Professions Policy for Saskatchewan* (Discussion Paper, 1990) 6. The State of Virginia also requires that new regimes be implemented only if there is no alternative to regulation and that the least restrictive form of regulation be chosen: R.D. Morrison, "Professions and the Government: A Social Contract Broken or Intact?" (Address to the Third Interprovincial Conference on Professional Regulation Legislation, Victoria, British Columbia, March 11, 1991) (unpublished).

[46]Law Reform Commission of Victoria, *supra* n. 42, at 15. According to three leading Canadian economists in this area, licensing and certification should be used "only in compelling circumstances.": Wolfson, Trebilcock and Tuohy, *supra* n. 5, at 212-213.

[47]Ontario, Professional Organizations Committee (H.A. Leal), *supra* n. 35, at 22.

(b) Significant in the sense of a large enough scale of practice to affect a sizable portion of the public.[48]

This definition suggests three factors which make a threat of harm serious: the likelihood of its occurrence, the significance of its consequences on individual victims and the number of people it threatens.[49]

Although the point at which a particular threat of harm becomes serious enough to justify licensing will be difficult to determine, we believe that this definition will be of assistance to decision-makers. Our only comment is that the harm need not be suffered by "clients" or consumers of the service but may also be suffered by third parties. Indeed, it may be that the seriousness of the harm needed to justify licensing may be less when third parties are at risk than when a consumer is threatened because a third party often has even less opportunity than a consumer to affect or control the quality of the service.

Besides the existence of a serious threat of harm, our principle requires that licensing must be capable of reducing that threat substantially before its implementation will be justified. Again, the extent to which a regime is capable of ameliorating the threat can only be ascertained after its scope of practice and entry and practice standards have been determined. However, at this preliminary stage, decision-makers should at least identify the sources of the improper practice (lack of ability, carelessness, fraud, etc.) and consider whether entry and practice standards are capable of adequately addressing these. If entry standards are incapable of predicting the future performance of a practitioner and if practice standards will not be effective in discouraging improper performance, another form of regulation ought to be considered.

3. CERTIFICATION SHOULD ONLY BE INTRODUCED WHEN THE THREAT OF HARM IS LESS SERIOUS, WHEN IT AFFECTS ONLY THE CONSUMER OF THE SERVICE (OR ITS EFFECTS ON THIRD PARTIES ARE MINOR) AND WHEN IT WILL RESULT IN GREATER CONSUMER KNOWLEDGE OF THE QUALIFICATIONS OF THE PRACTITIONERS SUFFICIENT TO REDUCE THE RISK OF HARM TO ACCEPTABLE LEVELS

Because it has a less substantial effect on the competitive market than licensing, certification is generally less costly for the public. As a result, its benefits may exceed its costs in situations where the threatened harm would not justify the introduction of a licensing regime. However, in general, certification is also less effective than licensing at reducing the risk of harm because consumers are still free to select services which may be provided by incompetent or unethical practitioners. We suggest therefore that certification belongs in a middle ground between licensing and the absence of regulation.[50]

The costs of certification mean that it should not be implemented unless some significant threat of harm would exist in its absence. For example, although an occupational service poses a risk of harm, consumers may have access to information from reliable sources (such as private certifying organizations) which give them sufficient protection from this risk. In this case, no regulation will be necessary.

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[48]Prince Edward Island, Executive Council, *Self-Regulatory Professional Statutes Guidelines for Government Departments* (No. M1/91, 1991). See also Ontario, Health Professions Legislation Review (A.M. Schwartz), *supra* n. 39, at 9.

[49]There were no responses to our Discussion Paper which provided recommendations as to an appropriate definition of "serious harm".

[50]Other forms of regulation may also occupy this "middle ground".

On the other hand, when the threat of harm is severe, it may be that it would be inappropriate to allow consumers to expose themselves to this risk.[51] In this case, licensing might have to be considered. The determination of the point at which certification is no longer appropriate and licensing or another form of regulation is required will be a difficult task for decision-makers and can only be made on a case-by-case basis.

Certification is also inappropriate when third parties face a serious risk of harm due to the improper performance of the occupational service. Where third parties are unable to protect themselves from the unwise choices of consumers, other forms of regulation, including licensing, will have to be considered.

Even when the harm meets these criteria for certification, however, certification may not be appropriate. Like licensing, certification is only effective if its entry and practice standards have some connection to the reduction of improper practice by practitioners. Where entry standards have little predictive connection to the performance of the task or service and where practice standards are ineffective in addressing the source of the improper practice, certification is not an appropriate form of regulation.

When decision-makers have come to the conclusion that certification is appropriate, it is important that consumers have easy access to the quality signal provided by that regime. In particular, distinctions ought to be drawn between private, voluntary groups which certify practitioners and a government certification regime. While the former ought not to be discouraged and can be very valuable in providing information to the public, it should be made clear that the connection between the standards used by these groups and the proper performance of the service have not been assessed and approved by government. We recommend that, in order to make this distinction, a specific term, such as "certified", should be reserved for the exclusive use of groups which are certified by government.

4. THE FORM OF REGULATION WHICH PROTECTS THE PUBLIC ADEQUATELY AT THE LEAST COST SHOULD BE CHOSEN AND DECISION-MAKERS SHOULD CONSIDER FORMS OF REGULATION OTHER THAN LICENSING OR CERTIFICATION

We have emphasized that a form of regulation should not be introduced unless its benefits in terms of public protection outweigh its costs. There may be situations, however, in which more than one form of regulation offers benefits which exceed its costs. In such a case, the public interest requires that the regulatory form which provides the greatest net benefit should be chosen. If both adequately protect the public from the threat of harm, the one which costs least should be selected. For example, if both certification and licensing provide adequate public protection, certification should be chosen because it permits greater competition in the market for the service.

However, there may be other forms of regulation which protect the public as well or better than either licensing or certification. Because the reference from the Minister of Justice and Attorney General made clear that the Commission was to consider forms of occupational regulation which are administered by self-governing bodies, we have not discussed forms of regulation other than licensing and certification. However, this does not mean that, in a particular situation, another form of regulation might not adequately protect the public and cost less than either certification or licensing. If the option which best serves the public interest is to be implemented, decision-makers ". . . should be aware that there are less restrictive alternatives

[51]Government has decided that individuals in our society should not be permitted to subject themselves to unacceptable risk and therefore regulates a number of behaviours, including the use of seatbelts in cars and the use of helmets on motorcycles.

to licensing . . . and in many cases these may be more appropriate forms of intervention in the market."[52]

Depending on the circumstances, any number of alternative regulatory regimes may be more appropriate and cost-effective than either licensing or certification. For example, the provincial government has the power to deter incompetent or unethical behaviour by making changes to laws concerning civil liability or by creating new offences.[53] It can also discourage dangerous practices by taxing them or it can subsidize behaviours and practices which provide greater safety for the public.[54] Governments can engage in programs designed to educate the public or offer subsidies to organizations which provide information to consumers and thereby address a lack of consumer knowledge about the service; in some cases, this may prove even more effective than certification.[55] In order to adequately address harm resulting from a lack of consumer information or from the effect of poor consumer choices on third parties, government could require that practitioners of a service obtain a minimum level of liability insurance, thereby enabling victims to recover for harm caused by practitioners.[56] A government inspection system may also be effective in deterring practitioners from acting improperly.[57]

If they come to the conclusion that an alternative form of government action can adequately protect the public at a lower cost than either licensing or certification, decision-makers ought not to be bound by the scope of this Report; they should refer the matter to an appropriate department or agency of government for regulatory action.

D. CONCLUSION

Based on the discussion in this Chapter, we make the following recommendations:

RECOMMENDATION 1

The purpose of occupational regulation should be to protect the public from harm resulting from the improper performance of an occupational service; it should not be used to benefit or reward practitioners.

RECOMMENDATION 2

Certification and licensing should be considered for use in situations where harm results from incompetence or unethical behaviour on the part of practitioners. Certification can be effective in addressing a lack of consumer information and licensing can be effective in addressing both a lack of consumer information and harm to third parties. However, each can also result in higher prices, greater

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[52]Ostry, *supra* n. 2, at 23. See also Ontario, Health Professions Legislation Review (A.M. Schwartz), *supra* n. 39, at 9.

[53]One method of doing this would be to make some or all occupational services expressly subject to *The Business Practices Act*, C.C.S.M. c. B120.

[54]See Dewees, Mathewson and Trebilcock, *supra* n. 8; Trebilcock, *supra* n. 5; and Wolfson, Trebilcock and Tuohy, *supra* n. 5, at 198ff.

[55]Dewees, Mathewson and Trebilcock, *supra* n. 8, at 28.

[56]Because this solution is reactive rather than preventative, it may be inappropriate for certain kinds of harm, such as bodily injuries. Moreover, it relies upon consumers recognizing the harm done to them and identifying the individual responsible. This may be unrealistic in some cases. In addition, damages must be capable of quantification and of sufficient magnitude to justify legal proceedings.

[57]In a U.S. Federal Trade Commission study of television repairers, the state which used investigators to check allegations of fraud produced a higher quality of service than a state with a licensing regime. Moreover, the price for television repairs in this state was 20% lower than under the licensing system: Ostry, *supra* n. 2, at 21.

inefficiencies and reduced access to the service. Accordingly, neither certification nor licensing should be implemented unless their benefits exceed their costs.

RECOMMENDATION 3

Because of its substantial costs, licensing should be used sparingly and cautiously. In general, licensing should not be implemented unless the threatened harm to the public from the inadequate performance of the occupational service is serious. The seriousness of the threatened harm should be evaluated by considering the likelihood of its occurrence, its potential effect on individual victims and the number of potential victims it may affect.

RECOMMENDATION 4

Certification should only be implemented when the threat of harm is less serious and when it affects only the consumer of the service or its effects on third parties are minor.

RECOMMENDATION 5

Neither licensing nor certification should be implemented unless it is capable of reducing the identified threat of harm to acceptable levels.

RECOMMENDATION 6

In order to make clear to the consumers the quality signal intended by a certification regime, a specific term, such as "certified" should be reserved for the exclusive use of groups which are certified by government.

RECOMMENDATION 7

Forms of regulation other than certification or licensing should be considered and should be implemented if they can adequately protect the public at a lower cost than certification or licensing.

RECOMMENDATION 8

If more than one form of regulation will adequately protect the public from the threat posed by the improper performance of the service, the least costly form should be selected.

As we have noted, the balance between the benefits and the costs of a proposed certification or licensing regime cannot be assessed until the scope of practice and the entry and practice standards for the regime have been determined; their delineation is integral to the analysis of benefits and costs. Accordingly, we now turn to a discussion of these issues.

CHAPTER 3

SCOPES OF PRACTICE AND REGULATED SERVICES

A licensing or certification regime is defined by two features: the occupational service to which the regime applies (commonly known as the "scope of practice") and the standards for entry into the regime and for continued practice within it. As we have noted, the costs and benefits of a regime will very much depend upon the design and enforcement of these two elements.

This fact leads logically to two important conclusions. First, if a form of regulation is to be employed only when its benefits exceed its costs, a decision to implement a licensing or certification regime cannot be made until its scope of practice and entry and practice standards are known. Second, the benefits of a particular regime will be maximized and the cost minimized only if its scopes of practice and entry and practice standards are appropriately drawn.

This Chapter will deal with the problem of setting appropriate scopes of practice for licensing and certification regimes; Chapter 4 will address the question of entry and practice standards.

A. DEFINITION OF REGULATED SERVICES

As we pointed out in Chapter 2, the advantages of a licensing or certification regime will only outweigh its disadvantages where the improper provision of the service poses a significant risk of harm to the public and where licensing or certification reduces that risk to acceptable levels. We also stressed that the least restrictive method of regulation capable of addressing the threat of harm adequately should be employed. It follows that the regime should be designed to minimize its costs and maximize its benefits. These principles have an important consequence for scopes of practice: they mean that licensing and certification regimes cannot apply to occupations; they must apply to services.

The traditional approach to occupational regulation has been to license or certify a profession or occupation. This has meant that the "scope of practice" of a licensing or certification regime - the services to which the form of regulation will apply - is composed of all of the tasks or services which have been traditionally associated with practitioners of the particular profession or occupation. Sometimes the scope of practice is set out in a long list of reserved services. In other cases, the scope of practice is defined in broad and somewhat vague language.[1]

Such expansive scopes of practice are inconsistent with the principles of public protection which we have recommended as the basis for policy in this area. Licensing should be reserved for those services which pose a serious threat of harm to the public and certification should only be implemented when consumers face a less serious but still substantial risk of harm from the improper performance of a service; in both cases, regulation must be shown to reduce the risk to

[1]For example, it may be defined as "the practice of" a particular occupation or profession.

traditionally associated with an occupation. A practitioner who wishes to be licensed (or certified) in only one or two of the services which form part of an occupation should be allowed to do so. To require that a practitioner be licensed (or certified) in additional tasks serves only to raise costs to consumers unnecessarily because it forces the practitioner to obtain knowledge and training which is not necessary to provide a particular service to the public competently and ethically.

Legitimate specialization is likely to result in greater flexibility on the part of practitioners. At present, practitioners who wish to provide a single service must demonstrate their competence in the whole range of services which are associated with that service in an occupation or profession. If they also wish to provide a service which is associated with another occupation, they must first master all of the services which form that occupation. By contrast, our approach removes the traditional, but often artificial, restrictions between occupations and permits practitioners more easily to provide services which may not have been associated with one another in an occupation.

Of course, the entry and practice standards of a particular service should be developed so that a practitioner who wishes to specialize can do so without endangering the public. If performing one service safely and competently requires an ability to perform other associated services, a practitioner should demonstrate competence in all these services before a licence or certificate to practise the first is issued.

B. ADMINISTRATION OF REGULATED SERVICES

The traditional, "occupational" approach to the regulation of services has the advantage of being easy to administer; because all services which form part of an occupation are either certified or licensed, they can be administered together. Furthermore, since a practitioner who provides one service must be licensed or certified for all the services which are governed by the regime, a common set of educational, training and practice standards can be applied. In addition, grouping several services together limits the number of administrative structures which exist to govern regulated services.

While several services can be grouped together under the traditional occupational approach, it also takes into account philosophical, educational or historic differences between practitioners who provide the same service. For example, chiropractors and physiotherapists are both licensed to manipulate bones but this licence is administered by two separate administrative structures.[6] Similarly, dentists and doctors share the right to prescribe drugs, doctors and pharmacists share the licence to dispense drugs and doctors and nurses share the right to administer medication. However, despite sharing these tasks, each of these groups operates a separate administrative structure; they are said to have "overlapping scopes of practice".

An approach which regulates services rather than occupations does not necessarily have the same ease of administration. There is virtually no limit to the number of services which could be regulated and, if each regulated service were to be administered separately, it is theoretically possible that hundreds or even thousands of separate administrative structures would have to be created. Moreover, if all practitioners who provide a particular service were governed by the same administrative body, no account would be taken of the differences between them in philosophy, training or values. In these circumstances, it would be extraordinarily difficult to develop and enforce common entry and practice standards.

[6]This is largely due to the fact that chiropractors and physiotherapists have adopted significantly different approaches to the diagnosis and treatment of ailments.

However, we believe that these problems can be avoided with a practical and flexible approach to administration of licensing or certification regimes in a task-based model. It is entirely possible, for example, to use one administrative structure to administer the regulatory regimes governing several services without requiring practitioners to become qualified in each service.[7]

Matching regulatory regimes with tasks rather than with occupations does not mean that several services (even if some are regulated by a certification regime and others by licensing regimes) cannot be administered by a single body. Services which involve similar threats to the public will often require similar skills, training and ethical commitments in order to be properly provided. In these circumstances, joint administration of more than one service will often be more efficient than administering each service separately because administrators will be able to apply the same knowledge and principles to the various regulated services.

We anticipate that services which have traditionally been grouped together in an occupation will often be good candidates for joint administration because of the close relationship between these services. In this case, administrative bodies which are currently responsible for services associated with an occupation may be responsible for a similar group of services under a task-based model (assuming that these services all require either a licensing or a certification regime).

Services which have not traditionally been viewed as part of the same occupational group may be less amenable to joint administration because there may not be the same historically close relationship between these services. Yet such an arrangement is possible, especially if the services are related and practitioners share a common approach to their provision.[8]

Joint administration under a self-governing system may require special measures to prevent problems. For example, rather than being required to be licensed or certified for all of the services governed by one administrative structure, our model would allow full membership for all practitioners, no matter how many services they practise or for which they are licensed or certified. As members, they should have an equal opportunity to participate and be represented in the administration of the regime. Safeguards may therefore have to be implemented in order to prevent practitioners of one service from using superior numbers to take control of the administrative body at the expense of practitioners of other services. A guaranteed representation from practitioners of the various services may have to be employed in order to avoid this problem.

If our model permits joint administration of several services, it also allows a single service to be administered by several bodies. Despite the fact that they have a licence or certificate to perform the same service, two or more groups of practitioners may wish to be governed separately. This desire may arise from significantly different approaches to the service, from a wish to preserve historical divisions or a wish to reflect differences in education and training. More commonly, separate administrative structures may be needed to reflect economic reality; one group of practitioners may be inclined to provide a service in connection with several other services while another group of practitioners may provide the service in connection with another group of services. The desire for separate administrative structures is most likely to arise when the form of administration selected is self-government. So long as the separate groups meet our criteria for self-government (discussed in Chapter 5), there is no reason why they should not be administered separately.

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[7]The Securities Commission currently administers licensing regimes for a number of occupations within the real estate and securities industry.

[8]For example, we note that in Ontario, audiologists and speech language pathologists participate in a joint administration of these two services: *Audiology and Speech-Language Pathology Act, 1991*, S.O. 1991, c. 19.

C. DELEGATION OF LICENSED SERVICES

We have recommended that a service should not be licensed unless its improper performance poses a serious threat of harm to the public and unless entry and practice standards can be designed which significantly reduce that threat to acceptable levels. These recommendations logically preclude the delegation of licensed services to a person who is not licensed to perform them. To delegate the provision of a licensed service to an unlicensed person would, by definition, subject the public to the serious risk of harm. Indeed, if the service can be delegated to unlicensed individuals without posing a serious risk of harm to the public, one of two conclusions is inescapable: either the service should not be licensed (the service does not, in fact, pose a serious threat to the public if performed improperly) or the standards for the regime have been set inappropriately (the unlicensed person is able to perform the service competently and ethically and should be given a licence to do so).

This does not mean that licensed practitioners should not be permitted to delegate the performance of the service to members of another administrative structure who are also licensed to provide the service (that is, they share overlapping scopes of practice) nor does it imply that a distinction cannot be drawn between a licence to prescribe a service and a licence to perform the service upon prescription. Moreover, it may be that a licensed practitioner can be assisted in providing the service by an unlicensed individual without endangering the public. However, because a licensed service necessarily poses a serious threat of harm to the public, it seems self-evident that the individual assisting the practitioner should, at most, be permitted to perform only mechanical and ancillary aspects of the task or service. The individual to whom the work has been delegated should not be performing all or substantially all of the service.

D. BODY RESPONSIBLE FOR SETTING SCOPES OF PRACTICE

The close relationship between a regime's scope of practice and its costs and benefits is clear; an excessively broad scope of practice will cost the public more than necessary without providing it with greater protection, while a scope of practice which excludes services which should be regulated will not protect the public adequately. In order to assess the costs and benefits of a proposed regulatory regime, those within government charged with this responsibility must know its precise scope of practice. Moreover, if the benefits of a regime are to be maximized and its costs minimized, we believe that government decision-makers must be able to design the regime's scope of practice.[9]

E. REVIEW OF SCOPES OF PRACTICE

As technology changes and the level of scientific and public knowledge grows, the needs of society and the activities of practitioners will also change. If an occupational regime is to remain in the public interest, the definition of the service to which it applies may also have to be modified. To ensure that these changes are made in the public interest and that the benefits of a regime continue to outweigh its costs, we recommend that the definition of each regulated service be reviewed at regular intervals by the same government decision-makers who had the responsibility to establish them.

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[9]We recommend in Chapter 9 the establishment of an independent governmental body with responsibility for setting scopes of practice. Reserving for this body the right to set scopes of practice does not mark a significant change from the status quo since government currently controls the design of scopes of practice of regulatory regimes, usually by setting them out in the legislation which creates the regime.

F. CONCLUSION

Based on the discussion in this Chapter, we make the following recommendations:

RECOMMENDATION 9

The traditional occupation-based approach to delineating scopes of practice should be replaced by a task-based model of occupational regulation in which tasks and services are regulated, rather than practitioners or occupations.

RECOMMENDATION 10

Rather than grouping together and regulating all the tasks or services which are considered to be part of an occupation, the activities of an occupation should be broken down on the basis of practical considerations into discrete services which are provided to the public; each of those tasks or services should be examined separately in order to determine the extent to which the improper performance of each threatens the public and the extent to which entry and practice standards are capable of reducing the threat of harm.

RECOMMENDATION 11

Tasks or services performed by members of an occupation which do not pose a threat to the public or in which the potential harm cannot be meaningfully reduced by entry and practice standards should not be regulated or should be regulated by regimes other than certification or licensing.

RECOMMENDATION 12

A regulated task or service (that is, one which will be governed by either a certification or licensing regime) should be described in clear and specific terms; vague or expansive language should be avoided. Descriptions should be broad enough to take into account future developments yet narrow enough to avoid unnecessary regulation.

RECOMMENDATION 13

Practitioner specialization in one or only a few tasks should be permitted as long as this task (or tasks) can be adequately performed without the need to be able to perform other tasks.

RECOMMENDATION 14

The possibility of having one structure jointly administer more than one regulated service should be explored and implemented where appropriate. This will be particularly useful for tasks or services which have been traditionally grouped together in an occupation.

RECOMMENDATION 15

To account for differences in approach to providing a service, it should be permissible for a licensed or certified service to be administered by more than one administrative structure and for a practitioner to choose to belong to one or another of the regimes. That is, overlapping scopes of practice should be permitted.

RECOMMENDATION 16

Licensed tasks or services should not be delegated to unlicensed individuals; that is, unlicensed individuals should not perform all or substantially all of a licensed task. To permit delegation of this sort would, by definition, expose the public to the serious risk of harm. If a licensed task or service can be safely delegated, then either it should not be licensed (as its improper performance does not, in fact, pose a serious threat of harm to the public) or the standards for practising the task or service have been set inappropriately.

RECOMMENDATION 17

Due to the close relationship between the costs and benefits of a particular regime and its scope of practice, government decision-makers should set appropriate scopes of practice for licensing and certification regimes.

RECOMMENDATION 18

Scopes of practice should be reviewed at regular intervals by the governmental body which designed them.

CHAPTER 4

ENTRY AND PRACTICE STANDARDS

As we pointed out in Chapter 2, the entry and practice standards of a certification or licensing regime are, like scopes of practice, inextricably linked to the costs and benefits of that regime. It is crucial, therefore, that they are carefully designed to ensure that the benefits of a regime in protecting the public are maximized and its costs are minimized.

For our purposes, entry standards mean those qualities which an aspiring practitioner must possess in order to practise properly; the methods by which these are assessed are, however, also discussed in this Chapter.[1] Similarly, practice standards are, for our purposes, statements of the qualities and conduct which are required in order to provide the service in a proper manner or may be stated negatively as prohibitions on behaviour which could result in harm to the public. However, the methods by which breaches of practice standards are detected and addressed are also dealt with in this Chapter and in Chapter 7.

A. ENTRY AND PRACTICE STANDARDS AND THE THREAT OF HARM TO THE PUBLIC

We have recommended that certification or licensing should be introduced only where they will significantly reduce the threat of harm to the public arising from the improper performance of the service. In order to produce a benefit - the reduction of the threat of harm - entry and practice standards of the regulatory regime must be meaningfully related to the causes of the improper performance of the service. The same point could be made positively: a certification or licensing regime will only produce benefits for the public where entry and practice standards reflect the qualities, skills and abilities required to provide the occupational service in a competent and ethical manner.[2]

It is not enough, however, to ensure that the qualities required to practise properly are reflected in entry and practice standards. In order to minimize the costs of licensing or certification, entry and practice standards must not be excessive or superfluous. They should be aimed at only those qualities which are required to provide a service competently and ethically.

Entry and practice standards therefore have two goals: they should be designed to exclude from a licensing or certification regime any practitioner who cannot perform the service in a competent and ethical manner but they should also be aimed at including within the regime all

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[1]The difference between the skills and knowledge needed to practise properly and the methods by which these are assessed is an important one. In some cases, this distinction appears to be blurred or erased. For example, graduation from an accredited institution or program is sometimes described as an entry standard when, in our view, it should be seen as a method by which the ability of an applicant to meet entry standards can be assessed.

[2]The Ontario Task Force on Access to Professions and Trades spoke of the need to identify "competencies" or "functions" which every competent practitioner must master. "The standard set by these competencies should, and inevitably will, be reflected . . . in licensure or certification examinations. . . . [T]hese standards must be justifiable *in the public interest* as necessary for practising the profession competently.": Ontario, Task Force on Access to Professions and Trades in Ontario (P.A. Cumming), *Access - Task Force on Access to Professions and Trades in Ontario* (1989) 62.

those practitioners who can provide the service to the public competently and ethically.[3] To these ends, we recommend the application of the following principles when entry and practice standards are designed.

1. ENTRY AND PRACTICE STANDARDS SHOULD FULLY ADDRESS THE CAUSES OF HARM TO THE PUBLIC

The causes of the improper performance of a service resulting in harm to the public may be numerous. Incompetence, for example, may be due to a lack of knowledge or training or the absence of physical or mental abilities needed to perform the service properly. The public may also be harmed by unethical behaviour, such as misrepresentations, the over-prescription of services, the abuse of clients and patients or the failure to apply knowledge and skills to practice. This latter failure may be caused by boredom, overwork, distractions or a lack of motivation. Third parties may suffer harm as the result of incompetence but may also be the victims of a deliberate choice on the part of consumers to obtain a low level of service which places others at risk.

The first task of decision-makers in setting appropriate entry and practice standards is to identify the sources or causes of improper conduct which pose a threat of harm to the public. Only after identifying these causes is it possible to design standards which adequately address them.

Once the causes of improper practice have been identified, entry and practice standards (or, often, a combination of the two) should be established which address all of them to the greatest extent possible. A failure to do so will leave the public at risk of harm. It is not sufficient, for example, to focus exclusively on an applicant's possession of knowledge when other skills or abilities are necessary for proper practice. Nor is it appropriate to concentrate on the competence of practitioners but ignore unethical conduct.[4]

A specific example of a failure to address a particular cause of harm was raised in the Discussion Paper and prompted several responses. We suggested that proof of a practitioner's competence when he or she begins practice is not usually a good indicator of his or her competence years later, especially if the proper performance of the service requires the continual adoption of new knowledge and skills. Therefore, in order to provide for the continuing ability of practitioners, we proposed that some method of evaluating their skills and knowledge after entry should be implemented. Two means of doing so - routine practice reviews and requiring that practitioners undergo entry standard evaluations at regular intervals - were suggested in the Discussion Paper. Responses to these suggestions were mixed; some respondents emphatically endorsed them[5] while others were unenthusiastic or reacted negatively to our proposal.

There are a number of arguments which could be advanced against requiring post-entry evaluations. The first is that practitioners will retain their initial knowledge and skills and will learn new skills and knowledge as needed. This argument is based on the assumption that

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[3]According to the Ontario Royal Commission Inquiry into Civil Rights, the goal of entry standards is "not only to see that persons licensed are qualified, but that all qualified applicants are licensed.": Ontario (J.C. McRuer), *Royal Commission Inquiry into Civil Rights* (Report No. 1, vol. 3, 1968) 1172.

[4]This is not to suggest that a licensing or certification regime will always be able to address every cause of improper performance. Some causes of improper performance will be so difficult or expensive to detect and their potential for harming the public so minimal that it would be impractical to address them using entry or practice standards. A regime which ignores these sources of harm may still be effective in reducing the threat to the public by addressing other causes of improper performance and it may be that this is sufficient to justify its implementation.

[5]Indeed, one respondent labelled any suggestion that routine post-entry practice reviews should not take place as "preposterous": D. Dalgleish.

everyday practice, augmented by self-directed reading and voluntary educational programs will provide practitioners with the qualities necessary to practise competently. We are not convinced that such an assumption can always be made and we point out that, when practitioners fail to maintain appropriate levels of competence, the public becomes vulnerable to the risk of harm.

Another argument is that it is unfair to practitioners to threaten the loss of their livelihood should they fail to meet standards of competence. However, the purpose of our proposal is not to eliminate practitioners from certification or licensing regimes; indeed, we believe that no practitioner should have a licence or certificate removed except for behaviour which demonstrates that he or she poses a danger to the public. Nonetheless, the purpose of regulation is not to secure a livelihood for practitioners but to protect the public. If practitioners are not competent to provide the service without endangering the public, we believe that their licence or certificate must be removed until they can demonstrate their ability to perform the service properly.

A final argument, advanced by several respondents to our Discussion Paper, is that post-entry evaluations are too costly and are not justified by the benefits produced.[6] To subject, at regular intervals, an acknowledged expert in a particular occupation to tests designed for applicants for entry is a waste of his or her time and energy and, in addition, is humiliating. We wish to stress, however, that an entry examination is not the only nor, in many circumstances, the best mechanism for post-entry assessment. A practice review, conducted by another practitioner, might adequately confirm the continued competence of such a practitioner; on occasion, it might reveal problems of ethics or competence in the practice of even an experienced and respected practitioner of which his or her colleagues are unaware and which would not be revealed in a written examination. Moreover, a practice review would likely interfere less significantly in the practitioner's daily practice than being forced to study for and pass an entry level examination.

We remain convinced and recommend that post-entry assessments of competence are necessary to protect the public from harm; administrators of occupational regimes should develop and implement such programs.

2. *STANDARDS SHOULD NOT CONTAIN SUPERFLUOUS REQUIREMENTS*

While it is important not to ignore sources of improper practice when designing entry and practice standards, it is also important to remember that, in occupational regulation, more is not necessarily better. It may be tempting in many cases to include within entry and practice standards requirements which, while desirable, are not necessary for the proper performance of the occupational service. This temptation should be resisted. Because it is likely that fewer practitioners will be able to meet them, superfluous requirements will tend to reduce the number of practitioners who can obtain a certificate or offer a licensed service to the public. In addition, superfluous requirements will tend to raise the investment costs of those who are able to meet them. Both of these are likely to result in increased costs to the public without providing a commensurate benefit.

Our Discussion Paper provided several examples of possible irrelevant elements in entry and practice standards. It is not uncommon, for instance, to require candidates for entry into a licensing or certification regime to be literate and fluent in English. Literacy and English language proficiency are desirable qualities and, in cases where the competent performance of

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[6]It is interesting to note that physicians and surgeons in Alberta have announced that some form of post-entry competence review will be required of all members on a regular basis (it is not clear whether this will take the form of a test or of a review of practice): S. Feschuk, "Alberta MDs face mandatory reviews", *The Globe and Mail* (Nat. ed.), April 6, 1994, A1. It is also interesting that, like responses to our Discussion Paper, letters to the editor in response to this announcement have focused on the cost of such an exercise.

the service demands an ability to read, write and speak English fluently, these requirements are appropriate. However, when literacy or linguistic ability are not needed in order to perform a service capably, these requirements will simply increase costs by excluding qualified practitioners from certification or licensing regimes. Moreover, they will have a disproportionately harsh effect on immigrants and others whose first language is not English.

An example of a potentially irrelevant practice standard is the prohibition on conduct which is offensive or even criminal in nature. Where the conduct (criminal or not) is related to the practitioner's ability to perform the occupational service, this approach is legitimate and beneficial in that it protects the public from harm. However, caution should be exercised. As Québec's Commission of Inquiry on Health and Social Welfare noted, civil and criminal courts may use criteria which differ from those which should guide regulatory regimes. It asked rhetorically, "Does a dentist found guilty of criminal negligence in driving his car become ineligible to practise his profession?"[7] It is particularly important in the context of a self-governing occupation that practitioners do not use practice standards to dissociate themselves from conduct which, though reprehensible, does not affect the ability of a practitioner to provide the occupational service competently and ethically. The purpose of practice standards is not to protect the public image of practitioners but to protect the public from harm.[8]

3. TESTING SHOULD BE CAREFULLY DESIGNED TO CORRESPOND TO THE QUALITIES NEEDED TO PROVIDE A SERVICE PROPERLY

In order to ensure that entry standards do not contain superfluous requirements but identify all the qualities necessary for proper practice, the form as well as the content of the devices used to assess applicants should be carefully considered. Our Discussion Paper cited as an example of a poorly designed entry standard the use of a written test when literacy is not required to perform the service properly.[9] Ontario's Task Force on Access to Professions and Trades recommended that the methods of assessing applicants for entry into licensing or certification should be carefully examined. It suggested that administrators of these regimes should utilize

> . . . objective test development and analysis procedures reflecting recognized professional standards. Such procedures ensure that the tests are culturally sensitive and administratively fair, that the standard set reflects the required level of competence, and that the level of fluency needed for the examination is appropriate to the occupation.[10]

In order to raise the likelihood that tests for competence will accurately reflect the knowledge and abilities needed to provide the service properly, we believe that decision-makers should emphasize the use of practical tests. There is a tendency to prefer written theoretical examinations to practical tests because of their use in educational and academic settings. These examinations can be useful in testing an individual's knowledge and should be used for that

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[7]Québec, Commission of Inquiry on Health and Social Welfare (G. Nepveu), *Report: The Professions and Society* (Part 5, vol. VII, Tome I, 1970) 60.

[8]It was this concern which prompted the McRuer Commission in Ontario to prefer the term "professional misconduct" to "unprofessional conduct" because the latter could mean "'. . . conduct unbecoming to a professional man', which might involve conduct that had nothing to do with professional standards.": Ontario (J.C. McRuer), *supra* n. 3, at 1189.

[9]A.R. Maurizi, "The Impact of Regulation on Quality: The Case of California Contractors" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 26 at 29. Several studies suggest that many applicants who failed written examinations for entry into a licensed or certified occupation were no less capable in actual practice than those who passed: S. Dorsey, "Occupational Licensing and Minorities" (1983), 7 Law and Human Behavior 171 at 178.

[10]Ontario, Task Force on Access to Professions and Trades in Ontario (P.A. Cumming), *supra* n. 2, at xiv. In Manitoba, the Working Group on Immigrant Credentials recommended that a new central body ". . . develop competency-based skills assessments for foreign credentials recognition in conjunction with provincial standards in order to achieve and promote fair and equitable review mechanisms in the trades and professions.": Manitoba, Working Group on Immigrant Credentials (L. LeTourneau), *Issues, Trends and Options: Mechanisms for the Accredition of Foreign Credentials in Manitoba* (1992) 97.

purpose. However, they may fail to reveal an individual's ability to relate that knowledge to practice and may also ignore less tangible but equally important qualities which are required for good practice. While difficult, an assessment of a practitioner or applicant in practice may provide a more accurate picture of his or her abilities than an examination written in a classroom setting.[11]

Another common form of entry level assessment is the requirement that applicants graduate from an approved school or course of studies as a condition of entry into a licensing or certification regime. This amounts to a *de facto* delegation of at least part of the design and administration of a regime's entry standards to these institutions; through their curriculum and testing, these institutions determine the qualities individuals must have and the standards they have to meet in order to be licensed or certified to perform a particular service.

There are dangers in this form of delegation. In many cases, an educational institution will have goals which differ from those of a regulatory regime. For example, a school may wish to provide a well-rounded education and may not see its role as producing members of a particular occupation. Consequently, its curriculum may contain requirements which are irrelevant for the proper performance of a particular service. At the same time, its curriculum may be inadequate in providing the level of training necessary in the skills and knowledge required for proper performance. Therefore, if graduation from an approved educational institution is established as an entry requirement, there is a risk that the entry requirement will not be related to the performance of the service.[12]

To the extent that educational qualifications do not correspond to the qualities needed to practise properly, a reliance on this method of assessment will exclude those who have not obtained the mandated level of education but possess the necessary skills and knowledge.[13] This is detrimental to the public since it blocks consumer access to capable practitioners but it is also unfair to these prospective practitioners. Immigrants (who may have received their education in foreign institutions) and disadvantaged or minority groups (who may not have had the resources to obtain the requisite education) are most likely to be adversely affected.[14] At the same time, to the extent that graduation from an approved institution does not provide the individual with all the skills or knowledge required to practise properly, reliance on it as an assessment mechanism may fail to protect the public adequately.

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[11]D.B. Hogan, "The Effectiveness of Licensing: History, Evidence and Recommendations" (1983), 7 Law and Human Behavior 117 at 122-123.

[12]In fact, most studies suggest that performance in an academic program is not particularly relevant to performance in the practice of a profession or occupation: D.B. Hogan, "Is Licensing Public Protection or Professional Protectionism? in P.S. Pottinger and J. Goldsmith, eds., *Defining and Measuring Competence* (1979) 13 at 16-17.

[13]They may have obtained the requisite skill and knowledge through experience or by way of a less orthodox form of education.

[14]In Ontario, both the McRuer Report and the Task Force on Access to Professions and Trades made a point of addressing discrimination against applicants from other jurisdictions, especially immigrants to Canada. The former stated: "Admission standards should not be set as an encouragement or discouragement of the immigration into Ontario of persons who have particular skills or qualifications. Questions of immigration are entirely separate from the exercise of the powers conferred on self-governing bodies. The only relevant question . . . to be asked of any applicant for admission, no matter what his place of origin and no matter where he took his training, is whether he has met the required educational standards established in the Province.": Ontario (J.C. McRuer), *supra* n. 3, at 1178. The Task Force on Access to Professions and Trades noted that inappropriately high entry standards affect foreign-trained applicants most severely and rarely serve the public interest. It also noted that immigrants and the consuming public suffer from the fact that ". . . there is, with some exceptions, a general reluctance to give credit for any learning obtained outside a for.nal program of education, no matter how relevant and well documented that learning may be.": Ontario, Task Force on Access to Professions and Trades in Ontario (P.A. Cumming), *supra* n. 2, at 62-63 and xiii. See also Manitoba, Working Group on Immigrant Credentials (L. LeTourneau), *supra* n. 10, at 25-26 and 41.

By excluding competent applicants from other jurisdictions, inappropriate entry standards may also violate the *Canadian Charter of Rights and Freedoms*. See *Richards* v. *Barreau du Québec*, [1992] R.J.Q. 2847 (C.S.), where the Court held that entry standards must have a close and pertinent connection to the goal of protecting the public in order to meet *Charter* requirements.

We do not mean to imply that an education, whether general or specialized, is not valuable. In general, an education will provide practitioners with useful knowledge and skills as well as other qualities which may be of assistance in practice. Obtaining an education should be encouraged. However, our purpose here is not to consider how to encourage individuals to obtain a better education. The effect of occupational regulation is to determine who will be permitted to offer an occupational service to the public (in the case of licensing) and who will be granted a market advantage (in the case of certification). These are separate issues and should not be confused with the desirability of an education.

Despite the dangers of using graduation from an educational institution as an assessment mechanism, there may be cases where its convenience and cost-effectiveness may justify its use. In these cases, the curriculum of the educational institution and the standards it applies should be carefully analyzed. The standards of educational institutions should only be used as an assessment mechanism when they correspond significantly to the skills, knowledge and other qualities needed to perform the occupational service; when the correspondence is minimal, graduation should not be used to assess applicants for entry into a regime.

Even when an educational institution provides students with the qualities required for practice, however, graduation should never be established as the sole path to entry into a regime; an alternative assessment mechanism should always be provided. This will allow applicants who have not attended the approved institution to demonstrate that they possess the skills and knowledge needed for proper practice.[15] In this way, the public will be assured of access to all practitioners who are competent, no matter how their competence was achieved. Furthermore, an alternative method of assessment will allow the educational institution to develop a curriculum which contains material which is not strictly relevant to the practice of the service and to demand standards which may be higher than needed to protect the public adequately. If potential applicants wish to forgo the advantages of this educational program, they can still receive a licence or certificate so long as they can prove they possess the qualities needed to practise competently.

An educational institution or program which provides training relevant to the provision of a service may nonetheless fail to address all of the knowledge or skills required in practice or it may apply standards which are not sufficient to protect the public adequately. In these circumstances, although graduation from this institution can be used as a partial assessment of applicants, other requirements or assessment mechanisms should be established to ensure that applicants are fully competent to provide the occupational service to the public.

4. ANTI-COMPETITIVE ELEMENTS IN PRACTICE STANDARDS SHOULD BE DISCOURAGED

Some self-governing licensing and certification regimes in Manitoba have included within their practice standards restrictions on advertising,[16] controls on fees which practitioners may charge,[17] rules on soliciting clients of other practitioners, restrictions on practitioners from other

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[15]An alternative path to entry will be particularly important for immigrants and individuals from other jurisdictions, people from disadvantaged backgrounds and practitioners who have practised prior to the introduction of graduation as a requirement for entry.

[16]In preparing our Discussion Paper, Commission staff examined legislation and regulations governing 28 self-governing certified and licensed occupations in Manitoba. Of these, almost 65% were found to maintain some restrictions on the advertising of their members.

[17]In our sample of regulated occupations in Manitoba, almost 60% were found to have restrictions on the fees which could be charged by practitioners or the power to enact such restrictions. Sometimes the restrictions are benign, such as a prohibition against charging excessive fees, but some rules were aimed at preventing practitioners from undercutting fees of other practitioners.

provinces practising in Manitoba and other similar strictures.[18] These restrictions have the effect of reducing competition between practitioners.

It may be that these measures serve the public interest.[19] For example, where the practice of a service in Manitoba differs significantly from other jurisdictions, restrictions on the inter-jurisdictional mobility of practitioners may be justified. However, the costs of these restrictions, particularly for consumers, should not be underestimated. Studies have shown that restrictions on advertising in Canada raised the average income of practitioners 10.8% in 1970 and were estimated to cost Canadians $138.3 million.[20] Fee-setting was found to raise practitioners' incomes 11.8% on average and cost Canadians $159 million in 1970.[21] Other studies have obtained similar results for other anti-competitive measures.[22] In addition, restrictions on advertising, offering second opinions and similar measures prevent consumers from obtaining knowledge which could be used to make an informed choice.[23]

The principle that practice standards should not be excessive requires decision-makers to examine such proposed provisions with care. Before any such measure is introduced, decision-makers should be strongly convinced that it assists in protecting the public from harm and that this benefit outweighs its costs to the public in the form of reduced competition.

B. LEVEL OF ENTRY AND PRACTICE STANDARDS

After designing entry and practice standards to address all the qualities which result in proper practice and excluding from them superfluous elements, the difficult task of determining appropriate levels for these standards must be faced. Typically, this task will fall to administrators of licensing and certification regimes, since the level of most standards cannot be set except through their application. It is, for example, difficult to describe in the abstract the level of skill which a practitioner or applicant must demonstrate in order to be deemed sufficiently competent to receive a licence or certificate for a particular task; such a determination can only be made by the person judging the level of skill displayed by a particular individual. The responsibility for setting an appropriate level for entry and practice standards must therefore be borne by those charged with the responsibility for administering the regime and applying these standards.

In carrying out their responsibilities in this area, administrators of a licensing or certification regime should be aware of the need for balance in applying entry and practice standards. Since the goal of licensing and certification is to protect the public from the improper

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[18]In our sample of regulated occupations in Manitoba, about 30% had restrictions on providing second opinions and 42% had provisions on taking clients from other practitioners.

[19]M. Spence, *Entry, Conduct and Regulation in Professional Markets* (Working Paper for the Ontario Professional Organizations Committee, 1978) 15ff; R.E. Olley, "The Future of Self-Regulation: A Consumer Economist's Viewpoint" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 77 at 84-85.

[20]B. Pazderka and T. Muzondo, "The Consumer Costs of Professional Licensing Restrictions in Canada and Some Policy Alternatives" (1983), 6 J. of Consumer Policy 55 at 65.

[21]*Id.*, at 65.

[22]S. Benham's 1972 study demonstrated that restrictions on advertising raised prices for eyeglasses 25.4% and J.F. Cady's study found that prescription drugs were 5.2% higher when restrictions on advertising were placed on pharmacists: Pazderka and Muzondo, *supra* n. 20, at 58-59. A 1984 report of the U.S. Federal Trade Commission found that the cost of legal services was 5% to 13% lower when advertising was permitted: S.D. Young, *The Rule of Experts: Occupational Licensing in America* (1987) 66. Pazderka and Muzondo, *supra* n. 20, at 65, stated that restrictions on the interjurisdictional mobility of practitioners were found to increase incomes by 4.3%.

[23]The Professional Organizations Committee in Ontario suggested that prohibitions on all forms of advertising ". . . deny access to knowledge from which to make an informed choice of a particular professional.": Ontario, Professional Organizations Committee (H.A. Leal), *The Report of the Professional Organizations Committee* (1980) 10.

performance of the occupational service, it is important that entry and practice standards are set high enough to protect the public adequately. Standards which are set too low will allow practitioners who do not offer adequate levels of service to be licensed or certified.

At the same time, the public is not well served if entry and practice standards are set at an inordinately high level, especially in the case of licensing. As we have noted, high standards may result in superb service from licensed or certified practitioners but they will also tend to reduce the number of practitioners who can meet the standards and will tend to raise the price of the service. This will reduce the number of consumers who can afford or have access to the service, forcing them to do without, perform the service themselves or seek the services of an uncertified or unlicensed practitioner. High standards may therefore actually reduce the quality of service received by the population as a whole because fewer consumers are able to make use of the high quality of service offered by practitioners. Again, in the area of occupational regulation, more is not necessarily better.

Two studies of dental practice (in Ontario in 1974 and in Saskatchewan in 1976) appear to provide examples of excessive entry standards in a licensing regime. These studies compared the performance of dentists and dental auxiliaries in carrying out several routine dental services.[24] Despite the greater training of dentists, the studies found that, for the services tested, dental auxiliaries performed as well or better than dentists.[25] Moreover, dental auxiliaries were able to provide these services at a lower cost than dentists.[26] Researchers have concluded that, due to their greater investment in education and training, dentists were forced to charge higher prices than dental auxiliaries and were able to spend less time in providing a particular dental service.[27]

However, while we have concerns about excessive standards, our approach is one which requires balance. Neither inadequate nor excessive standards are in the public interest. Finding an appropriate balance will be difficult and will require a subjective judgment on the part of administrators of the regime.

In the case of certification, while it is still important to set adequate standards, it is not so important to prevent excessive standards. If high standards are set, prices for the service are likely to rise. However, since the service is certified and not licensed, only those consumers who are prepared to pay for the high level of service offered by these practitioners will be forced to do so; consumers who are not prepared to pay the higher price will still be able to obtain the service from uncertified practitioners or practitioners who are certified in other regimes.

C. NATIONAL STANDARDS

We have no doubt that there will be occasions when standards which decision-makers have determined to be necessary to adequately protect the public will be higher or lower than national standards or standards adopted in other jurisdictions. In this case, a choice will have to be made between national uniformity for a particular service and the application of common principles to all occupational groups and services in the province.

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[24]In both studies, the quality of the performance was rated by examiners, all of whom were dentists, on the basis of agreed-upon standards.

[25]A.B. Hord, G.W. Thompson and R.L. Ellis, "The Ontario Dental Association Demonstration Project on Dental Auxiliaries with Expanded Duties" (June 1974), 51 Ontario Dentist 14; E.R. Ambrose, A.B. Hord and W.J. Simpson, *A Quality Evaluation of Specific Dental Services Provided by the Saskatchewan Dental Plan* (1976).

[26]D.T. Scheffman and E. Appelbaum, *Social Regulation in Markets for Consumer Goods and Services* (1982) 85.

[27]*Id.*, at 82-85.

The benefits of national uniformity must be acknowledged. They include cost savings in applying entry standards, inter-jurisdictional mobility for practitioners and the ability of consumers to anticipate similar levels of quality of service throughout the country. In order to obtain these benefits, we suggest that minor adjustments should be permitted when national standards are similar to those which our criteria would produce.

Nevertheless, we are also of the view that national standards should not be adopted uncritically. Provincial government jurisdiction over occupational regulation[28] must be exercised in the interests of the people of Manitoba. Therefore, where national standards are lower than necessary to protect the public adequately, we believe that Manitobans ought not to be placed at risk in order to satisfy the goal of national uniformity. When national standards are higher than necessary to protect the public, Manitobans should not be obliged to incur the costs of excessive standards. We note that a similar position has been taken by the government of Alberta whose policy is that the desirability of reciprocity and portability of credentials between provinces is not to take precedence over the best interest of the public.[29]

Moreover, when national standards exceed those set by decision-makers, certification within a licensing regime may be utilized to achieve many of the benefits of national uniformity.[30] Briefly, this would require all practitioners of a task which threatens serious harm to meet certain standards in order to be licensed. After that, however, those practitioners who are better qualified (for example, those who have been more highly educated, are better skilled or abide by more stringent ethical standards) could adopt or be granted a certification scheme in order to distinguish themselves from other practitioners who are also licensed to perform the service.[31] Consumers could then take these higher standards into account when purchasing the service. In the case of national standards exceeding the level adopted by the decision-makers in Manitoba, a licence could be granted to any practitioner who met Manitoba's standards. However, those who met the higher national standard could adopt or be given an additional certificate reflecting this fact.

D. "GRANDPARENT" CLAUSES

When entry standards are first introduced or altered thereafter, the question of their application to existing practitioners must be raised.[32] In the past, a common response has been to exempt practitioners from the new standards.[33] This sort of provision is commonly known as a "grandfather" clause.[34]

Several respondents to our Discussion Paper put forward the basic rationale for this approach: practitioners will have already learned from their experience the knowledge and skill incorporated into the new entry standards. Therefore, there is no need to reassess their abilities using the new standards.

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[28]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(14). See also P.W. Hogg, *Constitutional Law of Canada* (3rd ed., 1992) 546.

[29]Alberta, *Principles and Policies Governing Professional Legislation in Alberta* (1990) 3.

[30]This innovation was proposed by one of our respondents, Marie Berry.

[31]These practitioners might also wish to operate under an administrative structure which is distinct from that of other licensed practitioners. As we noted in Chapter 3, this is possible in our task-based model of occupational regulation.

[32]This does not appear to be a problem with practice standards; when these are implemented or altered from time to time, it is simply assumed that existing practitioners will have to meet them.

[33]D.A. Dodge, "Occupational Wage Differentials, Occupational Licensing, and Returns to Investment in Education: An Exploratory Analysis" in S. Ostry, ed., *Canadian Higher Education in the Seventies* (1972) 147.

[34]We have adopted the non-gendered term "grandparent" clause.

We see two difficulties with grandparent clauses. The first is that the assumption underlying this traditional rationale may not be accurate. It is possible that existing practitioners have not kept up with advances or changes to the practice of the service they perform. Moreover, if grandparent clauses are adopted, there is little incentive for practitioners to remain current; they will continue to be licensed or certified to perform the service in any event. Assuming that the new standard is in fact necessary to protect the public adequately, the introduction of a grandparent clause means that some practitioners may be practising at lower standards than are necessary to protect the public from harm.

The second difficulty with a grandparent clause is that it encourages practitioners to set (or lobby decision-makers to set) increasingly higher entry standards.[35] As we have noted, higher entry standards tend to reduce the number of practitioners and increase the investment new practitioners must make to obtain a licence or certificate. Higher standards therefore tend to raise the price of the service - a benefit to those who are able to obtain the licence. If they are able to achieve higher standards for the occupation without personally incurring the cost of meeting these standards, practitioners will have every incentive to encourage the use of higher standards, whether or not they are necessary to protect the public.

To a great extent, our recommendations would minimize the disruptions associated with the abolition of grandparent clauses. If practitioners have in fact obtained the skill and knowledge needed to meet the new standards through practice, they would be able to prove this in an assessment which is designed to focus on these qualities. For example, if a new entry standard requires skills and knowledge which can be demonstrated by graduation from a university program, existing practitioners should be allowed to prove that they have acquired in practice the skills and knowledge taught in the university program by means of an alternative assessment program. If possible, this assessment should stress practical ability rather than requiring existing practitioners to demonstrate their skill at test-taking.[36] In addition, fairness demands that existing practitioners ought to be given a reasonable amount of time to meet the new standards.

On this basis, we recommend that practitioners ought to be required to meet new entry standards even if this means that some will fail. To do otherwise would raise the possibility that the public would be placed at risk from the inadequate practice of existing practitioners.

E. BODY RESPONSIBLE FOR SETTING AND ALTERING ENTRY AND PRACTICE STANDARDS

Although legislation creating a certification and licensing regime typically sets out the services to which the regime applies, self-governing bodies have traditionally been granted a high degree of control over entry and practice standards. Our Discussion Paper suggested that a different approach should be taken. Because, like scopes of practice, entry and practice standards are critical to the success of the regime, we proposed that they should be set by the same decision-makers who determine whether or not to implement a particular licensing or certification regime. We suggested that, unless they were able to set entry and practice standards, decision-makers would have no way of knowing the costs and benefits of a regulatory regime when deciding whether or not it should be implemented. Furthermore, they would have no control over a primary factor in maximizing the benefits and minimizing the costs of a licensing or certification regime.

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[35] D.A. Dodge, *supra* n. 33, at 147.

[36] A practical test of a practitioner's abilities might involve a practice audit in which his or her past or current work is examined.

As a departure from the traditional approach, our proposal generated some negative response. Some respondents felt that practitioners should be able to continue to set their own entry and practice standards. The primary reason given for this view was that only practitioners would have the expertise to set these standards appropriately.

This argument places great faith in the ability of practitioners to act in the public interest. In many cases, this faith may be justified. However, it must be recognized that practitioners are not disinterested parties in this process. Entry and practice standards will affect the level of competition for a service and the price for performing the service. The standards set therefore directly affect the well-being of practitioners of the service. Allowing them to set these standards unilaterally would therefore place them in a conflict of interest.

Despite this conflict of interest, if practitioners were the only individuals capable of setting standards, it would be necessary to allow them to do so. In our view, however, this is not the case. We propose later in this Report that the body responsible for setting entry and practice standards should be composed of individuals from diverse backgrounds who will serve for extended periods of time.[37] This will give them an opportunity to become acquainted with a variety of occupational services. In addition, whatever expertise decision-makers lack can be provided by advice from individuals who have particular information and knowledge about the particular occupational service.[38]

We therefore believe that the same decision-makers who are to determine whether or not a licensing or certification regime should be implemented should also set entry and practice standards for the regime. However, in performing this function, we believe that they should be required, when practicable, to take into account the views and proposals put forward by practitioners. Because of their practical experience in providing the service, practitioners will be able to provide valuable information and advice to decision-makers. In addition, a failure to include practitioners in this process would likely leave them with a minimal commitment to ensuring the successful application of entry and practice standards. As a result, these standards (especially practice standards) would be difficult to enforce.

However, we are also of the view that input should not be restricted to practitioners. All parties with an interest in this issue should be encouraged to participate in the decision-making process. For example, decision-makers should be prepared to hear from members or representatives of the public, consumer groups, practitioners of related services, educational institutions and others. After considering the views of a diversity of interests, decision-makers will be better equipped to set entry and practice standards in the public interest.

F. PERIODIC REVIEWS OF ENTRY AND PRACTICE STANDARDS

It will often be difficult for decision-makers to assess in advance the effect entry and practice standards will have on the quality of a task or service and the costs of that service to the public; they will often be required to make an informed guess as to the best course of action. However, while still difficult to measure, the costs and benefits of a regime can be better assessed in hindsight. Moreover, like scopes of practice, entry and practice standards will have to be modified over time to respond to changes in technology and knowledge. We therefore recommend that the same decision-makers who set the standards initially ought to review the operation of a regulatory regime regularly to see if adjustments are required in the entry and practice standards initially imposed.

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[37]See Chapter 9.

[38]This is the approach adopted by the legal system, which allows judges to make decisions about a variety of difficult issues with the assistance of independent experts.

G. CONCLUSION

Based on the discussion in this Chapter, we make the following recommendations:

RECOMMENDATION 19

Entry and practice standards should be designed to address the underlying causes of improper performance of the occupational service.

RECOMMENDATION 20

Entry and practice standards should be aimed at addressing all causes of improper performance.

RECOMMENDATION 21

Entry and practice standards should not contain superfluous requirements which are irrelevant to the proper performance of the service.

RECOMMENDATION 22

Testing should focus on the qualities needed to practise competently; practical tests should be instituted whenever possible.

RECOMMENDATION 23

Setting and administering entry and practice standards should not be delegated to educational institutions unless the contents of the curriculum and the standards adopted by the institution correspond closely to those required for competent practice. When these functions are delegated to educational institutions, alternative methods of entry should be provided to allow applicants who have not attended these institutions to demonstrate their competence and be permitted entry. Furthermore, when educational institutions fail to address all of the qualities required for proper practice, additional requirements should be imposed on graduates from the educational institutions.

RECOMMENDATION 24

Administrators of occupational regimes should develop and implement a program to ensure that practitioners remain capable of meeting entry standards after their entry into a regime.

RECOMMENDATION 25

Anti-competitive elements in practice standards should be discouraged and should not be permitted unless they are demonstrably necessary for the protection of the public.

RECOMMENDATION 26

Entry and practice standards should be set neither too high nor too low, but at the level necessary to protect the public adequately from the identified harm which may flow from the improper provision of the task or service.

RECOMMENDATION 27

Although entry and practice standards may be slightly adjusted to take advantage of the benefits of national standards, the primary goal when setting entry and practice standards should be adequate public protection at the least cost for consumers and the public. Therefore, adherence to national standards ought to be secondary to the principles set out in this Report. Where national standards exceed the standards required for adequate public protection, certification within a licensing regime might be considered.

RECOMMENDATION 28

"Grandparent" clauses should not be permitted; when entry standards are raised, existing practitioners should be required to meet them within a reasonable period of time.

RECOMMENDATION 29

Because the development of entry and practice standards is integral to the costs and benefits of regulatory regimes, a governmental body ought to retain for itself the task of setting entry and practice standards. In doing so, this body should be required to consult with practitioners and other experts, as well as with members of the public.

RECOMMENDATION 30

Entry and practice standards should be reviewed on a regular basis by the same governmental body which established them.

CHAPTER 5

ADMINISTRATION OF THE REGIME

A. GOVERNMENT ADMINISTRATION AND PRACTITIONER ADMINISTRATION

In general, when government decides to introduce regulations to control a particular activity, it administers them itself. Frequently, a government department is assigned this task, in which case departmental employees administer the regulations directly. Government can also administer a regulatory regime indirectly by using a body it appoints but which acts at arm's length from government.

Some certification and licensing regimes are administered by government. For example, power engineers are regulated under a licensing regime administered by the Department of Labour.[1] The Securities Commission is an example of an agency which operates at arm's length from government; it regulates persons who trade in securities (for example, stock brokers).[2] The structure which governs the activities of hairdressers and barbers falls somewhere between direct and indirect government regulation. Although these practitioners receive their licences from the provincial Minister of Labour, they must first pass an examination set by an examining board composed of individuals appointed by the provincial Cabinet.[3]

Self-governing occupational groups (practitioner administration) are an exception to the general rule of administration of regulation by government. The classic model of self-government represents a delegation by the Legislature of administrative authority to an organization whose officers and directors are elected by practitioners rather than being appointed by government. This organization is given the power to apply the entry and practice standards of a regime and to prosecute non-practitioners who infringe on the regime's scope of practice or who use the title reserved for practitioners.

Although the administration of a regime by a practitioner organization differs from the more usual method of administering regulation, both are based on the goal of serving the public interest. Just as government is expected to exercise its administrative powers in the interest of the public, so administrative powers wielded by practitioners should be exercised only in the public interest. Furthermore, those powers should be delegated to practitioners only when it is in the public interest to do so. On the basis of this logic, we suggested in our Discussion Paper that, despite the desire for self-government by many occupational groups, a decision to grant self-government should not be based on the interests of practitioners but on the interests of the public. As the Ontario Royal Commission into Civil Rights (the McRuer Report) stated in 1968:

> The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status. The relevant question is not, "do

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[1] *The Power Engineers Act*, C.C.S.M. c. P95.

[2] *The Securities Act*, C.C.S.M. c. S50.

[3] *The Hairdressers Act*, C.C.S.M. c. H10 and *The Barbers Act*, C.C.S.M. c. B10.

> the practitioners of this occupation desire the power of self-government?", but "is self-government necessary for the protection of the public?" No right of self-government should be claimed merely because the term "profession" has been attached to the occupation. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it.[4]

Leading Canadian academics in this field have concurred, arguing that ". . . the state must delegate authority to professional groups only in response to the need to reduce the costs of information, error and enforcement in the regulatory process, and not in response to the power and persuasiveness of organized interests."[5] This position was supported by all those respondents to our Discussion Paper who addressed this issue.

We therefore recommend that self-government should not be granted unless it is in the interests of the public to do so; the interests of practitioners in obtaining self-government should be disregarded. On this basis, we also recommend the following principles for use by decision-makers in determining which form of administration of a certification or licensing regime should be used.

1. A DECISION ON WHETHER OR NOT TO IMPLEMENT A LICENSING OR CERTIFICATION REGIME OUGHT TO PRECEDE A DECISION AS TO THE ADMINISTRATION OF THE REGULATORY REGIME

One of the key elements of the approach put forward in the Discussion Paper was the conceptual distinction drawn between a regulatory regime (licensing, certification or another form of regulation) and its administration (self-government or administration by government). For the most part, reports, policies and legislation in other jurisdictions seem to have assumed that a decision to implement a certification or licensing regime meant that the regime would be self-governing. As we have shown, this is incorrect; administration of licensing and certification regimes by self-governing bodies is neither a logical nor a practical necessity. Indeed, numerous licensing and certification regimes are currently administered by government departments or agencies.

Having drawn the distinction between the form of regulation and the method by which it will be administered, our Discussion Paper adopted the position that a decision on the former should precede a decision on the latter. In our view, it is illogical to settle on a form of administration, such as self-government, prior to determining what, if anything, needs to be administered. We have recommended that the criteria for a decision to introduce licensing or certification should be the seriousness of the threat of harm to the public and the ability of the regime to reduce that threat. It follows that a licensing or certification regime should not be implemented simply because an occupational group is able to administer it. Only after licensing or certification is deemed to be necessary to protect the public from harm should a decision concerning administration be made.[6]

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[4]Ontario (J.C. McRuer), *Royal Commission Inquiry into Civil Rights* (Report No. 1, vol. 3, 1968) 1162. See also C.J. Tuohy and A.D. Wolfson, "The Political Economy of Professionalism: A Perspective" in Consumer Research Council Canada, *Four Aspects of Professionalism* (1977) 41 at 85.

[5]Tuohy and Wolfson, *id.*, at 85.

[6]This should not be taken to mean that the costs of administration should be ignored when decision-makers consider the costs and benefits of a particular regime. In fact, we have recommended that these costs should be taken into account when deciding whether or not a regime should be implemented. However, although administrative costs should be considered, we doubt that the costs of government administration will frequently justify a refusal to implement a licensing regime. If the threat of harm to the public is serious enough that no other form of regulation will address it adequately, licensing will almost always be justified, despite the costs of its administration. Certification may be more likely to be denied when government administration is required. This is particularly likely where the threat of harm to the public is less serious or where the ability of certification to address the harm is in doubt. In these circumstances, the costs of administration may well justify a refusal to implement a certification regime.

2. SELF-GOVERNMENT WILL SERVE THE PUBLIC INTEREST WHEN ITS ADVANTAGES OUTWEIGH ITS DISADVANTAGES AND WHEN ITS INHERENT DANGERS ARE ADDRESSED BY ADEQUATE SAFEGUARDS

Respondents to our Discussion Paper revealed widely divergent attitudes to the question of self-government. Many were critical of self-governing bodies; some suggested that self-government ought to be granted only rarely. Others took the position that self-government was always in the public interest and should be implemented whenever licensing or certification is introduced.

We acknowledge a number of advantages to self-government. The first is that it can be much less costly for taxpayers.

> In theory, the state could always choose to regulate professional services directly. But it would have to hire experts to assist it in the task. . . . The costs of replicating within government knowledge that exists within professions are not negligible. It is less costly to place the responsibility for regulation in the hands of the professions themselves.[7]

In a self-governing situation, practitioners often volunteer their time and effort to operate the regime. Expenses, including the cost of salaried employees, are usually borne by member practitioners through the payment of annual dues or fees. Although the costs of operating a regime are likely to be passed on to the consumers of the occupational service through higher fees, it can be argued that such a system is fairer than requiring taxpayers, some of whom may never use the service, to pay for the protection of those who do.

It can also be argued that self-government makes for a more efficient administration of the regime. The practitioners elected as members of the governing council are, by virtue of their training and experience, familiar with the service. Administration by knowledgeable individuals will reduce the likelihood that errors in regulating the service will be made.[8] When ill-considered regulations could result in significant harm, this factor takes on considerable importance. In addition, since practitioner-administrators often maintain their practices while serving on the governing council, they also remain in touch with the realities of everyday practice. This prevents the creation of regulations which are distant from the lives of practitioners and seem absurd to those they affect. As a result, it can be argued, self-government is more likely to result in compliance from practitioners than would a regime administered by the government.[9]

Compliance may also be more likely if self-government results in a sense of community among practitioners which strengthens a commitment to high standards of competence and ethical conduct. A fear of the disapproval of colleagues can be a greater motivating factor than a fear of penalties and sanctions.[10]

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[7]Ontario, Professional Organizations Committee (H.A. Leal), *The Report of the Professional Organizations Committee* (1980) 10.

[8]M.J. Trebilcock, "Regulating Service Quality in Professional Markets" in D.N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (1983) 83 at 101-102; M.J. Trebilcock, R.S. Prichard, D.G. Hartle and D.N. Dewees, *The Choice of Governing Instrument* (1982) 91; A.D. Wolfson, M.J. Trebilcock and C.J. Tuohy, "Regulating the Professions: A Theoretical Framework" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 180 at 211.

[9]Trebilcock, "Regulating Service Quality in Professional Markets", *supra* n. 8, at 102.

[10]Trebilcock, Prichard, Hartle and Dewees, *supra* n. 8, at 92; A.K. Daniels, "How Free Should Professions Be?" in E. Friedson, ed., *The Professions and Their Prospects* (1973) 43-44; C.J. Tuohy and A.D. Wolfson, "Self-Regulation: Who Qualifies?" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 111 at 116.

Finally, some writers have contended that self-government is important for occupational services which require that a consumer place great trust in a practitioner: "It may be that individual clients and the public at large are more likely to have confidence in the activities of practitioners when the State has indicated its confidence in the profession as a whole."[11]

However, there are also reasons why administration of a regime by practitioners might not be preferable to administration by government. The director of a 1978 Manitoba government study of the professions noted that ". . . there may, from time to time, be situations in which the self-serving interests of a particular profession may not coincide with the public interest."[12] These conflicts of interest result from the fact that practitioner-administrators, although elected by their fellow practitioners, have a duty to act in the interests of the public. It is argued that they ". . . cannot serve both their members and the best interests of the public; in essence, self-regulation puts . . . [self-governing bodies] in a conflict of interest position."[13] In addition, practitioner-administrators will often have ". . . a direct economic interest in many of the decisions they make concerning admission requirements and the definition of standards to be observed by licensees."[14]

The conflict of interest in which practitioner-administrators find themselves is not a reflection on the integrity of those individuals; it is inherent in the structure of self-government. As one author has noted:

> This is not an indictment of the honesty or good intentions of all board members. However, they are members of the profession they govern, and they cannot help but be influenced, if only subconsciously, by the fact that their actions will affect their own and their colleagues' well-being.[15]

Ironically, a conflict of interest can also be caused by the commitment of practitioners to an occupational community, described earlier as an advantage of self-government. Although an allegiance to a practitioner community can result in compliance with community norms, close ties between practitioners can also result in an inappropriate unwillingness to report or act upon the incompetent or unethical behaviour of colleagues and may even cause practitioners to cover up for one another. A sense of community might also cause practitioner-administrators to overlook or deal lightly with offences and minimize publicity about unethical or incompetent behaviour in an effort to protect the image of the occupational community.[16]

Even when practitioner-administrators attempt to put aside their own interests and the interests of their colleagues when making administrative decisions, they may still inadvertently act in ways which are detrimental to the public.

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[11]Trebilcock, Prichard, Hartle and Dewees, *supra* n. 8, at 92. See also Trebilcock, "Regulating Service Quality in Professional Markets", *supra* n. 8, at 102.

[12]S.M. Cherniack, "Governing professional bodies", *Winnipeg Free Press*, May 4, 1979, 6.

[13]J. Brockman and C. McEwen, "Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away?" (1990), 5 Can. J. Law and Soc. 1 at 3. See also New South Wales Law Reform Commission, *The Legal Profession: General Regulation* (Discussion Paper #1, 1979) 122; C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation* (Bureau of Economics, Federal Trade Commission, Staff Study, 1990) 36-37; Ontario (J.C. McRuer), *supra* n. 4, at 1166.

[14]W. Gellhorn, *Individual Freedom and Governmental Constraints* (1956) 140.

[15]J.F. Barron, "Business and Professional Licensing - California, A Representative Example" (1966), 18 Stan. L. Rev. 640 at 650.

[16]Daniels, *supra* n. 10, at 54; R.E. Olley, "The Future of Self-Regulation: A Consumer Economist's Viewpoint" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 77 at 82. See E. Rayack, "Medical Licensure: Social Costs and Social Benefits" (1983), 7 Law and Human Behavior 147 at 154-155; S.D. Young, *The Rule of Experts: Occupational Licensing in America* (1987) 41-46.

> It is often the case that a person does not so much prefer his own interests in a conflict, as fail even to see the conflict. It is easy to be oblivious of the interests of others, particularly if one has never been in their position.[17]

Québec's Commission of Inquiry on Health and Social Welfare recognized this problem when it noted that practitioners who are appointed by government to administer regulatory regimes (and are not therefore elected by practitioners) ". . . nonetheless pursue objectives which, one may note, favor the professions over the public interest." The Commission concluded that, ". . . more than a question of structures, it is a question of tradition and mentality which is involved and must be changed."[18]

One example of this problem is the tendency, sometimes noted, of self-governing bodies to impose increasingly higher standards for entry into a licensing or certification regime.[19] This may not be driven by a desire to reduce competition but rather by the perceived need to raise the level of service offered by practitioners. Practitioner-administrators may be oblivious to the effect these actions can have on consumers who find themselves unable to afford the service or who have difficulty finding an accessible practitioner. Nevertheless, whether a result of selfish or pure motives, the effect of these actions will be the same.[20]

Besides any actual conflicts of interest which might arise, practitioner-administrators must also deal with public skepticism about their function. Even administrators who recognize conflicts of interest and are scrupulous in resolving them in favour of the public face the perception that self-government is being used to protect practitioners and to further their financial interests.

> [T]here is a prevalent attitude of suspicion, a notion that, whatever the professionals, among themselves, may be up to, it is probably not in the general public's interest. Expressions such as "conspiracy of silence" with reference to the professional associations' powers of self-discipline, enjoy considerable popular currency.[21]

The Manitoba President of the Consumers Association of Canada said in 1990: "[T]he public is skeptical about the ability of professionals to protect the public interest." She further stated: "The image of licensing bodies . . . has been tarnished by public suspicion that professionals cover up their mistakes behind closed doors. . . ."[22]

Despite these disadvantages of self-government, we believe that, in some cases, it can serve as a cost-effective and beneficial form of administration. However, in our view, the advantages of self-government will exceed its disadvantages only where practitioners demonstrate the qualities necessary to sustain self-government and where adequate safeguards against self-interest on the part of practitioners are implemented.

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[17]New South Wales Law Reform Commission, *supra* n. 13, at 137.

[18]Québec, Commission of Inquiry on Health and Social Welfare (G. Nepveu) *Report: The Professions and Society* (Part 5, Vol. VII, Tome I, 1970) 43.

[19]Barron, *supra* n. 15, at 650; D.A. Dodge, "Occupational Wage Differentials, Occupational Licensing, and Returns to Investment in Education: An Exploratory Analysis" in S. Ostry, ed., *Canadian Higher Education in the Seventies* (1972) 135 at 155-157.

[20]Tuohy and Wolfson, *supra* n. 4, at 64-65, 77; Tuohy and Wolfson, *supra* n. 10, at 116.

[21]Cherniack, *supra* n. 12.

[22]A. Paul, "Disgruntled clients urge lawyer accountability", *Winnipeg Free Press*, January 28, 1990, 1 at 4. Sylvia Ostry has referred to the ". . . cynicism that often surrounds the activities of professional groups": S. Ostry, "Competition Policy and the Self-Regulating Professions" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (1978) 17 at 22. In the United Kingdom, the Royal Commission on Legal Services (H. Benson), *Final Report* (1979) noted at 355: "The public . . . does not always have complete confidence in . . . [self-governing] bodies if they are open to the allegation that they protect their colleagues."

The qualities necessary to sustain self-government will be dealt with in this Chapter. The safeguards against self-interest on the part of practitioners will be discussed in Chapter 6.

B. QUALITIES NEEDED FOR PRACTITIONER ADMINISTRATION

In our view, the qualities needed to sustain self-government include adequate financial and human resources, a democratic structure and a genuine and demonstrated willingness on the part of practitioners to act in the public interest. Our Discussion Paper extracted these three qualities from legislation in Alberta and put them forward for public consideration. They were unanimously endorsed by the respondents who addressed the issue.

It is clear that self-government will require a significant expenditure of financial and human resources if it is to be sustained. The self-governing body will require a critical mass of practitioners to fill its administrative positions while allowing for a regular turnover. In addition, practitioners must be willing to devote financial resources to the organization and, unless the organization is able to pay salaries or honoraria to its officers, must also be prepared to volunteer their time and effort without financial reward.

However, in circumstances where self-government is impossible due to the small number or limited resources of practitioners who perform a regulated service, it may still be possible to grant them a form of self-government. We suggested in Chapter 3 that two or more groups could band together to administer several regimes jointly. Joint administration with other practitioners should be considered when practitioner groups meet our other criteria but lack the resources to administer their regimes separately.

A successful self-governing administration also requires that practitioners have a commitment to democratic principles. Democratic principles, in this context, require that representatives of practitioners must be fairly elected and that the rights of practitioner minorities must be respected. This will require, in most cases, regional representation and may also require representation based on the types of practice in which practitioners are engaged. Fair representation will be particularly important but especially difficult when several regimes are governed by a single administrative body.[23] In addition, since self-governing bodies will be responsible for evaluating applicants for entry and for disciplining existing members, it is important that practitioners be able to apply the principles of fundamental justice.[24]

A final (and undoubtedly the most important) quality which practitioners seeking self-government should be required to demonstrate is the ability and willingness to act in the interests of the public rather than in their own interests. We have noted that one of the inherent disadvantages of self-government is the fact that it places practitioner-administrators in a conflict of interest. To some extent, the temptation to act in the interests of practitioners rather than in the public interest can be checked by appropriate safeguards.[25] However, the safeguards we recommend can be circumvented by practitioners who are not committed to acting on behalf of the public. For this reason, as one respondent noted, practitioners must understand that ". . . all meaningful powers of self-government are, effectively, delegated state powers" and must be exercised in the public interest and not for the benefit of practitioners.[26]

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[23]This potential arrangement was discussed in Chapter 3.

[24]The question of discipline will be more fully discussed in Chapter 7.

[25]These will be discussed in Chapter 6.

[26]W. Wesley Pue.

In this context, many respondents noted the obvious conflict of interest represented by a practitioner organization operating both as a self-governing body (with a responsibility to act in the public interest) and as an association or trade union dedicated to promoting the best interests of practitioners. This dual role was criticized by almost all respondents who referred to it.[27] We agree that this sort of conflict of interest should be avoided and we recommend that any group which proposes to assume both roles should be prohibited from acting as a self-governing body.

However, a willingness to separate these functions may not in itself demonstrate a sufficient ability to transcend self-interest. As one respondent noted, occupational organizations which are granted self-governing powers are often those whose primary prior activity has been to lobby government for regulation.[28] We agree that, when an organization has devoted itself primarily to activities designed to advance the interests of practitioners, its ability to put aside the interests of its members to act in the public interest must be questioned. Nevertheless, the fact that a group of practitioners has advanced an application for self-governing powers should not, in itself, disqualify it from obtaining self-government.

Traditionally, several additional factors have influenced legislators when deciding whether or not to extend powers of self-government. These include the existence of a standardized body of knowledge (usually contained in a university curriculum), the affiliation of the local group of practitioners with national or international bodies and the presence of a code of ethics to which practitioners are bound. Our approach would largely dismiss these factors as irrelevant to the issue of self-government.

The justification for restricting self-government to practitioners who use a standardized body of knowledge as the basis for practice is that only the practitioners who have mastered this body of knowledge can assess the competence of applicants for entry and the behaviour of existing practitioners. However, as we have pointed out, this justification does not withstand close scrutiny; governments use experts to assist them in assessing the competence of applicants or practitioners in a variety of occupational regimes and can do so when an understanding of a standardized body of knowledge is required. We therefore recommend that the existence of a standardized body of knowledge should not be a prerequisite when determining whether or not powers of administration should be delegated to practitioners.

Affiliations with national and international groups and the adoption of national standards may be a means of demonstrating the stability and commitment of an occupational group and, to that extent, could be taken into account when decisions concerning self-government are made. However, the fact that an occupational group has adopted national or international standards of competence and conduct may not be particularly relevant. We have recommended that, while conformity to national standards is often advantageous, this advantage should not be pursued to the point where standards fail to ensure the adequate protection of the public or add unnecessary costs to the regime. In this case, if they are to act in the public interest, practitioners must set aside their commitment to national standards and apply those which have been set for Manitoba.

Typically, a code of ethics serves as a set of practice standards for members of an occupational group. Depending on their content and the extent to which they have been enforced by the voluntary association, codes of ethics may demonstrate the ability of an occupational group to act in the public interest rather than in the interest of practitioners. However, given our recommendation that a governmental body retain for itself the ultimate decision concerning appropriate practice standards, the fact that a group has an established code of ethics is far from conclusive in the decision to grant it self-government.

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[27]The only response to our Discussion Paper which defended a dual purpose organization was submitted by the Manitoba Dental Association, a body which functions in these dual roles.

[28]E. McGill, Superintendent of Insurance (Manitoba).

C. GOVERNMENT ADMINISTRATION

When self-government is inappropriate as an option for the administration of a licensing or certification regime, decision-makers have no choice but to institute some form of government administration.[29] In this case, decision-makers should choose the most appropriate form of government administration for the particular task or service in question. There are several ways in which this could be done.

Direct administration Government could assign to departmental staff the task of evaluating applicants and ensuring that practitioners meet practice standards. As we have noted, this approach is currently used by the Departments of Labour and Education for some occupations.[30]

Indirect administration A variety of forms of indirect administration by government is possible, granting government a great deal of flexibility in designing an administrative structure which fits with the service or services and the regime being administered. For example, in the case of occupational services which fall under the *The Apprenticeship and Trades Qualifications Act*, a nine member board involving representatives of employees, employers, the Departments of Labour and Education and two other individuals acts as an appeal body and also advises the Minister as to appropriate entry and practice standards.[31] The Board does not necessarily include practitioners of the services being administered. By contrast, Alberta's Health Discipline Committees are composed exclusively of ministerial appointees but a majority must be practitioners of the discipline being regulated.[32]

We are prepared to suggest one model of indirect government administration for consideration by decision-makers. It would involve the government appointing individuals (including practitioners) to a council which would operate much like a self-governing body. The structure of this government-appointed body would, at least in disciplinary matters, duplicate the structure of self-governing bodies. This would have the advantage of facilitating the laying of complaints by members of the public because the structure would be familiar to them. In addition, it would make transition to self-government easier, should that option ever be appropriate.

However, in such a situation, the number of practitioners compared to non-practitioners might well be significantly lower than in a self-governing body and might constitute a minority. This is to be expected, for example, in cases where self-government has not been granted due to doubts about the ability of practitioners as a whole to act in the public interest or because the number of practitioners is too small to sustain self-government. Non-practitioners on the self-governing body should represent those segments of society affected or interested in the performance of the particular task or service; particular care should be taken to ensure representation of consumers.

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[29]This assumes that the costs of government administration are not so onerous as to exceed the benefits of the regime and thereby justify a decision to refuse its introduction.

[30]The Department of Labour is responsible for setting and conducting entry assessments of power engineers: *The Power Engineers Act*, C.C.S.M. c. P95, s. 7(5). A person designated by the Minister of Education and Training acts as Director for the administration of *The Apprenticeship and Trades Qualifications Act*, C.C.S.M. c. A110; he or she is responsible for applying entry standards to applicants for certification in a variety of trades: ss. 2(2) and 9.

[31]*The Apprenticeship and Trades Qualifications Act*, C.C.S.M. c. A110, ss. 3-5.

[32]*Health Disciplines Act*, R.S.A. 1980, c. H-3.5, s. 5.

We recommend that, when self-government is inappropriate, decision-makers should select the form of government administration which is most suitable for the task or service being regulated. We also recommend that, when government administration is required, the possibility of imposing fees on practitioners in order to defray the costs of administration should be considered.

D. CONCLUSION

Based on the foregoing, we make the following recommendations:

RECOMMENDATION 31

The power to administer a licensing or certification regime should only be delegated to practitioners when it is in the public interest to do so and not merely because practitioners desire this power.

RECOMMENDATION 32

A decision on whether there is a need to regulate a service by licensing or certification should precede a decision on whether to grant self-government; the question of self-government should be considered only after it is decided that a licensing or certification regime is needed to protect the public from harm.

RECOMMENDATION 33

The power of self-government should only be granted when its advantages outweigh its disadvantages. This will only be the case when practitioners demonstrate the qualities needed to sustain self-government in the public interest and when adequate safeguards have been adopted to protect the public interest.

RECOMMENDATION 34

The qualities needed to sustain self-government in the public interest are adequate human and financial resources, a democratic structure and a genuine and demonstrated willingness to act in the public interest.

RECOMMENDATION 35

Self-government should not be granted to bodies which intend also to act as an association or trade union dedicated to promoting the interests of its members.

RECOMMENDATION 36

In granting self-government, the existence of a standardized body of knowledge, affiliations with national or international bodies and a code of ethics should be disregarded as irrelevant except to the extent that they provide evidence of the qualities necessary to sustain self-government in the public interest.

RECOMMENDATION 37

Joint administration of several regimes should be considered where occupational groups lack the human or financial resources to administer occupational regimes separately.

RECOMMENDATION 38

When administration by practitioners is inappropriate, the regime should be administered by government unless the costs of this form of administration outweigh the benefits of establishing the regime (in which case the regime ought not to be established). Government administration may take the form of direct administration by a government department or the form of indirect administration.

RECOMMENDATION 39

When direct or indirect government administration is required, the possibility of imposing fees on practitioners to defray the costs of administration should be considered.

As we indicated earlier, the advantages of self-government will exceed its disadvantages only where practitioners demonstrate the qualities necessary to sustain self-government and where adequate safeguards against self-interest on the part of practitioners are implemented. We now turn to a discussion of these safeguards.

CHAPTER 6

SAFEGUARDS FOR SELF-GOVERNING BODIES

We recommended in Chapter 5 that the power to administer a licensing or certification regime should not be granted to practitioners unless they could demonstrate the qualities which we believe are necessary to sustain self-government in the public interest. We also recommended that self-governing powers should not be granted unless safeguards are established to ensure that these powers are exercised in the public interest. This Chapter will focus on these safeguards.

The safeguards which we recommend fall into two categories: first, accountability and openness in the administration of self-government and, second, public representation on self-governing bodies.

A. ACCOUNTABILITY AND OPENNESS

Self-government is a delegation of administrative powers by the people of Manitoba through their provincial government to a practitioner organization. One of the basic principles of a democracy is that those who hold delegated powers must be held accountable for their exercise. It follows, then, that self-governing bodies must be held accountable for their use of the powers granted to them.[1]

Besides the theoretical need to hold self-governing bodies accountable, however, there are practical reasons for doing so. As we have noted, practitioners administering a regulatory regime find themselves in a conflict of interest; elected by their fellow practitioners, they nonetheless are to exercise their powers solely in the interests of the public. Even when their intentions are good, the consequences of the decisions of self-governing bodies may be detrimental to the public. Accountability will help to ensure that the public interest is served in their actions and improve public confidence that this is so.

The most common lines of accountability run from the body to which powers have been delegated to the body delegating these powers: in this case, from the self-governing body to the provincial government. We believe that government must accept a role in holding self-governing bodies accountable and we suggest later in this Chapter a means by which it can do so. However, we also believe that, whenever possible, self-governing bodies should be directly accountable to those who are affected by their decisions. This means that, within reasonable limits, the operation of self-governing bodies should be open and accessible to members of the public.

Openness on the part of self-governing bodies also has the effect of making available information which can be used by the public in choosing a particular service or practitioner. In light of the fact that consumers often lack sufficient information or training to make well-

[1]This principle was emphasized by a sizeable number of respondents to our Discussion Paper.

considered choices, we see this as an additional benefit of adopting a policy in which the goal of self-governing bodies should be to act as openly as possible.

With these principles in mind, we make the following specific recommendations.

1. Annual Reports

We suggested in our Discussion Paper that annual reports should be made mandatory for all self-governing bodies in order to provide information needed to assess the functioning of the self-governing occupational group. Our proposal received general support from respondents. We therefore recommend that every self-governing body be required to report annually to government on its activities.

We also believe that annual reports ought to be made available to the public. This will assist in holding self-governing bodies accountable and will also give the public information concerning the service, the regulatory form governing it and the practitioners who provide the service. Self-governing bodies should make their annual reports available for perusal at their offices and should be prepared to distribute copies upon request free of charge or at a modest price. Copies filed with the provincial government should also be made available to the public.

In order to make annual reports an effective tool of accountability, we recommend that they contain as much information as possible in order to allow government and the public to assess the performance of the self-governing body and to provide information valuable to consumers; we suggest that annual reports should include at least the following information:

a) an up-to-date description of the structure of the self-governing body, including the names of all permanent or *ad hoc* committees and the functions of each;

b) the names of all individuals (practitioners and public representatives) serving on the central body and its committees during the past year;

c) a copy of all by-laws, rules and regulations enacted in the past year;

d) a description of the assessment process used for applicants for entry during the past year, including the specific skills assessed and the method of assessment of each;

e) the number of applications for entry received in the past year and their disposition;[2]

f) the number of complaints against practitioners filed in the past year and their disposition;

g) the names of practitioners disciplined in the past year, the reasons for the discipline and the sanctions imposed;[3]

h) the methods and mechanisms used to provide for the continuing competence of practitioners and their results during the past year.

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[2]For example, of 100 applications, 75 may have been admitted without restrictions, 10 rejected and 15 allowed to practise under restrictions or conditions.

[3]The dissemination of this information is more fully discussed later in this Chapter.

2. Access to Rules, Regulations and By-laws

The rules, regulations and by-laws of a self-governing body represent the methodology by which it carries out the mandate delegated to it by government. Accordingly, both the public and government should have access to a complete set of these rules. Any additions, deletions or modifications to the body's rules, regulations and by-laws should also be made available as soon as they are enacted. Of course, as we have already recommended, rules, regulations and by-laws enacted in the past year should appear in the self-governing body's annual report.

3. Access to the Register of Members

A register of members will reveal the names of all practitioners who are currently licensed or certified to provide a regulated service. It should also include information concerning current suspensions, conditions on practice or probationary terms under which a practitioner is allowed to practise. We believe that this information will help to protect the public from individuals who are practising without a current licence or who are falsely claiming to be certified. It will also increase the likelihood that these individuals will be detected and deterred. Such information should be freely available to the public and to government.

The purpose of access to this information is, of course, to advance the public interest. We recognize, however, the possibility that this information may be sought for commercial purposes. For example, the list of members could be exploited by individuals seeking to compile a commercial mailing list. Therefore, although we recommend that the public should be granted access to the self-governing body's register of members upon request, we are also of the view that self-governing bodies ought to be permitted to take reasonable steps to protect this information from any commercial exploitation which is inconsistent with public protection.

4. Open Disciplinary Hearings

Perhaps no complaint about self-governing bodies is more often heard than the allegation that practitioner-administrators fail to take seriously complaints about practitioners and act to "protect their own" in disciplinary hearings.[4] To some extent, this criticism is fostered by the fact that many disciplinary hearings are closed to the public.[5]

It may be argued that closed disciplinary hearings are needed to protect practitioners accused of incompetent or unethical conduct; these practitioners should be presumed innocent until convicted and should not face a loss of reputation merely because they have been accused. However, it should be noted that concern for an individual's reputation in criminal or civil law does not justify closing a trial to the public nor does it justify a ban on publication of the trial. Indeed, the principle that justice must be seen to be done is basic to our justice system. Moreover, we will recommend in Chapter 7 that an investigation of any allegations made should precede a hearing on the allegations. This will reduce the likelihood that a blameless practitioner will have his or her reputation damaged due to unfounded allegations.

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[4]A.D. Wolfson, M.J. Trebilcock and C.J. Tuohy, "Regulating the Professions: A Theoretical Framework" in S. Rottenberg, ed., *Occupational Licensure and Regulation* (1980) 180 at 203; A. Paul, "Complainant just another witness", *Winnipeg Free Press*, January 21, 1990, 1 and 4; A. Paul, "Disgruntled clients urge lawyer accountability", *Winnipeg Free Press*, January 28, 1990, 1 and 4; S. Cherniack, "Governing professional bodies", *Winnipeg Free Press*, May 4, 1979, 6.

[5]In our sample of regulated occupations in Manitoba, just over 50% had provisions in their legislation permitting hearings which were closed to the public.

We have not found any compelling justification for a general rule which would exclude the public from disciplinary hearings, especially if an investigation has determined that sufficient evidence exists to have the matter heard. On the contrary, we believe that open hearings will serve to raise the level of public confidence in self-governing bodies. Furthermore, we note that open hearings are generally required in the reforms undertaken in Québec, Ontario and Alberta.[6] Accordingly, we recommend that, in general, disciplinary hearings should be open to the public.

Nonetheless, we recognize that, in some limited circumstances, there may be reasons compatible with the public interest for closing the hearing to the public. We agree with the position taken in Ontario's *Health Professions Procedural Code*[7] that there should be a discretion (to be exercised with great care) to restrict public access where a matter of public security is involved, where civil or criminal litigation would be prejudiced, where the safety of an individual might be jeopardized or in other circumstances where the need to keep private the personal and financial matters of a complainant or third party outweigh the public interest in an open hearing. In cases where the complainant or third parties could be harmed or embarrassed by an open hearing, they should be granted the opportunity to express their views on the issue. We repeat, however, that a discretion to close a hearing to the public should not be used simply as a tool to shield the reputations of practitioners. If it is used for this purpose, the supervisory body (whose establishment we recommend in Chapter 9) should take appropriate actions to address the situation.

5. Access to Information Concerning Past Disciplinary Sanctions Imposed on Practitioners

We have proposed that self-governing bodies include information about the discipline of practitioners in their annual reports (to which the public will have access). We have also recommended that the public be offered information as to the current practising status of practitioners through access to the register of a self-governing body; this will include information about current suspensions, restrictions or conditions affecting the individual's practice. Finally, we have recommended that the public be granted a general right to attend disciplinary hearings; this includes the right to hear verdicts and the imposition of sanctions which occur at the time of the hearing.

An argument can be made that the public should be granted additional access to the whole of a practitioner's disciplinary record, not simply disciplinary measures which are currently in force. This information would be of assistance in assessing the performance of self-governing bodies in the disciplinary decisions. It would also be valuable to members of the public when choosing a practitioner.

There are, however, arguments against releasing this information. A practitioner who is not currently suspended or restricted in his or her practice has presumably been found by the self-governing body to be able to practise without endangering the public. This conclusion will have been reached after a fair hearing by individuals who are knowledgeable about the service being provided and the practitioner's conduct. Such a conclusion is likely to be more accurate than that of a member of the general public for whom a disciplinary record can be misleading. Charges which may appear serious may not in fact reveal serious or dangerous actions by a

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[6] *Professional Code*, R.S.Q. c. C-26, s. 142; *Health Disciplines Act*, R.S.A. 1980, c. H-3.5, s. 16(3); *Health Professions Procedural Code* (being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18), s. 45(1). However, under Alberta's *Professional and Occupational Associations Registration Act*, S.A. 1985, c. P-18.5, s. 27, all proceedings before the Discipline Committee and the governing body with respect to complaints may be held in camera.

[7] *Health Professions Procedural Code* (being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18) s. 45(2).

practitioner. Moreover, the presence or lack of a disciplinary record may not accurately reflect a practitioner's ability or ethics; disciplined practitioners may have learned from their mistakes while other practitioners' improper conduct may not have been detected. Finally, it can be argued that releasing a practitioner's disciplinary record subjects him or her to an additional, unfair and continuous punishment; a single error in judgment can ruin a reputation and haunt a practitioner for years to come.

We believe that arguments on both sides of this issue have merit and that a balanced approach is required. In the interests of openness and accessibility, we recommend that records of practitioners' "convictions" should be made available for public scrutiny for at least three years after the end of a disciplinary sanction (or such longer period as a governing body determines). However, the benefits of providing this information must be balanced against the unfair damage to a practitioner's reputation which could result, especially when the offence occurred years in the past. Therefore, we are not prepared to require that members of the public be permitted access to practitioners' files for more than three years prior to the request for this information. In other words, after three years have elapsed from the end of a particular disposition (for example, a suspension), this information would no longer be made available to the public (although it could still be used when future dispositions are considered).[8]

Furthermore, in order to minimize misinterpretations of disciplinary records, we recommend that specific charges (or particulars when more general charges are used) should be employed in order to reflect more accurately the actions for which a practitioner has been disciplined.

6. Dissemination of Convictions and Sanctions

The Province of Québec requires self-governing bodies to publish information concerning a practitioner's suspension or any restrictions placed on his or her practice in the provincial *Gazette* and by means of a notice in a local newspaper in the area where the practitioner practises. This represents an active attempt to inform the public rather than relying on members of the public to request this information.

We believe that this approach has merit. Expulsions from a regime, suspensions from practice and the imposition of restrictions or conditions on practice are expressions of a conclusion on the part of the self-governing body that the unrestricted practice of the practitioner will pose a threat to the public. Providing this information to the public will reduce the likelihood that the practitioner will be able to continue to practise in violation of the sanction imposed. It will therefore help to protect the public from the harm which this practitioner poses.

Accordingly, we recommend that self-governing bodies be obliged to publish in the *Manitoba Gazette* and in a newspaper widely distributed in the area in which a practitioner practises information concerning the removal or suspension of his or her licence or certificate or any restrictions or conditions which have been attached to his or her practice. Furthermore, we recommend that the self-governing body should be free to disseminate further information concerning the practice of a practitioner where dissemination of that information would be in the public interest.

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[8]Although our recommendation may result in a significant change from the status quo in Manitoba, we note that Ontario has gone even further, permitting access to disciplinary records dating back six years except for dispositions relating to sexual abuse to which there is no time limit on access.

7. Public Attendance at Meetings of Self-governing Bodies and Public Access to Minutes of Meetings of Self-governing Bodies

A self-governing body is not a private organization; it exercises powers granted to it by the Province of Manitoba. In our view, therefore, as a general rule, the meetings of the governing body should be open to the public and the minutes of those meetings should be viewed as public documents.

This does not mean that a self-governing body should never be permitted to meet *in camera*. It will, inevitably, be forced to deal with sensitive financial and personnel issues or other similar matters. In these limited circumstances, it can be reasonably argued that the need to ensure the privacy of individuals outweighs the need for public accessibility. We believe that self-governing bodies ought to be granted a discretion to exclude the public from meetings when these situations arise and minutes of *in camera* proceedings should similarly be closed to the public. However, we stress that *in camera* proceedings should be exceptional; they should not be allowed to become the general rule.

We take a different view with respect to meetings of committees of a self-governing body. Other than disciplinary hearings (which we discussed earlier in this Chapter and which are discussed further in Chapter 7), these meetings are not intended to produce final decisions but are intended to discuss ideas and make recommendations to the board. In order to encourage full and frank discussion in committees, it may be that closing them to the public is warranted. We are prepared to allow self-governing bodies to decide which committee meetings should be open and which should be held *in camera*.

8. Periodic Public Meetings

In order to provide a practical illustration of the principle that the individuals to whom self-governing bodies are answerable are not practitioners but members of the general public, we are of the view that periodic public meetings, sponsored by government, should be held at which representatives of one or more self-governing bodies would explain their role and activities to members of the public.[9] At these meetings, members of the public would be able to question these representatives and make their views concerning the self-governing body's annual report, policies, rules and decisions known to both the administrators of the regime and the appropriate government representatives.[10] In our view, each self-governing body should participate in a public meeting of this sort at least once every two years.

Great care would have to be taken to ensure that a public meeting does not degenerate into a rehashing of complaints against a specific practitioner or a dispute over a particular disciplinary decision. However, we believe that public meetings, held on a regular basis, would serve as useful forums for dispelling misinformation. Just as important, they would give self-governing bodies an opportunity to hear from the people whose interests they are meant to protect and to account to the public for their actions.

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[9]This idea is similar to a requirement in *The Crown Corporations Public Review and Accountability Act*, C.C.S.M. c. C336. Among the responsibilities of the Crown Corporations Council (which is to supervise the activities of Crown corporations) is the duty to ensure that each Crown corporation holds three public meetings annually (one in Winnipeg, one in northern Manitoba and a third in another centre in the province). These meetings give the officers of Crown corporations an opportunity to provide information to the public about the activities of the corporations.

[10]We recommend in Chapter 9 that the body responsible for holding these hearings would be the same body which is responsible for supervising self-governing bodies.

9. Supervision and Investigation

Despite our belief in the need for direct accountability to the public on the part of self-governing bodies, we recognize that public access will not in itself be sufficient to hold self-governing bodies accountable for their use of power. Government must also accept responsibility for overseeing the powers which it has delegated and ensuring that they are exercised in a manner consistent with the goal of public protection.

We pointed out in the Discussion Paper that some provinces have adopted legislation which requires that a Cabinet Minister (or Cabinet as a whole) approve all significant regulations enacted by self-governing bodies before they become effective.[11] This provides one method of supervision on the part of government and we have considered recommending its use in Manitoba.

However, given our recommendation that government retain responsibility for setting scopes of practice and entry and practice standards, we believe that this method of supervision is unnecessary. The remaining powers of self-governing bodies are not policy-oriented but are administrative in nature. Having delegated these powers to bodies which have demonstrated an ability to act democratically and in the public interest, there is no need, in our view, for a general rule that the use of these administrative powers be approved by government.

There is, however, one activity which we believe requires the more active involvement and supervision of government - prosecution for unauthorized practice.[12] As we have noted, it is generally advantageous for practitioners to protect their scope of practice against encroachments by non-members.[13] This is usually done by prosecuting non-members who perform services which are seen as falling within a regime's scope of practice. Restricting the power to initiate prosecution for unauthorized practice will reduce the likelihood that this power will be used illegitimately to protect the interests of practitioners rather than the public. We therefore recommend that the approval of a supervisory body should be obtained before a self-governing body can bring a prosecution for unauthorized practice.[14]

Our recommendation that self-governing bodies should not require government approval for their decisions (except for prosecution for unauthorized practice) should not be read to imply that government supervision of their activities is unimportant. A general power to supervise and investigate improper behaviour as revealed in annual reports, rules, regulations or by-laws or by public complaint is, in our view, imperative. Québec and Ontario have granted supervisory and investigatory powers to governmental agencies. In both cases, the agency assigned this function is the same one which initially determined the need for regulation and the advisability of self-government. In Manitoba, in what might be considered an analogous situation, the government has granted supervisory and investigative powers over Crown corporations to the Crown Corporations Council, which is to receive complaints and investigate any failure on the part of a Crown corporation to comply with the legislation governing it.[15]

We recommend that Manitoba follow the lead of Ontario and Québec in assigning to a governmental body the task of supervising the activities of self-governing bodies to ensure that

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[11] *Professional Code*, R.S.Q. c. C-26, s. 95; *Dental Disciplines Act*, S.A. 1990, c. D-8.5, s. 75; *Health Professions Procedural Code* (being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18), s. 95; *Professional and Occupational Associations Registration Act*, S.A. 1985, c. P-18.5, s. 14.

[12] Most self-governing bodies in Manitoba are currently authorized to initiate a prosecution without reference to the Crown.

[13] Indeed, this has sometimes led to long-running "turf wars" between rival self-governing organizations.

[14] We recommend in Chapter 7 that the decision-making body which established the regime's scopes of practice should also approve prosecutions for unauthorized practice.

[15] *The Crown Corporations Public Review and Accountability Act*, C.C.S.M. c. C336, s. 6(1)(d) and s. 8(2).

they comply with the legislation creating them and regulations passed pursuant to that legislation.[16] Any material contravention of the legislation or regulations should be investigated and addressed. The form and role of this body will be more fully discussed in Chapter 9.

B. NON-PRACTITIONER REPRESENTATION

Our Discussion Paper dealt at some length with the issue of public representation on self-governing bodies. Respondents were overwhelmingly in favour of the idea that non-practitioners should serve along with practitioners on self-governing bodies. Most responses expressed the view that non-practitioners can play an important role in representing the interests of the general public and can bring to self-governing bodies a perspective which would otherwise be absent. Several respondents also expressed the view that the presence of public representatives tends to increase public confidence in self-governing bodies.

The Discussion Paper pointed out that the presence of non-practitioners does not in itself guarantee that the public is being represented. It warned that, unless they are granted real power, the inclusion of public representatives could become a token gesture which serves only to reassure the public without safeguarding the public interest to any significant extent. Several keys to improving the effectiveness of non-practitioners were mentioned in the Discussion Paper. These included the method of their appointment, their numbers relative to practitioner-administrators, their ability to serve on key committees and means by which they could be encouraged to maintain their independence and assertiveness. Respondents addressed all of these issues.

1. Appointment

The Discussion Paper expressed the concern that, if appointed by practitioners, public representatives would be less likely to strongly represent the interests of the public than if they were appointed by government or as representatives from consumer and other groups. Although some respondents supported this concern, others criticized appointment by government on the grounds that a failure by government to appoint public representatives in a timely fashion would interfere with and delay the functioning of the self-governing body. One respondent group suggested that government appointment of lay members would tend to become a form of political patronage. Still others argued that consumer groups should be involved in the selection process.

We believe that all of these suggestions and concerns can be addressed by an approach which encourages the submission of the names of potential public representatives to an independent body operating at arm's length from government.[17] Names could be proposed by any interested person or group and individuals would be free to submit their own names. The nomination process should be encouraged by the routine announcement of vacancies and the solicitation of applications or nominations. The independent body would be responsible for making appointments from the list of applications and nominations, reducing the possibility of political patronage.[18] This body would consider the qualifications of applicants for the position and would be required to consult with practitioners of the self-governing body and consumer

[16]We recommend in Chapter 9 that the same body which decided to grant the power of self-government should be responsible for supervising its use.

[17]We suggest in Chapter 9 that the independent body should be the same one which is responsible for granting self-government and supervising its exercise.

[18]The *Office des professions* in Québec currently serves this function.

groups before making a final choice. We anticipate that this process would result in vacancies being filled in a timely fashion.

In selecting public representatives, the independent body ought to be aware of the need to provide for a wide range of experiences and perspectives, especially those which would not otherwise be present on a self-governing body. For example, as we have noted, practitioners are naturally inclined to place great emphasis on raising the level of service they provide; they may be less aware of the lack of access resulting from their higher standards. In these circumstances, it may be advisable to select individuals who represent those who do not currently have access to the occupational service or who are in danger of losing their access.

2. Ratio Between Public Representatives and Practitioners

Several respondents to our Discussion Paper took the opportunity to suggest a specific ratio between the public representatives and practitioners on the governing council of the self-governing body. Suggestions ranged from a low of 20% to a high of 50%. Of other jurisdictions, Ontario has taken the most aggressive position on this issue, requiring that just under 50% of the governing body be made up of public representatives.

In addressing this issue, we start from the presumption that a decision to grant self-government means that a majority of the administrators of the regime will be practitioners of the regulated services. Nevertheless, it is critical that the public interest (including the interests of those who do not have access to the service) is well represented when decisions are made. This will require a number of public representatives which is large enough to exert influence on the decision-making process. We are therefore of the view that at least one-third of the administrators of a self-governing regime ought to be public representatives.

3. Public Representatives on Committees

For the same reason that we consider public representation to be valuable on the governing council of a self-governing body, we believe that public representatives should serve on all of its committees. In our view, the same ratio between practitioners and public representatives should exist on these committees as on the governing council; that is, at least one-third of each committee should be public representatives. With only one exception, respondents to our Discussion Paper endorsed the suggestion of greater public representation on committees and, in particular, felt that a significant level of non-practitioner involvement was required on disciplinary panels.[19] We recommend in Chapter 7 that the percentage of public representatives on disciplinary panels should be the same as on the governing council; that is, at least one out of every three members should be a representative of the public.

4. Effectiveness of Public Representatives

The Discussion Paper noted that public representatives face two dangers, both of which can result in a lack of effectiveness. The first was that the perception of undue aggressiveness on the part of public representatives or an unfamiliarity with the issues faced by the self-governing body could alienate practitioner-administrators and result in the marginalization of public representatives. The second is that public representatives will be so intimidated by the superior knowledge of technical details displayed by practitioners that they will cease to be a strong and independent voice on behalf of the public.

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[19]Indeed, the Women's Health Clinic suggested that disciplinary panels should contain a majority of public representatives.

We believe that our recommendations with respect to the selection of public representatives, their proportionate numbers on the governing body and their participation in all committees will go far in reducing these dangers. With their role as public representatives legitimated by the selection process and in numbers sufficient to have an impact on the decision-making process, non-practitioners are not likely to be intimidated by practitioners or forced into a defensive and antagonistic posture. In order to strengthen their position still further, we recommend that their role as advocates for the public interest and their duty to challenge the actions of practitioners when this interest is threatened should be explicitly set out in legislation.

Ontario's government, in an attempt to make public representatives more effective, provides a two day training course for all public representatives serving on self-governing bodies of health occupations. These courses familiarize public representatives with the occupation they will be helping to govern and some of the issues they will face.[20] Although we would not go so far as to formally recommend the introduction of such courses, we believe that such an approach could be useful and suggest that it be given serious consideration by the governmental body which will oversee the regulation of occupations or, perhaps, by self-governing bodies collectively.[21]

C. CONCLUSION

Based upon the preceding discussion, we make the following recommendations:

RECOMMENDATION 40

Self-governing bodies are not private organizations, but exercise powers granted to them by the Province of Manitoba for the purpose of protecting the public. Accordingly, all aspects of the operation of self-governing bodies should be governed by the principle of openness and accountability to the provincial government and to the people of Manitoba generally.

RECOMMENDATION 41

Annual reports to government should be mandatory for all self-governing bodies and should be made available to members of the public. These reports should include as much information as possible in order to allow government and the public to assess the performance of the self-governing body and to provide information valuable to consumers; they should include at least the following information:

(a) an up-to-date description of the structure of the self-governing body, including the names of all permanent or ad hoc committees and the functions of each;

(b) the names of all individuals (practitioners and public representatives) serving on the governing council and its committees during the past year;

(c) a copy of all by-laws, rules and regulations enacted in the past year;

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[20]Telephone conversation with Christie Jefferson, Chairperson, Health Professions Regulatory Advisory Council (Ontario), February 2, 1993.

[21]We also note that training for volunteers generally is offered by the Volunteer Centre, the University of Manitoba and others and this may be a valuable resource.

(d) a description of the assessment process used for applicants for entry during the past year, including the specific skills assessed and the method of assessment of each;

(e) the number of applications for entry received in the past year and their disposition;

(f) the number of complaints against practitioners filed in the past year and their disposition;

(g) the names of practitioners disciplined in the past year, the reasons for the discipline and the sanctions imposed; and

(h) the methods and mechanisms used to provide for the continuing competence of practitioners and their results during the past year.

RECOMMENDATION 42

Government and the public should have access to each self-governing body's rules, regulations and by-laws.

RECOMMENDATION 43

Each self-governing body should have a register of members which sets out the names of member practitioners, their practising status and any restrictions or conditions on their practice. Government and the public should have access to this register, subject to the self-governing body's right to prevent its use for commercial purposes.

RECOMMENDATION 44

The disciplinary hearings of self-governing bodies should be open to the public unless there are compelling reasons compatible with the public interest for keeping a particular hearing closed.

RECOMMENDATION 45

Governing bodies should be required to reveal practitioners' disciplinary records for at least the three years preceding a request for this information. In order to make this information meaningful, disciplinary "charges" should reflect the particular actions for which a practitioner is being disciplined; vague descriptions should not be used.

RECOMMENDATION 46

Self-governing bodies should be required to publish in the Manitoba Gazette and in a newspaper widely distributed in the area in which a practitioner practises information concerning the removal or suspension of a practitioner's licence or certificate or any restrictions or conditions which have been attached to practice. Self-governing bodies should be free to disseminate further information concerning the practice of a practitioner where revealing that information would be in the public interest.

RECOMMENDATION 47

Subject to circumstances where issues of privacy outweigh the need for public accessibility (such as in financial or personnel matters), the meetings held by self-governing bodies should be open to the public and the public should have access to minutes of meetings.

RECOMMENDATION 48

Periodic public meetings, sponsored by government, should be held at which representatives of one or more self-governing bodies would explain their role and activities to members of the public and members of the public would have the opportunity to question these representatives. Each self-governing body should be required to participate in one of these meetings at least once every two years.

RECOMMENDATION 49

Since an independent governmental body will be setting scopes of practice and entry and practice standards for self-governing bodies, there is no need for a requirement that government approve all significant regulations made by them. However, a governmental body should be assigned the task of overseeing the activities of self-governing bodies to ensure that they comply with the legislation creating them and regulations passed pursuant to that legislation.

RECOMMENDATION 50

The approval of the supervisory body should be required before a self-governing body prosecutes an unlicensed person for providing a licensed service or an uncertified person for holding himself or herself out as certified (that is, for unauthorized practice).

RECOMMENDATION 51

At least one-third of the governing council of each self-governing body should be composed of public representatives (that is, non-practitioners). At least one-third of the members of all committees should be public representatives.

RECOMMENDATION 52

The government body responsible for supervising self-governing bodies should also be responsible for appointing, in a timely fashion, the public representatives to the governing councils of the self-governing bodies. The supervising body should seek nominations and applications from the public and should consult with practitioners, consumer groups and others representative of the community. In selecting public representatives, regard should be given to the need to provide for a wide range of experiences and perspectives, especially those which would not otherwise be present on a self-governing body.

RECOMMENDATION 53

The role of public representatives in self-governing bodies as advocates for the public interest should be explicitly set out in legislation.

CHAPTER 7

ENFORCING PRACTICE STANDARDS

A. PREVENTION

The goal of a licensing or certification regime is to ensure that the level of performance of certified or licensed practitioners does not pose a threat of harm to the public. The first aim of administrators of such a regime must therefore be to prevent improper performance of the service from taking place.

There are a number of devices which can be used to achieve this goal, some of which have already been discussed. These include:

- mandatory or optional educational programs;
- confidential assistance programs (these are used as non-judgmental avenues by which a practitioner can admit and begin to address addictions and other problems which may affect his or her practice);
- professional consultation programs (these are generally staffed by experienced practitioners who offer free advice to other practitioners facing a difficult professional problem or ethical dilemma);
- published decisions of disciplinary bodies (these could augment codes of conduct or other statements of actions which are considered unethical or incompetent; they provide both practitioners and consumers with a better indication of what is meant by the practice standards);
- practice circulars (these are designed to inform practitioners of new developments or problem areas in practice and to provide advice on how to avoid difficulties in those areas);
- professional activity studies (these would study all practitioners providing a particular service in an effort to uncover patterns of potential danger to the public).

We are of the view that self-governing bodies ought to be able to take advantage of all of these devices in order to prevent improper conduct from taking place. However, no program of prevention, no matter how assiduously pursued, will ever be completely successful in eliminating all unethical or incompetent behaviour on the part of practitioners. A self-governing body will inevitably be forced to deal with improper conduct by its members. A disciplinary system is needed in these circumstances.

The purpose of a disciplinary process is to protect the public by reducing the incidence of incompetent or unethical practice. This goal can sometimes be achieved by measures which are

designed to deter a specific practitioner from repeating the action or to deter practitioners as a whole from engaging in a certain course of conduct. Fines, reprimands and awards of costs can serve this end. At other times, the goal of public protection can be reached by identifying and treating the specific sources of the improper behaviour. For example, incompetence may be the result of an addiction; ordering the treatment of the addiction is likely to reduce the chances of incompetent actions in the future. Finally, in order to protect the public, it may be necessary to place limitations on an individual's practice, to suspend his or her licence or certificate or to expel the practitioner permanently from the regime.

The goal of public protection through the reduction of improper conduct cannot be pursued at all costs; it must take into account rights which are fundamental in a democratic society, including protection against arbitrary actions by government. This means, among other things, that an accused practitioner is entitled to a fair and impartial hearing before being punished for actions which offend the regime's practice standards.

Besides its importance in protecting the public and its impact on practitioners whose conduct is impugned, the disciplinary process is important because it serves as the primary point of contact between members of the public and self-governing bodies. It is critical, therefore, that the process is fair, just and effective in protecting the public.

B. STANDARD DISCIPLINARY PROCESS

The Discussion Paper took the tentative position that a standard disciplinary procedure for use by all self-governing bodies could and should be implemented.[1] It argued that requiring all self-governing bodies to use the same procedure would increase the familiarity of members of the public with the complaints procedure and would thereby encourage its use, that it would make monitoring of self-governing bodies easier because they could be compared with one another and that it could be developed with relative ease because the disciplinary structures of many self-governing bodies already share common elements.

For the most part, respondents supported the idea of a standard disciplinary structure. Few rejected the notion outright, although some suggested that a standard system could become inordinately detailed and rigid; they expressed the view that it should allow for minor variations to accommodate the needs of individual self-governing bodies.[2]

Upon reflection, we are still of the view that significant benefits can be achieved if the disciplinary process of self-governing bodies demonstrate a substantial degree of uniformity. However, we have kept in mind concerns about excessive detail and rigidity in our design of the uniform structure. It is uniformity in the key elements which we seek, not uniformity in matters of minor procedural detail.[3]

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[1]It could also be used by regimes administered by government.

[2]A minority of respondents, who may have misinterpreted our proposal, addressed themselves to the idea of a single system of discipline administered by a single entity for all self-governing bodies. Several respondents liked this idea (primarily because it addressed the concern that self-governing bodies would not be impartial in disciplining their members) but about the same number rejected it.

Although we considered this idea, we have come to the conclusion that permitting each self-governing body to administer its own disciplinary system is preferable to the adoption of a single disciplinary system administered by a single body. The concern that self-governing bodies would not be sufficiently impartial in disciplining their own members has already been addressed, at least in part, by the safeguards we have recommended and by the fact that practitioners will have demonstrated a commitment to procedural fairness and the public interest before being granted self-government. We will recommend additional safeguards surrounding the disciplinary process itself.

[3]Assuming that a standard disciplinary procedure is implemented, the idea of using identical or similar names for the committees responsible for each stage in the process should be considered. This would facilitate public access and monitoring of self-governing bodies.

C. DETECTION

One of the key elements of a disciplinary procedure is the detection of unethical or incompetent practice. Our Discussion Paper suggested that consumers are likely to be unaware of improper practice on the part of a practitioner and may be reluctant to file a complaint even when they suspect unethical or incompetent conduct. We therefore advanced the position that relying on consumers to detect improper practice is, by itself, inadequate as a method of enforcing practice standards and ensuring the safety of the public. We proposed that self-governing bodies should supplement consumer complaints with other forms of detection, including practitioner-initiated complaints, routine testing of practitioner competence and periodic practice checks.

A large number of respondents spoke to these proposals. On the whole, they endorsed the idea of requiring self-governing bodies to be proactive in enforcing practice standards.

We have already discussed the need for regular evaluations of practitioner competence to ensure that practitioners remain abreast of new developments and do not lose the skills and knowledge they demonstrated at the time of their entry. Post-entry testing can help to achieve this objective but, while it can provide evidence as to a practitioner's capacity to perform properly, it cannot reveal whether or not a practitioner is actually putting his or her knowledge and skill into practice. We therefore suggest the use of routine practice checks (or "practice audits") and practitioner-initiated complaints in order to determine whether a practitioner's potential for competent, ethical practice is being realized. A thorough program of public protection will make use of all of these methods for identifying improper practice.

In order to ensure that self-governing bodies are taking effective measures to identify practitioners who are failing to meet practice standards, we recommend that the body responsible for supervising self-governing bodies should be required to review and approve the programs of detection employed by self-governing bodies.

D. INVESTIGATION

Our Discussion Paper suggested that investigations prior to disciplinary hearings serve two useful purposes. Investigations eliminate frivolous and harassing complaints with a minimum expenditure of time and effort; if little or no evidence exists which could result in the conviction of a practitioner, investigators can dismiss the complaint and decline to hold a hearing on the matter. On the other hand, if the suspicion or allegation proves to be well-founded, an investigation will help to gather evidence for a hearing which will increase the likelihood of a finding upholding the complaint.

Despite our fears (expressed in the Discussion Paper) that an investigatory stage might be too expensive for some self-governing bodies, respondents generally endorsed the implementation of an investigation prior to a hearing. On the basis of the benefits of an investigation and the support of respondents, then, we recommend that an investigatory stage form part of a standard disciplinary procedure.

Some respondents to our Discussion Paper expressed the concern that practitioners who investigate other practitioners may not be impartial. In order to address this fear, we believe that complainants should be permitted to appeal a decision to dismiss a complaint prior to a hearing. Legislation in Alberta and Ontario both permits such an appeal, as does some legislation

governing self-governing bodies in Manitoba,[4] and it was generally endorsed by respondents to our Discussion Paper.

We are of the view that such an appeal should lie to the body responsible for supervising self-governing bodies on behalf of government. The appeal should be based on the report of the investigator, which could be challenged by the complainant. As in the case of the investigation itself, the question for the supervising body is whether sufficient evidence of incompetence or unethical behaviour exists which could, if believed, result in a conviction at a hearing. The procedure for this appeal should be determined by the supervising body and may be informal, so long as the rules of natural justice are observed.

If, after hearing the appeal, the supervising body were of the view that a hearing should be ordered, this body should be permitted to appoint a prosecutor for that particular matter; otherwise, doubts about the vigour of such a prosecution would be inevitable.

One issue which was raised in response to our Discussion Paper is the length of time which could pass between the filing of a complaint and the decision to have it dealt with by way of a hearing. We appreciate this concern and agree that complainants should have their complaints considered and dealt with promptly.

We believe that most investigations, if diligently pursued, can be completed within 90 days of receiving a complaint. If further investigation is required, we believe that the investigators should be required to seek permission to extend the deadline. In our view, they should inform both the complainant and the body responsible for supervising the activities of self-governing bodies[5] of the need for further investigation, the reason for the delay and the length of additional time which is being requested. If the complainant and the supervising body are satisfied with the explanation given and raise no objection to the request, the request for additional time should be granted automatically. However, if unsatisfied, the supervising body should be allowed to investigate the reason for the delay and should be obliged to do so at the request of the complainant. After investigating the matter, the supervising authority may approve the request for additional time, reduce the additional time being sought or require the investigators to make an immediate decision on whether or not to proceed to a hearing. If additional time is approved but proves to be insufficient, another request for additional time should be made to the supervising body and the complainant should again be notified.[6]

The final issue associated with the investigatory stage has to do with mediation, a process in which representatives of a self-governing body may meet with a complainant and practitioner to determine if an agreement can be reached which is satisfactory to both and which will avoid a disciplinary hearing.

Inasmuch as mediation satisfies both practitioner and complainant and saves the self-governing body the expense of a hearing, it may be viewed as beneficial to all concerned. However, we have concerns that, in focusing on the two parties to the dispute, such a process might ignore the interests of the public generally. We believe that mediation is appropriate

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[4]See, for example, *The Registered Dietitians Act*, C.C.S.M. c. D75, s. 30, *The Licensed Practical Nurses Act*, C.C.S.M. c. P100, s. 32(2) and *The Pharmaceutical Act*, C.C.S.M. c. P60, s. 24(1); each contains a provision permitting the complainant to appeal the decision of an investigator not to hold a hearing into the complaint.

[5]The role of this body was discussed at some length in Chapter 6; its composition and form will be more fully discussed in Chapter 9.

[6]We note that recent amendments to Québec's *Professional Code* (passed, but not yet in force) have addressed the concern about excessive time lapses between a complaint and a decision to hold a hearing. These amendments require investigators to inform complainants in writing after 90 days as to the status of the investigation and, unless a hearing is held, provide up-dates every month after that: Bill 140, *An Act to amend the Professional Code and other Acts respecting the professions*, 2d sess., 34th Leg. Que., 1993, cl. 109 (adding s. 123.1).

where the complainant and practitioner are engaged in a dispute which involves only the two of them.[7] However, mediation is not appropriate where the alleged conduct of the practitioner raises concerns about the safety or well-being of other consumers or the public generally.[8] We therefore recommend that the investigator should determine prior to the initiation of mediation whether or not the complaint justifies a disciplinary hearing; the dispute should be referred for mediation only if a disciplinary hearing is not justified. Moreover, if information emerges during mediation which would, if found to be true, constitute a breach of practice standards, the investigating body should be permitted to pursue the matter by proceeding to a disciplinary hearing. Finally, in order to ensure that investigators act appropriately and in the public interest in referring matters to mediation, we recommend that mediated settlements should be open to scrutiny; the facts of all matters which are settled by mediation and the terms of these settlements should be reported to the supervisory body as a matter of course.

E. DISCIPLINARY HEARINGS

We take it for granted that practitioners will only be disciplined after a hearing which meets the test of procedural fairness contained in the principles of natural justice.[9] That having been said, however, a number of issues surrounding the disciplinary hearing remain to be addressed.

The first issue is the composition of the disciplinary panel. We have recommended that at least one-third of the members of all committees of a self-governing body should be public representatives. In our view, public representation on disciplinary panels is particularly important in order to prevent suspicions that the public interest is being ignored. We therefore recommend that the quorum for a panel to hold a hearing should require the presence of at least one public representative. Given the value of practitioner experience and training in this area, we also recommend that at least one practitioner should sit as a member of every disciplinary panel.

Another important issue is that of appropriate rules of evidence and procedure for the disciplinary hearing. We are not persuaded that the rules which govern our legal system would necessarily be appropriate in a disciplinary hearing; their formality and complexity may hinder rather than promote a fair hearing, especially since the participants are not likely to be legally trained. However, we are reluctant to permit each self-governing body to develop its own rules and procedures. To the extent that these differ from one body to another, they will reduce the uniformity in disciplinary matters which we view as important. We therefore recommend that the supervising body appointed by government design suitable evidentiary and procedural rules for use as a guide by disciplinary panels.

The identity and role of the prosecutor is another critical component in an effective disciplinary system. Our Discussion Paper raised the possibility that complainants could be allowed to participate more fully in the disciplinary process by permitting them to control the prosecution of the complaint. However, this suggestion was soundly rejected by most respondents. Respondents expressed the fear that allowing complainants to prosecute would transform a disciplinary hearing, at which the protection of the public is to be the primary

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[7]For example, a dispute over fees.

[8]Even a dispute over fees may have implications beyond the practitioner and the particular consumer if, for example, there is evidence of a pattern of overcharging.

[9]The rules of natural justice have developed over time to ensure that administrative tribunals meet certain minimum standards of procedural fairness. The two basic tenets of natural justice are the right to an unbiased and disinterested adjudicator and the opportunity to be heard. See *M.N.R.* v. *Coopers & Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.) and Manitoba Law Reform Commission, *Administrative Law; Part I: Procedures of Provincial Government Agencies* (Report, 1984).

concern, into a venue in which private disputes could be pursued. Others were concerned that disgruntled complainants could use a prosecutorial power to pursue practitioners even when the complaint had little merit. Still others expressed the fear that complainants could decide not to prosecute a matter for reasons of convenience or cost, in which case the disciplinary process would not serve to protect the public.

We are persuaded by these responses and are not prepared to recommend that complainants should be allowed to prosecute their own complaints. Instead, we propose that the self-governing body should designate someone to perform this function. This person could be a member of the investigating body, another practitioner or a non-member (perhaps a lawyer) retained for this particular task. However, in order to avoid a perception of bias, the prosecutor should not be closely associated with the complainant, the practitioner or members of the disciplinary panel hearing the complaint.

Once assigned this function, the prosecutor should be granted the freedom to conduct the prosecution without interference from members of the governing body or the panel. For example, a prosecutor ought to be permitted to "stay charges" against the practitioner if he or she has reached the conclusion that no prosecution is warranted. However, in this case, we believe that the complainant should be allowed to appeal this decision in the same manner as a decision of investigators not to proceed to a hearing can be appealed.

As in matters of criminal justice, it should be possible for a prosecutor to strike a "plea bargain" with a practitioner; for example, in return for a guilty plea, the prosecutor will recommend a particular punishment. These sorts of arrangements can be successful in reducing the time and money spent in disciplinary hearings while still protecting the public. However, we believe that two precautions must be taken. First, the disciplinary panel ought not to be bound by a recommendation made by the prosecutor; if they believe that a greater punishment is warranted, they ought to be free to impose it. Second, details of all "plea bargains" or other arrangements made with accused practitioners ought to be forwarded to the supervising body. This information should be retained and reviewed as an indicator of whether the self-governing body is carrying out its mandate appropriately; where it is found that "plea bargains" are in fact being used to protect individuals or the image of the occupation itself, the supervising body should take suitable action.[10]

Our Discussion Paper also raised the issue of an appropriate role for complainants at a disciplinary hearing. Respondents had widely diverging views on this matter. After considering the opinions expressed, we have reached the conclusion that complainants should be given notice of the hearing and be allowed to be present at the hearing and give evidence if required.[11] In addition, we believe that complainants should be informed in writing of the "verdict" reached by the panel and the punishment, if any, imposed on the practitioner. We have already recommended that complainants should be informed of the progress of the investigation of their complaint, should be able to require the supervisory authority to investigate undue delays in an investigation and should have the right to appeal a decision by investigators or a prosecutor not to proceed to a hearing.

Although some respondents strongly advocated a more substantive role for complainants (for example, allowing them to give a statement to the panel or granting them the equivalent of intervenor status), we have concerns that this would transform a hearing designed to protect the public into one whose primary purpose was to settle a private grievance. In our view, the purpose of a disciplinary hearing should be to protect the public from harm resulting from incompetence or unethical conduct on the part of practitioners, not to settle personal disputes or

[10]The powers of the supervising body are more fully discussed in Chapter 9.

[11]This, of course, would be open to any member of the public unless the hearing were closed.

to satisfy a desire for retribution. It must be remembered that civil remedies are still open to individuals who have been damaged by a practitioner's behaviour.

One of the issues considered at some length in our Discussion Paper was the question of compensation. We set out a variety of forms of compensation which could be ordered as part of a disciplinary hearing. These ranged from payment of the complainant's out-of-pocket expenses (incurred as a result of the practitioner's conduct) to an order of full compensation for all harm suffered by the complainant. We also noted that, in addition to the practitioner being ordered to pay compensation as part of a disciplinary disposition, the self-governing body could create a fund from which victims of practitioners could be compensated.

We expressed some reservations in the Discussion Paper about ordering the practitioner to pay compensation. Many respondents agreed with our concerns. In particular, fears were expressed that compensation would have the effect of diverting the attention of participants in the hearing from its primary purpose - the protection of the public. Respondents also expressed doubts that self-governing bodies would have the expertise needed to deal with issues of compensation. Moreover, we continue to have concerns that an order of compensation for all harm suffered by complainants would amount to an award of general damages and would infringe on powers reserved for superior court judges under section 96 of the Constitution.[12]

In view of these apprehensions, we are not prepared to recommend that a self-governing body should be empowered to order the payment of compensation nor are we prepared to demand that self-governing bodies create a compensation fund to reimburse complainants. In our view, the courts have well-established and accessible means for dealing with these issues and will order compensation in appropriate circumstances.

However, while the creation of a compensation fund should not be made mandatory, it would no doubt be welcomed by members of the public who have suffered a loss as a result of the conduct of practitioners; self-governing bodies should be permitted to establish a compensation fund if they choose. Moreover, while we do not support a general power on the part of self-governing bodies to order practitioners to pay compensation, in some cases an order of restitution for out-of-pocket expenses or for the refund of excessive fees will be rationally and functionally connected to the disciplinary process and will complement rather than distract from the goal of public protection. It may be that, in these cases, an order of restitution will not violate section 96 of the *Constitution Act*. In such cases, self-governing bodies should be encouraged to make such an order.

F. APPEALS

Both a practitioner who has been convicted of a breach of the practice standards of a regulatory regime and the prosecutor should, in our view, have the right to appeal the decision of a disciplinary panel. An appeal should be possible on a "conviction", punishment or both. Such an appeal should be based on the evidence which was presented at the disciplinary hearing; this means that a transcript must be taken of the hearing and made available to the appellate body. No new evidence should be admitted unless it was unavailable at the time of the hearing.[13]

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[12]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 96. As pointed out in our Discussion Paper, this section reserves for federally-appointed judges the powers they had in 1867, including the power to order compensation for civil wrongs. A self-governing occupational group (established under provincial legislation) with the power to order compensation might be viewed by the courts as usurping the role of a federally-appointed court. If the courts were of that opinion, then this would be considered to be an unconstitutional delegation of power.

[13]The "fresh evidence rule" permits new evidence to be introduced on appeal if the evidence could not reasonably have been obtained for the first hearing, the evidence is both credible and relevant, and is such that (if believed) could reasonably be expected to have affected the result: *Palmer* v. *R.*, [1980] 1 S.C.R. 759 at 775. These principles have been developed for use by judges; they are more strictly adhered to in criminal, as compared to civil, matters and traditionally have been relaxed even further in cases involving administrative tribunals. See, for example, *Re Houston and Cirmar Holdings Ltd. (No. 1)* (1977), 17 O.R. (2d) 254 (Div. Ct.).

In our view, because of the legal issues which will inevitably arise in an appeal, the best body for dealing with an appeal of this nature is the Court of Queen's Bench. Indeed, since some current self-governing bodies use this court as an appellate body, these judges are already familiar with cases of this nature. We are confident that they will be able to deal fairly and expeditiously with appeals of disciplinary panels.

G. CONCLUSION

Based on the foregoing discussion, we make the following recommendations.

RECOMMENDATION 54

Each self-governing body should develop preventative measures which attempt to ensure that practitioners remain competent and ethical. A full range of measures should be made available to self-governing bodies, including mandatory or optional education programs, confidential assistance programs, professional consultation programs, published decisions of disciplinary bodies, practice circulars and professional activity studies.

RECOMMENDATION 55

A disciplinary process which is standard in its key elements should be administered by each self-governing body.

RECOMMENDATION 56

The disciplinary process, while protecting the rights of practitioners, must be effective in protecting the public.

RECOMMENDATION 57

Self-governing bodies should not rely solely on consumer complaints to identify breaches of practice standards. They should actively supplement consumer complaints with other forms of detection, including practitioner-initiated complaints, routine testing of practitioner competence and periodic practice checks.

RECOMMENDATION 58

The body responsible for supervising self-governing bodies should be required to review and approve the programs of detection employed by self-governing bodies.

RECOMMENDATION 59

An investigatory stage should form part of a standard disciplinary procedure: self-governing bodies should conduct an investigation of the merits of a complaint prior to a disciplinary hearing.

RECOMMENDATION 60

If, following an investigation of a complaint, the investigator decides that the complaint should be dismissed without a hearing, the complainant should be

permitted to appeal that decision to the body responsible for supervising self-governing bodies. If that body agrees with the complainant that a hearing should be held, it should appoint the prosecutor.

RECOMMENDATION 61

Investigations into a complaint should be completed within 90 days of receiving it. If further investigation is required, the investigators should be required to seek permission to extend the deadline by informing both the complainant and the body responsible for supervising self-governing bodies of the need for further investigation, the reason for the delay and the length of additional time which is being requested. If the complainant and the supervising body are satisfied with the explanation given and raise no objection to the request, the request for additional time should be granted automatically. However, if unsatisfied, the supervising body should be allowed to investigate the reason for the delay and should be obliged to do so at the request of the complainant. After investigating the matter, the supervising body should approve the request for additional time, reduce the additional time being sought or require the investigators to make an immediate decision on whether to proceed to a hearing. If additional time is approved but proves to be insufficient, another request for additional time should be made to the supervising body and the complainant should again be notified.

RECOMMENDATION 62

Mediated settlements of complaints are appropriate only where the dispute involves only the complainant and the practitioner. Where the complaint involves a possible breach of practice standards and raises concerns about the safety of other consumers or the public generally, mediation should not be employed. Mediated settlements should be open to the scrutiny of the body responsible for supervising self-governing bodies: the facts of all matters which are settled by mediation and the terms of these settlements should be reported to the body responsible for supervising self-governing bodies.

RECOMMENDATION 63

Self-governing bodies should adhere to the rules of natural justice when conducting disciplinary hearings.

RECOMMENDATION 64

At least one-third of every disciplinary panel should be made up of public representatives. At least one practitioner and one public representative should sit as a member of every panel conducting a disciplinary hearing.

RECOMMENDATION 65

Disciplinary panels should not be required to follow all of the rules of evidence which govern proceedings before a judge. The body responsible for supervising self-governing bodies should instead design suitable evidentiary and procedural rules for use by disciplinary panels.

RECOMMENDATION 66

Subject to Recommendation 60, the self-governing body should appoint the person who will prosecute complaints before the disciplinary panel. The complainant should not act as prosecutor.

RECOMMENDATION 67

Although a prosecutor should be permitted the discretion not to bring a matter to a hearing, complainants should have the right to appeal such a decision in the same manner as a decision of investigators not to proceed to a hearing.

RECOMMENDATION 68

Plea bargains in disciplinary matters should be permitted; however, disciplinary panels should not be bound by the agreement between the prosecutor and the practitioner and the details of all plea bargains should be forwarded to the body responsible for supervising self-governing bodies. This information should be retained and reviewed as an indicator of whether the self-governing body is carrying out its mandate appropriately.

RECOMMENDATION 69

Complainants should be given notice of the disciplinary hearing at which their complaint will be heard, be permitted to attend and be informed of any decision reached.

RECOMMENDATION 70

While self-governing bodies should not be required to order practitioners to compensate complainants or be required to create a compensation fund to reimburse complainants, they should not be prohibited from creating a compensatory fund or from ordering practitioners to pay restitution to complainants to the extent that such an order is constitutional. This limitation will likely restrict orders of restitution to the reimbursement of out-of-pocket losses and the refunding of excessive fees.

RECOMMENDATION 71

Both practitioners and prosecutors should be permitted to appeal the decision of disciplinary panels (as to both verdict and disposition) to the Court of Queen's Bench.

CHAPTER 8

INCORPORATION

A. THE PROHIBITION AGAINST INCORPORATION

The reference from the Minister of Justice and Attorney General asked us to consider "the advisability of permitting incorporation of professionals." This request alludes to section 15(3) of *The Corporations Act* which prohibits the incorporation of practitioners of a "profession" which is governed by an Act of the Legislature unless the legislation expressly permits incorporation.[1]

Unfortunately, it is not entirely clear to which practitioners this subsection refers. The fact that these practitioners must be governed by an Act of the Legislature is of little assistance; we have identified 156 occupational groups who are directly regulated by legislation.[2] Practitioners of most of these groups are in fact currently permitted to incorporate; therefore, something other than governance by an Act of the Legislature must distinguish practitioners who are allowed to incorporate from those who are not.

It appears that the key term in making this distinction is "profession". Profession, in this context, cannot refer to all licensed or certified practitioners, since the services of hairdressing, barbering, piano tuning, bee-keeping, carpentry and many other regulated services may be supplied through a corporation. We have concluded that it must refer to those occupations which are regulated by a self-governing body, since none of these is currently being provided by corporations, except for pharmaceutical, architectural and denturist services; the legislation governing these three occupations specifically permits incorporation.[3]

Changing the term "profession" to "self-governing occupation" might lend some clarity to section 15(3), but it does not address the larger questions: Does a prohibition against incorporation by practitioners who are self-governing serve a purpose and does it benefit the public? Is there a good reason why practitioners of all other services (including those who are licensed and certified but not self-governing) are permitted to incorporate but those who are self-governing are not? Furthermore, are there good reasons why architects, pharmacists and denturists are currently allowed to provide their services through a corporation while other practitioners (such as lawyers, dentists and accountants) are not?

The rationale underlying the ban on incorporation in *The Corporations Act* is not entirely clear, although the reference to "profession" suggests that it is based on the historic distinction between "professions" and "occupations" to which we have already referred in this Report.[4] This

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[1]*The Corporations Act*, C.C.S.M. c. C225, s. 15(3).

[2]This does not include practitioners who are regulated indirectly or regulated by forms of regulation other than certification or licensing.

[3]*The Pharmaceutical Act*, C.C.S.M. c. P60, s. 48; *The Architects Act*, C.C.S.M. c. A130, s. 16; *The Denturists Act*, C.C.S.M. c. D35, s. 16.

[4]This historical distinction was discussed in Chapter 1.

theory is supported by the fact that one of the key distinctions which has traditionally been drawn between these two groups of services is the level of commercialism they involve. While "occupations" were traditionally viewed as profit-driven commercial enterprises, "professions" were seen as transcending the world of commerce and business. Practitioners of occupations were viewed as being primarily (if not exclusively) interested in making money, while professionals were seen as devoted to public service and the public good with little concern for profits. Since, by definition, professionals were not involved in commerce, they had no need to become incorporated. In addition, a prohibition on incorporation was one way in which the difference between professions and occupations could be underlined.

Despite the extent to which the traditional distinction between "occupations" and "professions" has penetrated our culture, we have rejected it as a sound basis for regulation of services; we also have serious doubts that it can serve as a valid foundation for a policy on incorporation. In nearly every occupation or profession, practitioners can be found whose profit motive dominates their activities. Similarly, at least some practitioners in nearly every line of work view their labour as something more than a way to earn a livelihood; they use their skills to serve the community and will provide their services free or at a reduced rate in order to help others. In our view, while individuals may be characterized as greedy or selfless, entire occupations or professions cannot; both characteristics can be found in practitioners of most services.

However, the fact that the traditional occupation/profession distinction cannot support a ban on incorporation does not necessarily mean that such a prohibition should never be applied. It is possible that the consequences of incorporation and, in particular, its effect on consumers and the public may justify denying it to practitioners of some services.

B. THE EFFECTS OF INCORPORATION

Incorporation creates a legal entity which is distinct from its shareholders, directors and employees. This entity is taxed on its income, but usually at a lower rate than individuals.[5] It can sue or be sued and its liability is independent of the liability of its shareholders, directors or employees. If directors or employees act wrongfully, they must be sued and found liable as individuals. Although directors and employees can be held to be jointly liable with a corporation for wrongdoing, shareholders are not liable for the actions of the corporation and their risk of loss is therefore limited to the extent of their investment in the corporation. Like an individual, a corporation is also subject to laws, rules and regulations and can be penalized by way of a fine or by curtailing its activities if it violates these laws.[6]

The current ban on incorporation for some practitioners means that they must practise alone, in a partnership with other members of the self-governing body or as employees of other practitioners. As sole practitioners, they are personally liable for their own errors or wrongdoing and the contractual obligations they have incurred. They are also liable for the mistakes or wrongdoing of their employees committed in the scope of their employment and the contractual

[5]In Manitoba, an individual earning in excess of $62,000 pays federal and provincial income tax at a marginal rate of approximately 51%. However, for a corporation that qualifies, the small business deductions contained in the income tax Acts reduce the tax rate to approximately 22% on the first $200,000 of active business income earned each year: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 125(1); *The Income Tax Act*, C.C.S.M. c. 110, s. 7. See also S. Slutsky, "Benefits Minimal From Incorporation", *The Financial Post Daily*, October 25, 1989, 13; M. Oxby, "Pros and Cons of Incorporation", *The Financial Post Daily*, May 4, 1993, 22.

It should be noted, however, that once profits flow through to individual shareholders by way of dividends, the combined corporate and personal tax rates on those profits are only minimally less than the rate applied to non-corporate earnings. Still, to the extent that profits can be left in the corporation as retained earnings, overall taxes are deferred because the shareholder is not required to pay the second (personal) level of taxes.

[6]Of course, unlike a person, a corporation cannot be imprisoned (although its directors can be).

obligations incurred by employees as agents or representatives of the firm. As partners in a firm, practitioners are similarly liable for their own wrongdoing or contractual obligations as well as the wrongdoing or contractual obligations of other partners in the firm and the employees of the partnership. Whether practising alone or in a partnership, practitioners' liability is unlimited; it extends to all of their assets, including their houses, cars and personal belongings.

The effect of incorporation on a sole practitioner might, in some cases, be minimal. The practitioner would become an employee of a corporation but could also be its sole or primary shareholder and director. He or she would remain liable for errors or wrongdoing in the course of his or her work (since both employees and employers can be sued for employees' negligence).[7] However, he or she would be somewhat protected from the contractual obligations he or she incurred on behalf of the corporation as well as from the mistakes or obligations incurred by an employee; in this case, unless he or she were found to be personally liable, his or her loss would be limited to the value of his or her investment in the corporation. In addition, in some cases, a sole practitioner could benefit by incorporating because of the differential tax rates paid by corporations and individuals. The practitioner would still pay taxes on the salary paid to him or her and on dividends declared by the corporation. However, if the corporation made a large profit, the practitioner could leave this money in the corporation, with the result that tax on its profit would be paid at the lower corporate rate rather than the higher personal rate.

The effect of incorporation on a partnership might be more substantial. "Partners" (who would now be shareholders) would still be completely liable for their own errors and wrongdoing but would enjoy limited liability (to the extent of their investment in the corporation) with respect to any contractual liability they incurred on behalf of the corporation, the actions of employees and the actions of other "partners". The corporate structure would also permit partners to arrange their relationship in a more flexible fashion which also would allow greater long-term stability. Finally, like sole practitioners, partners would often be able to take advantage of tax benefits by incorporating.

The effect of permitting incorporation should not be overstated; practitioners who are not permitted to incorporate are, to some extent, able to achieve the benefits of incorporation in other ways. For example, the ban on incorporation only applies to the provision of "professional" services; it does not normally extend to supporting services. Therefore, sole practitioners and partnerships are currently allowed to lease office space or equipment from a separate corporation; there is no prohibition on practitioners owning shares in or serving as directors of this "service" corporation. As shareholders and directors of the service corporation, practitioners enjoy limited liability for any negligence or contractual obligations incurred by the corporation and can achieve some tax savings. Permitting the creation of service corporations therefore limits the current ban on incorporation to the provision of the regulated service itself; other supporting aspects of the service can already be incorporated.

Practitioners can also achieve effects similar to those of incorporation by limiting their liability in other ways. For example, a practitioner may transfer personal assets (such as a home or car) to his or her spouse or adult children; this reduces the assets which can be seized to satisfy a debt or judgment. In addition, practitioners can carry sufficient liability insurance for

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[7]Whether employees, in the face of an existing contract between the employer and the injured party, can be sued personally for negligently performing their duties raises complex legal questions which have not been completely laid to rest by the courts. However, in *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.* (1992), 97 D.L.R. (4th) 261 (S.C.C.), a majority of the Supreme Court of Canada held that employees (warehouse workers) did, in fact, owe a duty of care towards their employer's customer and, but for an exemption clause in the contract which the Court held protected them as well, would have been liable for damage caused by their negligence.

The British Columbia Court of Appeal recently applied the same reasoning to an architect and an engineer who were each the majority shareholder and an employee of their own professional corporations. The Court concluded that they could be found personally liable in negligence despite the existence of contracts between their employers (the corporations which they controlled) and the injured party: *British Columbia* v. *R.B.O. Architecture Inc.* (9 June 1994), B.C.S.C. No. C923850 (B.C.C.A.).

errors or wrongdoing on the job.[8] In this case, although their liability remains unlimited, their potential loss is restricted to the amount of their deductible.

C. NON-PRACTITIONER INVOLVEMENT

A separate issue, which is nonetheless closely linked to the question of incorporation, is the extent to which non-members of a self-governing body are permitted to participate in the provision of the regulated service by investing in or managing the business. Currently, most self-governing bodies prohibit members from entering into investment or partnership arrangements with non-members and only members are permitted to serve in management positions. The major reason for this restriction is the concern that standards of competence and ethics would be jeopardized if non-members (who are presumably interested in increasing profits and are not controlled by the self-governing body) were given significant levels of control over the provision of the regulated service.

The ban against the involvement of non-members could be continued even if incorporation were permitted; non-members could be prevented from holding shares in or serving as directors of the corporation. However, if the ban were lifted, practitioners would be able to obtain investments from non-practitioners, enter into profit-sharing arrangements with support staff and join forces with practitioners of other services in multi-service firms.

D. THE EFFECT OF INCORPORATION ON THE PUBLIC

In order to explain the issues involved, our discussion has to this point focused on the effect of incorporation on practitioners. However, in keeping with the principle that occupational regulation should serve the public and should not be designed to benefit practitioners, the remainder of this Chapter will focus on the effect on consumers and the public at large of permitting incorporation by practitioners to whom it is currently denied.

The tax effects of incorporation are obvious; they will benefit at least some practitioners (especially those in upper income brackets) and, by reducing the taxes these practitioners currently pay, will negatively affect the revenues of the provincial (and federal) government. This may in itself provide a reason to maintain or expand the current ban on incorporation. However, in our view, a decision based on fiscal policy does not fall within our jurisdiction; it should be made by the provincial Cabinet and Legislature and not by a law reform body. We will therefore ignore the tax implications of permitting incorporation in our discussion of the possible benefits and disadvantages for the public of lifting the ban on practitioner incorporation.

1. Possible Benefits of Incorporation

In our view, there are few advantages to the public from a removal of the ban on incorporation unless it is accompanied by a relaxation of the rule which prevents non-members of a self-governing body from investing in or controlling the management of businesses which offer a regulated service to the public. However, if both incorporation and association with non-members were permitted, several advantages would accrue.

The primary advantage of a relaxation of these rules is that it allows practitioners to obtain capital by way of investments from non-practitioners. So long as incorporation is prohibited, practitioners can only obtain capital in two ways: by means of a loan (this is the only method to

[8] In fact, many regulatory regimes currently require that practitioners obtain liability insurance.

obtain capital from non-practitioners) or by entering into a partnership (this is only permitted if the partner is also a practitioner). However, if non-practitioners are permitted to invest in a business which offers a regulated service to the public, considerably greater new sources of capital will be made available.

This may not have a great impact on practitioners who are able to obtain sufficient funding by way of loans. However, there will inevitably be some instances in which non-practitioners would be prepared to invest in a firm when they would not be prepared to offer it a loan. The potential pool of capital from which practitioners may draw is therefore increased when non-practitioners are permitted to invest as shareholders in a corporation offering a regulated service to the public.[9]

By increasing the amount of capital available to practitioners, incorporation and a relaxation of the rules against co-ownership with non-practitioners are likely to have at least two positive results for the public. First, because it allows practitioners who wish to set up a practice or to expand an existing practice to increase their chances of obtaining financing, relaxation of these prohibitions is likely to allow individuals to practise who would otherwise have been prevented from doing so. This is especially likely for emerging services and technologies as well as others which may be viewed as marginal in their viability. As we noted in Chapter 2, if greater numbers of practitioners are given an opportunity to offer their services to the public, a probable result is lower prices and greater access for consumers.

Second, access to investment as an additional source of capital is likely to allow more practitioners to obtain new technologies and equipment for use in practice. In cases where loans for purchase of such equipment are difficult to obtain or where share capital involves more attractive conditions than a loan, access to share capital will increase the availability of new technologies and equipment and will therefore raise the level of service received by the public.

Another advantage of the relaxation of the rule against non-practitioner involvement is that it will permit novel approaches to the organization of a firm offering regulated services to the public. For example, the rule against non-practitioner involvement currently precludes the formation of multi-disciplinary firms which offer the public several related services. It also makes entering into profit-sharing arrangements with staff very difficult and prevents practitioners from taking on as a partner, director or shareholder an individual who is better able to manage the business than practitioners. Removing or relaxing current restrictions will allow these innovations to take place, with the likelihood that consumers will have the advantage of greater efficiency and convenience than can be offered under the current strictures.

Finally, incorporation would make it easier for consumers to ascertain the ownership of the entity offering the regulated service to the public. Because the names of a corporation's directors, officers and significant shareholders must be registered with the Corporations Branch, this information would be accessible to the public. By contrast, partnership agreements are not public documents and consumers may have great difficulty learning the identity of individuals who are the owners of the firm with which they are doing business.[10]

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[9]This point was made by the Certified General Accountants of Manitoba in response to our Discussion Paper. To understand the potential positive effect on practitioners of access to this additional source of capital, one might consider the reverse - the effect on "non-professional" businesses if they were prohibited from obtaining funds except by loans or partnerships. As one might imagine, the negative effects of such a restriction on individual businesses and the economy in general would be substantial.

[10]This problem could be dealt with by means of a requirement that all partnerships offering regulated services to the public register the names of their partners with the Corporations Branch.

2. Possible Disadvantages of Incorporation

There are a number of concerns about permitting regulated services to be offered by a corporation and particular fears respecting non-practitioner control of the corporation. The first concern is that a corporation whose employees offer a regulated service may be immune from the monitoring and disciplinary controls currently imposed on practitioners by administrators of a licensing or certification regime.[11] If self-governing bodies or government administrators of a regime are unable to control the behaviour of practitioners due to the interposition of a corporate entity, it is likely that the standards of ethics and competence would be ignored and the public would be put at risk.

This concern can be addressed, however, by the use of safeguards. One safeguard is to state in legislation that incorporation does not diminish the authority of administrators of the regime over practitioners, whatever their working arrangements.[12] Another safeguard is to require that corporations which wish to offer regulated services to the public must themselves be licensed or certified (as the case may be).[13] If they act improperly, these corporations would be subject to the same discipline to which practitioners are currently vulnerable. They could be fined, allowed to continue to offer the service only under conditions or restrictions or prohibited from being allowed to offer the service entirely.[14] This is the approach which is currently taken for some businesses offering potentially dangerous services, such as airlines, in order to permit them to operate as corporations while ensuring the public's protection.[15] In addition, a corporation's directors, officers and shareholders could be made subject, as individuals, to the disciplinary process for any wrongdoing in connection with the corporation.

A second and related concern is that, if incorporation were permitted and the rule against involvement with non-practitioners relaxed, non-practitioners could obtain a controlling interest in a corporation which employs practitioners and could encourage practitioner-employees to act in ways which place the public at risk.[16] For example, shareholders (through the board of directors) could pressure practitioner-employees to overprescribe their services or to cut corners on treatment so as to save money. However, while it is possible that these fears will be realized, it is again possible to minimize this potential problem by imposing disciplinary control over the shareholders and directors of the corporation. For example, a shareholder or director who exerts influence on a practitioner-employee to act improperly could be fined, removed from the board

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[11]Ontario, Professional Organizations Committee (H.A. Leal), *The Report of the Professional Organizations Committee* (1980) 164.

[12]For example, Alberta's *Legal Profession Act* permits incorporation but states: "The relationship of a member of the Society or of a student-at-law to a professional corporation, whether as shareholder, director, officer or employee, does not affect, modify or diminish the application to him of the provisions of this Act and the rules.": *Legal Profession Act*, S.A. 1990, c.L-9.1, s. 131.

[13]This approach was favoured by Ontario's Professional Organizations Committee (H.A. Leal), *supra* n. 11, at 166, and by several writers on this issue, including, J.R.S. Prichard, "Incorporation by Lawyers" in R.G. Evans and M.J. Trebilcock, eds., *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (1982) 303 at 314 and M.J. Trebilcock, C.J. Tuohy and A.D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario* (Working Paper prepared for the Professional Organizations Committee, 1979) 360.

[14]The control of administrators of the regime in this situation would in fact be greater than the control currently exerted over employees of practitioners. Currently, although employees of a practitioner may not be members of a regulatory regime, they are often bound by the regime's practice standards (for example, by a prohibition against revealing confidential information). Control is exerted on these employees through their employers; employers are vulnerable to punishment and will therefore take steps to ensure that the employee meets these standards. In the scenario we envision, the administrators of the regime would have a similar control over the employer (the corporation) and would also have control over the employee, a control it does not currently have.

[15]*Aeronautics Act*, R.S.C. 1985, c. A-2, s. 4.9. This legislation empowers the Federal Cabinet to regulate the licensing of flight crews and air carriers.

[16]Ontario Professional Organizations Committee (H.A. Leal), *supra* n. 11, at 166; Prichard, *supra* n. 13, at 320; Trebilcock, Tuohy and Wolfson, *supra* n. 13, at 361.

of directors, required to dispose of his or her shares or prohibited from owning shares in a corporation which offers that regulated service to the public.

In addition, there are several reasons to believe that non-practitioner ownership will do little to alter the status quo significantly. First, many practitioners are already frequently under pressure from external sources (such as banks and other creditors) to earn greater profits; profit-making pressures from investors and directors might add little to that tension. Second, practitioners who are not currently permitted to be employed by corporations offering regulated services to the public are often employed by public or semi-public organizations which offer these services (for example, hospitals or Legal Aid) or by government. Although these institutions are not designed to make a profit, they may nonetheless have an interest in increasing income and lowering expenses. If so, they are in the same position as a corporate board to exert pressure on practitioner-employees to act unethically.[17]

Third, a belief that pressure from non-practitioners will change the behaviour of practitioners rests on the assumption that non-practitioners are more profit-driven than practitioners; that is, without pressure from non-practitioners, practitioners would be less likely to be driven by profit-making impulses. This may sometimes be true but, as we have noted, the desire to earn money and the willingness to cut ethical corners to do so depends on individual characteristics, not the occupation or service in which the person is engaged.

A third concern is that non-practitioner shareholders or directors might have an interest which conflicts with that of clients being served by the corporation. The practitioner-employees in this situation might be disinclined to act wholeheartedly in the interests of their clients and, worse, might use confidential information from clients to benefit shareholders or directors.

While this is a legitimate fear, it may be reduced to some extent by the threat of disciplinary action against shareholders or directors who act in a way which prejudices consumers. The threat of discipline is currently used to prevent practitioners from acting in their own interests rather than in the interests of their clients; it would likely have a similar deterrent effect on shareholders and directors. In addition, it should be noted that shareholders do not participate in the day-to-day operations of a corporation; that role is reserved for the board of directors. Therefore, unless these shareholders are members of the board of directors, such a conflict of interest should not arise. One way to deal with this concern, then, is to prohibit individuals who might have a conflict of interest in the operation of the firm from sitting on the board of directors. Another safeguard against conflicts of interest has already been adopted by some regulatory regimes. It is, for example, a violation of the Law Society's Code of Conduct for a lawyer to represent a client when doing so places the firm in a conflict of interest.[18] The same standard could be applied to corporate ownership of such a firm; codes of conduct could prevent practitioners from acting in the case of a conflict of interest unless the existence of shareholders or members of the board of directors who might pose a potential conflict of interest problem were fully disclosed to and accepted by the consumer.[19]

Another concern is that the provision of a service by employees of a corporation might interfere with the close, personal and trusting relationship required in the provision of some services. It is possible that some consumers may feel uncomfortable with the knowledge that their practitioner is an employee of a corporation and may be less inclined to trust him or her as a

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[17]It should be noted, however, that the public or semi-public nature of these institutions usually requires accountability to the public and makes them more vulnerable to public scrutiny than a private corporation.

[18]The Law Society of Manitoba, *Code of Professional Conduct* (1992) 15-18. A lawyer can continue to represent the client only if the client is fully aware of the actual or potential conflict of interest and agrees to let the lawyer continue to act.

[19]As noted earlier, consumers already have greater access to information about the ownership and control of a corporation than they do about the ownership and control of a partnership.

result. However, it should be noted that the current ban on incorporation and non-practitioner involvement does not prevent practitioners from offering regulated services to the public as employees of a sole practitioner or a partnership. In addition, the number of services whose provision requires a close relationship between consumers and practitioners should not be exaggerated. In some cases, the regulated service is provided by teams of practitioners or para-professionals while in others the service is provided to a large corporate body; it is difficult to develop a close personal relationship in these situations. Even when a service is supplied by a single practitioner to a single consumer, however, consumers do not necessarily develop a close relationship with practitioners but simply rely on their commitment to competence and ethics which is enforced by the regulating body.

It should also be noted that incorporation does not prevent a close relationship between practitioner and consumers. For example, many consumers currently enjoy a close relationship with their pharmacist, financial advisor or stockbroker, all of whom are likely to be employed by a corporation.

A fifth concern is that incorporation will reduce the likelihood of financial compensation for consumers or third parties who have been harmed by negligent practice on the part of practitioners. This is because incorporation would limit the liability of practitioners as shareholders for the wrongdoing of other employees of the corporation (who may or may not be practitioners) to the amount of their investment in the corporation; their personal assets would not be at risk.

While recognizing this as a legitimate concern, the limited effect of incorporation on liability should be kept in mind. First, practitioners would normally remain personally liable for their own wrongdoing.[20] Second, it is already possible for practitioners to escape the effects of personal liability by transferring personal assets to a spouse or children and business assets to a service corporation. In addition, many practitioners carry liability insurance. In order for unlimited liability to be a significant benefit for victims at the present time, the practitioner must be relatively wealthy, carry no insurance and have failed to transfer his or her major assets.

It should also be noted that there are other ways of ensuring that victims are compensated, regardless of the wealth of the practitioner or the amount of the claim. For example, corporations which provide a relatively dangerous service could be required to carry a specified level of liability insurance or, alternatively, maintain sufficient unencumbered corporate assets to allow victims to recover for their losses.[21]

A final concern about limiting a practitioner's personal liability is that it might result in greater carelessness on the part of practitioners and might thereby increase the number of incidents in which the public is harmed. A practitioner whose personal assets are insulated from judgment might be less inclined to spend the time and effort necessary to ensure that harm does not result from his or her performance of the occupational service.

Again, this concern may be more apparent than real. First, it is likely that other factors will affect a practitioner's behaviour at least as significantly as exposure to personal liability. The personality of the practitioner and peer pressure will probably be at least as important in his or her behaviour as the threat of liability. Moreover, to the extent that practitioners are currently able to limit the effects of liability (through, for example, obtaining liability insurance or transferring their assets), the effect of incorporation on their conduct would be negligible.[22]

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[20]Recent jurisprudence on this point is discussed at page 80, footnote 7.

[21]This suggestion was made in response to our Discussion Paper by the Institute of Chartered Accountants of Manitoba.

[22]Indeed, the fact that insurance premiums are often tied to the performance of practitioners as a whole, rather than to the claims history of one individual, further weakens the link between carelessness in practice and financial loss.

E. CONCLUSION

As we have noted, the question of incorporation has significant implications for the revenue of the provincial government. We have not attempted to assess these implications in this Report. However, assuming that the Legislature decides that incorporation of practitioners for whom it is currently prohibited should not continue to be banned for reasons of revenue, we have come to the following conclusions.

Although, in most cases, the disadvantages of incorporation and non-practitioner involvement can be minimized through the use of safeguards and other measures, we are not confident that incorporation and non-practitioner involvement will be appropriate in every situation in which they are currently banned. We are therefore not prepared to recommend a total repeal of the prohibition on incorporation and non-practitioner involvement. However, we are also convinced that the current ban (which is based on a traditional distinction between professions and occupations) cannot be sustained. Moreover, we can find no other general rule which would provide a justification for banning incorporation and non-practitioner involvement for some occupations but not for others.

We are therefore of the view that the question of incorporation and business associations with non-practitioners should be considered for each service and form of regulation on an individual basis. In some cases, especially where safeguards can adequately protect the public, the advantages of permitting practitioners to incorporate and allowing non-practitioner involvement in the provision of regulated services will outweigh any negative effects these may have on the public. In others, the disadvantages of permitting incorporation and allowing non-practitioner involvement will exceed the benefits. We believe that the decision to permit or prohibit incorporation for practitioners of a service ought to be made by the body given responsibility for assessing applications for regulation and ought to form part of the assessment process.

In the case of services which are not currently regulated, a decision on permitting or prohibiting incorporation and on the question of non-practitioner involvement should be made in the course of the supervising body's assessment of whether or not to regulate that service. In the case of services which are currently regulated, a decision on these issues should be made in the course of the review of that service's regulated status which we recommend in the next Chapter.

RECOMMENDATION 72

The questions of incorporation and non-practitioner involvement in the provision of a regulated service should be considered for each service and form of regulation on an individual basis. Incorporation and non-practitioner involvement should be permitted where its advantages to the public outweigh its disadvantages (as offset by any safeguards).

RECOMMENDATION 73

The decision to permit or prohibit incorporation and non-practitioner involvement in the provision of a service which is currently unregulated should be made by the body responsible for assessing applications for regulation as part of that assessment process.

RECOMMENDATION 74

The decision to permit or prohibit incorporation and non-practitioner involvement in the provision of a service which is currently regulated should be made by the body responsible for assessing applications for regulation as part of its review of the form of regulation of all existing regulated services.

CHAPTER 9

TRANSITION AND IMPLEMENTATION

Having set out principles and recommendations which we believe should be adopted for future regulation of occupational services, we must decide to which services and practitioners our new model of regulation should apply and the method by which government should apply our proposals.

A. TRANSITION

Obviously, we are of the view that our new system of occupational regulation should be adopted for use when dealing with currently unregulated services. This means that, when an application is made to government for regulation, the process of determining the most appropriate form of regulation for that service (licensing, certification or another) and the setting of scopes of practice and entry and practice standards should be undertaken in accordance with our proposals. A decision would also be made concerning the ability of the occupational group to act as a self-governing body and, if self-government is appropriate, whether more than one occupational service regime could be administered by that body. A decision concerning the appropriateness of incorporation would also be required.

If the regime is to be administered by a self-governing body, arrangements will have to be made for the election of practitioner representatives and public representatives should be appointed. Once this has taken place, the self-governing body should be formally created. Thereafter, the body should be expected to comply with all the safeguards we have recommended, including filing annual reports, administering the standard disciplinary system and permitting public access to its operations.

The more difficult issue concerns the approach which should be taken to services which are already governed by a certification or licensing regime. Some of these are administered by self-governing bodies while others are administered by government departments or independent governmental bodies.

Some respondents to our Discussion Paper argued that services which are currently regulated should be allowed to remain undisturbed unless serious problems are identified in their regulation or administration. At first glance, this point of view seems to have merit. A review of the need for regulation and the adequacy of the administration of each of the many services currently regulated in Manitoba was beyond the scope of our reference (and our resources). Therefore, we are not in a position to make judgments about specific occupational regimes in the province; naturally, we are reluctant to make recommendations which are aimed at repairing something which has not been shown to be broken. Moreover, excusing existing regimes from undergoing the assessment process we propose would no doubt result in cost savings for the government.

However, upon reflection, we believe that this argument cannot be sustained.

First, the practical consequences of such an approach are that two streams of occupational regulation will be created. Services which have not been previously regulated would be subjected to the assessment process we propose and, if self-government is warranted, the self-governing body would be required to implement safeguards designed to protect the public. However, services which are determined to be regulated already (a determination which will itself be difficult to make in many cases) would continue to be governed by their current form of regulation indefinitely. No examination would be undertaken of the need for licensing or certification nor of the standards established for the protection of the public. These regimes would presumably retain their current disciplinary systems and may or may not be sufficiently accountable to the public and the government; public representatives may or may not be required to sit on their committees. When legislative changes are required for these regimes, the existing *ad hoc* approach will presumably be taken; while practitioners of unregulated services will have a clearly defined path to follow and established criteria to meet, practitioners of regulated services will continue to petition the appropriate Minister (or other members of the Legislature) and legislation will be enacted without reference to a uniform set of principles or criteria.

Responses to our Discussion Paper suggest that this scenario is unsatisfactory. Respondents stressed the need for uniformity, accountability and public involvement in occupational regulation. They wanted an objective, impartial process for occupational regulation in place of the current reliance on lobbying and *ad hoc* measures. We agree with these goals and recognize that they will not be achieved if currently regulated services are exempted from our model. Moreover, as time goes by, the two streams produced by this approach will become more difficult to maintain. For example, it is inevitable that applications to regulate services will be made which affect services which fall into a currently regulated regime. In this case, so long as the structure of the existing regime is inviolable, regulation in response to the application will be extremely difficult.

Second, the argument against applying our model to existing forms of regulation is circular. One cannot argue logically that the current approach and the regulatory regimes it has produced should not be subject to an assessment until proof is provided that they are not operating properly; by preventing an assessment of these regimes until evidence of serious problems is produced, the possibility of obtaining such evidence is compromised.

Third, this argument draws an artificial and arbitrary distinction between currently regulated and unregulated services. This distinction is entirely based on historical accident and not on any material difference between occupations. Therefore, unless our model of occupational regulation is in some way faulty or deficient, there is no reason why it should not be applied to existing regimes as well as to unregulated services.

Fourth, the argument against applying our model to existing regulatory regimes must be based on the conviction that the current approach to occupational regulation (and the regulatory regimes it has produced) is operating effectively and serves the public well; a contrary conclusion would require proponents of this position to seek the reform of the status quo. However, if the traditional approach is effective in serving the public interest, no reform of any kind is needed and our approach to occupational regulation ought not to be applied to any occupational services, currently regulated or not; the traditional approach ought to continue to be followed as it has in the past.

However, we are not convinced of the value of the traditional approach to occupational regulation and have substantial doubts that the regulatory regimes it has produced are in all circumstances serving the public as well as possible. These doubts go beyond whether current regimes are working well and encompass concerns about the adequacy of the consideration which has gone into determining the need for the regimes at all.

Our doubts arise from a number of sources. The reference from the Minister of Justice and Attorney General itself suggests concern on the part of government about the extent to which the public is being benefitted and protected under the present system. Our research in response to this reference has reinforced this concern. We have engaged in an extensive review of the academic literature concerning occupational regulation and have cited some of this research in this Report; much of this literature points to serious flaws in the current approach to occupational regulation and affords specific examples in which it has failed to serve the public interest. We have also considered reforms in other provinces which have, in some cases, been undertaken as the result of extensive and lengthy reviews of the same approach which is used in Manitoba. Our doubts about the status quo have been further strengthened by responses to our Discussion Paper, which revealed a rough consensus that steps were required to ensure that occupational regulation was in fact being designed, implemented and operating in the public interest.

All of these factors have contributed to our conclusion that the traditional thinking about occupational regulation on the part of government, practitioners and the public does not withstand scrutiny and that a new approach to occupational regulation is required. We believe that sufficient evidence has been set out in this Report to cast doubts on the adequacy of the existing approach to occupational regulation; if so, it is reasonable to assume that at least some of the regimes which this approach has produced are also flawed. In these circumstances, we believe that it is not sufficient to rely on the absence of incontrovertible and specific proof before assessing existing regimes; the appropriate approach is to adopt a principled and coherent approach to occupational regulation and to review all existing forms of regulation to determine whether or not their design and operation serve the public interest as fully as possible.

Assessing current forms of regulation and self-government does not mean that these will all be substantially reformed in the process. No doubt there are services whose present form of regulation functions well in protecting the public; there are also likely to be licensing and certification regimes whose scopes of practice and entry and practice standards are suitable for their regulated service. We expect that self-government will be endorsed for some regimes in which it currently exists and that, because some of the safeguards we recommend have already been adopted by some self-governing bodies, our proposals in this regard will often only require a minor adjustment. After their assessment and compliance with our recommendations, these regimes and self-governing bodies will be able to operate with renewed public confidence that they are serving the public interest.

However, it also seems probable that regulation has sometimes been granted where it is not warranted, that scopes of practice have been drawn too broadly or too narrowly, entry and practice standards have been set inappropriately and self-government has been extended when the public interest requires another form of administration. It is also likely that the safeguards we propose to protect the public interest are not present in some existing regimes. These regimes will be forced to change. Nevertheless, we believe that this process, however difficult, is necessary if the public interest is to be served.

We therefore recommend that all services which are currently regulated by means of a licensing or certification regime should be integrated into our model by means of a review in accordance with our recommendations. The review should begin by identifying each service currently controlled by a regime or self-governing body and conducting a separate assessment for each one. This will involve a determination of the most appropriate form of regulation for each service, an appropriate scope of practice for each regime, suitable entry and practice standards, the best form of administration for the regime and a consideration of joint administration for several services or more than one administrative structure for a single service. It will also require a decision with respect to the incorporation of practitioners.

Depending on the resources which can be committed to them, reviews of this sort for all existing regulatory regimes will take several years to accomplish. We recommend that a specific

period of time should be set within which a comprehensive review of all existing regimes will be conducted and that it be set out in legislation so as to ensure timely completion. We believe that a reasonable period of time for the completion of such an exercise would be ten years after the adoption of our approach in legislation. This does not mean that all existing regimes will be entitled to continue without a review for a ten year period; it means that no existing regime will continue for more than ten years without having its regulatory form and administration assessed by government.

Obviously, the governmental body with responsibility for assessments of this nature will have to determine in which order currently regulated services should be reviewed. We recommend that public protection considerations should play the most significant role in the priority given to these reviews but that, for the sake of convenience, several associated services may be reviewed together or in sequence. We also suggest that a schedule should be created at the outset which, although subject to revision, indicates when specific existing services will be assessed.

Even before a formal and fundamental review is carried out, however, existing regimes should be expected to comply with some of our recommendations. We believe that many aspects of our model can be implemented within a year or two of the adoption of our program. Regimes which are currently self-governing should be required to provide annual reports (containing the information we have recommended) at the end of the first fiscal year following the adoption of our recommended system.[1] Furthermore, the public should have immediate access to:

- the register of members, including information about the current practising status of practitioners;
- all rules, regulations and by-laws;
- meetings of governing councils of self-governing bodies held after our recommendations take effect;
- the minutes of meetings of the governing councils held after our recommendations take effect;[2]
- practitioners' disciplinary records for the three years preceding the request for the information;[3] and
- disciplinary hearings.

In addition, existing self-governing bodies should immediately be required to publish in a local newspaper (and eventually in the annual report) the names and particulars of practitioners whose practice has been suspended or restricted.[4] In our view, administrators of regulatory regimes should also be required to seek permission before initiating prosecutions for unauthorized practice as soon as a government body is established with responsibility for this function.

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[1]This will give self-governing bodies at least one but less than two years to prepare their first report.

[2]Except for *in camera* items relating to personnel or property.

[3]In our view, existing regimes should not be required to provide access to records which predate the implementation of the new system unless their governing legislation otherwise requires it. For these regimes, then, this recommendation would take three years to phase in completely. Before the phase-in is complete, members of the public would have access to records going back only to the implementation date.

[4]Other convictions would be publicized (with the practitioner's name) in the annual report.

To the extent that an existing regime wishes to comply with other requirements of the new system voluntarily (for example, if it wishes to have 33% public representation on all committees or to adopt the standard disciplinary system), all efforts should be made to facilitate and expedite changes to its governing statute.

However, if an existing regime requires more fundamental changes to its governing statute (for example, if it proposes to alter its scope of practice or its entry or practice standards), it should first undergo its fundamental review and be opened to scrutiny in all areas of its current regulation.

B. THE REGULATING BODY

The implementation of our model also requires a consideration of the most appropriate arm of government to administer our recommended approach. In fact, the reference from the Minister of Justice and Attorney General anticipated this need when it asked us to consider whether it was advisable to create a structure within government to deal with occupational regulation. In addressing this issue, we have kept in mind the various functions which we have recommended that government (or an agency thereof) should perform. These include the following:

Regulatory assessments

- determining whether unregulated occupational services should be regulated
- determining whether occupational services regulated prior to the implementation of reform should be deregulated or regulated differently
- where regulation is necessary, deciding on the form of regulation[5]
- setting scopes of practice for practitioners offering regulated services to the public[6]
- setting entry and practice standards
- deciding whether an occupational regime should be administered by practitioners or by government and, if by government, the most appropriate form of government administration
- deciding when several related tasks can be administered by a single administrative body
- deciding when one task should be administered by more than one administrative body
- deciding whether practitioners offering a regulated service should be permitted to incorporate

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[5]Although the body given responsibility for this function might decide that something other than licensing or certification is the best way of regulating an occupational service, our terms of reference are restricted to a consideration of these two forms of regulation. We have therefore recommended that jurisdiction of this body should be limited to implementing, developing and supervising licensing and certification regimes. Other regulatory options should be referred to the government departments best suited to deal with them. However, these departments should not be bound by advice on options other than licensing or certification.

[6]This involves a decision as to which services should be regulated and a definition of those services.

- reviewing licensing and certification regimes and the form of their administration at regular intervals

Oversight of regulatory regimes

- reviewing the annual reports submitted by self-governing bodies
- the programs developed by administrative bodies to identify breaches of practice standards and, where necessary, either suggesting or requiring changes to those programs
- monitoring and investigating[7] the activities of administrative bodies[8]
- approving or rejecting requests for delays in the investigation of complaints
- hearing appeals from decisions not to proceed with complaints and, where appropriate, ordering that a complaint proceed to a disciplinary hearing[9]
- considering and, where appropriate, approving requests from administrators of occupational regimes to bring a prosecution for unauthorized practice
- supervising the implementation and administration by each self-governing body of the uniform disciplinary procedure

General responsibilities

- appointing public representatives to bodies administering regulatory regimes
- holding periodic public meetings at which members of the public can comment on and question the activities of self-governing bodies generally
- designing rules and procedures for use in a uniform disciplinary system

Appropriate powers will be needed in order to carry out these functions. For example, when a review of a self-governing body's activities reveals that practitioners are not able to administer a regime on the basis of the principles we have recommended, the power to revoke self-governing status temporarily or permanently and to arrange for government administration of the regime will be required. In addition, the power to inspect or order the inspection of records of self-governing bodies will be needed. The government body assigned a supervisory role should also have the power to order self-governing bodies to comply with legislation or regulations and to issue reprimands and impose fines on bodies which are acting inappropriately. When financial irregularities or improprieties are revealed, the power to order that the financial administration of a self-governing body be placed in the hands of a receiver should also be available. Finally, we believe that the governmental body should seek to avert potential problems by providing support, information and advice to administrative bodies.

In our view, coordination of these functions is extremely important. Just as the administration of a regime must be based on the same principles used to create it, so the

[7]Investigations might be undertaken as a result of a complaint or on the initiative of the governmental body assigned the supervisory function.

[8]The review of annual reports prepared by the administrative bodies would be part of the monitoring process.

[9]In this event, it would also be necessary to appoint a prosecutor.

monitoring and oversight of the administration of a regime cannot be divorced from the assessment process which gave rise to the regime. If several government bodies were assigned these functions (for example, if one were responsible for assessments, another for oversight and another for appointing public representatives to boards or self-governing bodies), we doubt that the requisite level of coordination would be achieved. We also note that in Ontario and Québec the body which has responsibility for determining the need for regulation and the advisability of self-government also has the duty to supervise the activities of self-governing bodies. We therefore recommend that a single government body be granted responsibility for all of these functions with respect to particular regulated services.

This recommendation nonetheless leaves open the possibility that several bodies could be created, each with responsibility for a specific occupational sector. In Alberta, for example, three separate structures are employed; one each for medical and dental disciplines and a third for all other occupations. A sectoral approach has the advantage of permitting members of the regulating bodies to achieve a level of specialization in the sector with which they are concerned. However, despite this advantage, we prefer the approach taken by the Province of Québec, where a single governmental body (the *Office des professions*) is responsible for all regulated services. This approach was advocated by a large majority of respondents to our Discussion Paper. It is less likely to result in duplication and overlap than a sectoral system and is therefore likely to be more cost-effective. It also has the considerable benefit of consistency and uniformity; all services and practitioners will be dealt with by the same body applying the same objective principles and criteria, thereby increasing the likelihood that all will be treated fairly.

In theory, a single regulatory body could take the form of a Cabinet Minister, a committee of Cabinet (or Cabinet as a whole) or a Legislative Committee. However, as noted in an earlier Chapter, we envision a relatively formal assessment process which will involve extensive consultations with groups and individuals who are affected by the application for regulation. In our view, the time and effort involved in such a process would be too onerous for Cabinet Ministers or other members of the Legislature.

Furthermore, we are concerned that leaving this task in the hands of the Legislature would encourage continued lobbying as a method of obtaining occupational regulation. Respondents to our Discussion Paper echoed the views of academics and other commentators in expressing dissatisfaction with this practice. Their primary concern was that powerful and well-connected groups of practitioners are more likely to succeed in their objectives by lobbying than less influential groups. This raises the prospect that some practitioner groups will be treated unfairly but, more importantly, it suggests that occupational regulation may be employed to protect and enhance the interests of certain groups of practitioners rather than the interests of the public as a whole. Another concern is that, rather than resulting from the application of objective principles, the pattern of occupational regulation will depend on the power and influence of particular Ministers or other members of the Legislature. There seemed to be a consensus among respondents that, to the greatest extent possible, decisions concerning occupational regulation should be removed from the partisan political arena and placed on a more objective and permanent footing.

Accordingly, we believe that these functions will have to be delegated. One possibility is to delegate the responsibility to a departmental body under the supervision and authority of a Cabinet Minister. This might allow the use of existing personnel and structures and might therefore result in cost savings over another option. This solution also provides a high level of accountability; departmental staff would be accountable to a Cabinet Minister, who would, in turn, be accountable to the Legislature and to the people of the province.

However, we have concerns that the level of political control inherent in such an arrangement would serve to weaken the impartial and objective application of our principles. Members of a departmental body would be vulnerable to pressure brought to bear on them by the

Minister; because their career prospects could be jeopardized by Ministerial disapproval of their actions, they might be inclined to make decisions of which the Minister approved rather than to apply the principles we recommend. Moreover, this would also encourage applicant groups to continue the practice of lobbying Ministers and other members of the Legislature rather than focusing their energies on the criteria and the decision-making process we propose.

Therefore, in our view, the body which is responsible for occupational regulation should be an independent entity, operating at arm's length from government. However, we also recognize that this body cannot be allowed to use its substantial powers without accountability to the elected representatives of the people of Manitoba. A check over its activities must rest with the government and the Legislature. This balance should be reflected in the appointment of its members, its powers and the effect of its decisions.

There are a number of options in choosing an appropriate Minister who would be responsible for the independent body. Alberta's legislation for occupational services other than those within the dental and medical disciplines falls under the jurisdiction of the Minister of Labour.[10] While this choice could be made, we suggest that the responsible Minister should be the Minister responsible for consumer affairs.[11] One of the principal attractions of associating occupational regulation with consumer affairs is that it would serve to underline the principle that occupational regulation is to be conducted in the interests of the public rather than in the interests of practitioners.

Typically, members of independent agencies and commissions are appointed by the Lieutenant Governor in Council (that is, the provincial Cabinet). We see no reasonable alternative to this method of appointment for the regulatory body we propose. Concerns about the independence of members appointed in this way can, in our view, be adequately addressed by a recommendation that these appointees be granted security of tenure; although they could be removed for cause, they would otherwise serve for a fixed term at a fixed level of remuneration. In light of the expertise which we wish the members of this body to develop, we suggest that a reasonable term would be seven years. In addition, we recommend that the terms of members should be renewable on a staggered basis; this would allow for a high level of continuity within the body.

Care should be taken to ensure that the regulatory body is not overwhelmed by its substantial mandate and that it is able to work efficiently and effectively. In order to deal with the substantial workload our recommendations have assigned to it, we believe that a relatively large number of members will be required on this body, perhaps in the neighbourhood of ten or twelve. By using smaller panels to deal with the matters which come before the body (we suggest that a quorum of only three should be sufficient), a body of this size should be able to accomplish its tasks.

A sizable body will also give the Minister (or the Cabinet) an opportunity to make appointments which reflect the diverse elements of Manitoba's population. Although we are not prepared to make a formal recommendation as to specific representatives, we suggest that women and men from a variety of cultural, educational and occupational backgrounds should be chosen and, in particular, that individuals capable of representing consumers and the general public should sit on this body.

The balance between political accountability and independence of the regulatory body should also be reflected in the effect of its decisions. In our view, some of the functions our recommendations would assign to this body do not require Ministerial involvement. For

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[10]Responsibility for the dental and medical disciplines rests with the Minister of Health.

[11]This proposal was put forward by one of the respondents to our Discussion Paper, W. Wesley Pue.

example, it should not be necessary to obtain approval for authorizations of time extensions for the investigation of complaints by self-governing bodies, appeals of decisions of investigators not to proceed with a complaint, requests for prosecution of unauthorized practice, holding public meetings or appointing public representatives to self-governing bodies.

On the other hand, the other functions and powers of the regulatory body are more substantial; rather than affecting particular individuals, their exercise will affect the regulation of entire services and will therefore have a significant impact on large numbers of practitioners, consumers and the public. In these circumstances, we believe that a greater degree of political responsibility is required and that the Minister ought to have some form of control over the decisions of the regulatory body. At the same time, however, it is important that sufficient authority be delegated to the regulatory body to remove these decisions from partisan politics and to discourage lobbying of the responsible Minister, other Cabinet Ministers or members of the Legislature. We believe that this balance can be achieved by granting the regulatory body the power to make these decisions, subject to a veto exercised by the responsible Minister.

One way to implement this approach would be to enact omnibus legislation which would give the regulatory body the power to make regulations pursuant to its functions and powers. When powers are exercised which are subject to ministerial approval, regulations would be drafted, made public and sent to the Minister who would have a limited period of time (we suggest 30 days) to respond to the regulations as drafted. The Minister could approve the regulations either explicitly or by allowing the specified period of time to lapse without action. Alternatively, the Minister could veto the draft regulations by setting out this decision in writing to the regulatory body. However, the Minister could not alter or amend the draft regulatory package except through legislation.

In the case of an application for regulation, our suggested system would see the regulatory body draft a package of regulations which would set out the services to which a licensing or certification regime would apply, its entry and practice standards, its form of administration (government administration or self-government), its administration by more than one administrative body or joint administration with other services, the availability of incorporation and so on. This package of draft regulations would be made public and sent to the Minister. They would take effect upon being officially approved in writing by the Minister or after 30 days of being received by the Minister if no action is taken. If he or she disapproved of them, the Minister would be required to veto the whole package of draft regulations within 30 days of receiving them. However, if the Minister wished to alter any aspect of the recommendations (for example, if the form of administration or the entry standards were deemed unacceptable), legislation to this effect would have to be introduced and approved by the Legislature.

We envision that the regulatory body will utilize a variety of procedures in order to perform its functions. These will range from the private and informal (for example, reviewing annual reports or monitoring and investigating the activities of self-governing bodies) to the more formal and public (for example, holding public meetings for self-governing bodies). We see no purpose in setting out the procedures which this body should use in performing these functions; these should be determined by the members of the body itself.

Nevertheless, it is important to make clear our view that the process of initial regulation of a service and the periodic review of regulated services should be a public process which involves consultation with practitioners of the services being examined, practitioners of associated services, educational institutions, representatives of consumer groups and, in particular, members of the public. The most accessible form of consultation would be a public hearing at which a variety of views could be heard and in which arguments and statements of fact could be rebutted or challenged by members of the regulatory body or other participants. If public hearings are seen as too expensive and time consuming, inviting written submissions may be an alternative,

although this approach suffers from a certain lack of accessibility and does not permit the testing of facts and opinions to the same extent as a public hearing.

If the regulatory body is to be permitted to utilize public hearings in its decision-making process, it will require certain powers in order to do so effectively. We recommend that it be given the powers normally accorded to decision-making agencies of the government; these include the power to administer oaths, compel testimony and obtain expert advice.

Historical experience suggests that the majority of applications for regulation will be initiated by practitioners of the service in question. However, there may be instances where regulation is necessary to protect the public but practitioners are unorganized or are reluctant to file an application. We therefore recommend that the government, members of the public and the regulatory body itself also be permitted to initiate the decision-making process. In order to avoid the needless expenditure of time, effort and funds, we believe that applicants ought to be required to provide some evidence that certification or licensing is needed for a particular service or group of services. The decision-making process would be assisted if applicants were also able to provide a proposed definition of the service to be regulated and entry and practice standards as well as details concerning the regime's administration. However, subject to the right of the regulatory body to priorize the applications it receives, evidence that the improper provision of a service threatens the public with significant harm and that certification or licensing would reduce that threat should obligate the regulatory body to consider the application.

In keeping with the principle of accountability and openness, we are of the view that the regulatory body should provide an annual report to the responsible Minister setting out its activities over the preceding year. At a minimum, the report should include the number of regulatory assessments made in the past year and decisions made with respect to them, the number and nature of complaints made against self-governing bodies and the steps taken by the regulatory body to deal with them, the actions taken to determine whether self-governing bodies are meeting their public protection mandate and steps taken to resolve any problems uncovered.

We also believe that, like self-governing bodies, the regulatory body should operate in public to the greatest extent possible and that, as a general rule, members of the public should have access to its operations. This means, in our view, that members of the public should have access to the regulator's annual report, any regulations it passes and all of its decisions.

Given the extensive nature of the regulator's mandate, we believe that at least its chair should be a full-time, salaried employee. The other members of the regulatory body may also have to occupy full-time positions, but it may be that they can serve on a part-time basis. In either case, they should receive appropriate remuneration for their efforts. Besides these expenses, it is likely that the regulatory body will require the assistance of several staff members. The cost of an office, equipment and supplies will add to the expenses associated with establishing and maintaining this body.

We are well aware that our recommendations concerning the establishment of a regulatory body involve the expenditure of funds in an era of restrictive fiscal policy on the part of government. We point out, however, that not all of this expenditure will be new. Government is already involved in the regulation of occupations. Currently, that process is conducted in an *ad hoc* manner by several government departments who have staff involved on at least a part-time basis in supervising the activities of self-governing bodies, preparing amendments to existing legislation and developing legislation for newly regulated services. Relying on a single body to perform this function should reduce the amount spent by these departments under the current approach and should make occupational regulation more efficient and cost-effective. We are not suggesting that the cost of consolidating these functions in the hands of the regulatory body we have proposed will necessarily be less than the current cost of occupational regulation.

However, we are confident that the public will receive greater value for the money spent on such a body than under the current system.

At present, the costs to government in organizing and supervising occupational regulation are paid from the Consolidated Revenue Fund; that is, these costs are paid by taxpayers. The same approach could be taken in funding the regulatory body we propose. Such a solution would have the advantage of being consistent with the principle that occupational regulation should benefit the public; if the public gains from occupational regulation, it can be argued that it should be prepared to pay for this benefit through its taxes.

However, several respondents to our Discussion Paper suggested that practitioners of regulated services should be asked to defray at least some of the expenses of the regulatory body. This could be accomplished in several ways. For example, it would be possible to impose an application fee on those seeking new or revised forms of regulation. Although Alberta currently takes this approach,[12] we have concerns that a substantial fee would discourage applications, especially from members of the public.

Another option is to impose a levy on all practitioners of regulated services. This has the disadvantage of requiring all practitioners to pay the same amount, despite significant differences in their income levels. Objections could also be raised to this approach on the grounds that it suggests that practitioners are paying for benefits they receive by way of occupational regulation when our basic principle is that occupational regulation is to benefit the public and not practitioners. However, this objection does not unduly concern us. It is common to require those who are licensed to pay a fee for this privilege, even though the goal of the licence is to protect the public.[13] Furthermore, in many occupational services, this levy can and will be passed on to consumers of the service. Since consumers are, in most cases, the primary beneficiaries of the public protection offered by occupational regulation, it can be argued that it is fairer to require them to pay than requiring all taxpayers, some of whom may never use the service, to pay for it.

We have come to the conclusion that we cannot make a formal recommendation with respect to the funding of the regulatory body. We believe that this decision should remain the responsibility of the government, taking into account its fiscal position. We have, however, no fundamental objection to requiring that practitioners of the regulated services defray some of the costs of this body.

C. CONCLUSION

Based on the discussion in this Chapter, we make the following recommendations:

RECOMMENDATION 75

All applications for the regulation of services which are not currently regulated (including decisions as to the form of regulation, setting of scopes of practice and entry and practice standards, form of administration and advisability of incorporation) should be assessed and dealt with in accordance with the recommendations set out in this Report.

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[12]Occupational associations who wish to be registered under the *Professional and Occupational Associations Registration Act* must pay an application fee of $700.00: Telephone conversation with L. Johnson, Assistant to the Director, Health Disciplines (Alberta), June 17, 1994.

[13]For example, drivers of motor vehicles must pay a fee for a licence despite the fact that a licence is granted only when they can demonstrate an ability to drive without harming others.

RECOMMENDATION 76

All existing licensing and certification regimes should be reviewed in accordance with the recommendations set out in this Report. The review should identify all the services currently controlled by the regime and, in respect of each identified service, determine the most appropriate form of regulation, if any, entry and practice standards, form of administration and advisability of incorporation.

RECOMMENDATION 77

The review of all existing licensing and certification regimes should be completed within a reasonable period of time established in legislation. A period of ten years after the adoption of our approach in legislation seems a reasonable deadline for the completion of this review. A schedule should be created at the outset of this process which indicates when each specific existing regime will be assessed.

RECOMMENDATION 78

Even before their scheduled assessment, existing regimes should be required immediately upon the adoption of our proposals by government to:

(a) grant the public access to their operations as described in Recommendations 42, 43, 44, 45 and 47 (the register of members, including practising status; all rules, regulations and by-laws; minutes of meetings held after the adoption of our proposals; practitioners' disciplinary records for the preceding three years; access to meetings of governing councils and disciplinary hearings);

(b) publish the names and particulars of practitioners whose practice has been cancelled, suspended or restricted; and

(c) seek permission from the regulatory body before initiating prosecutions for unauthorized practice.

Existing regimes should be required to provide annual reports (containing at least the information which we have already proposed) at the end of the first fiscal year following the adoption of our proposals.

RECOMMENDATION 79

To the extent that administrators of an existing regime wish to comply with other requirements of our proposals in advance of the regime's review and assessment (such as one-third public representation on all committees or adopting the standard disciplinary system), all efforts should be made to facilitate and expedite changes to its governing statute. However, more fundamental changes (such as changes to scope of practice or to entry and practice standards) should only be considered as part of that regime's review and reassessment and not before.

RECOMMENDATION 80

A single, independent entity, operating at arm's length from government, should be established to perform the various functions which we have recommended for government or a supervising or regulatory body. These include the following:

Regulatory assessments

- *determining whether unregulated occupational services should be regulated*
- *determining whether occupational services regulated prior to the implementation of reform should be deregulated or regulated differently*
- *where regulation is necessary, deciding on the form of regulation*
- *setting scopes of practice for practitioners offering regulated services to the public*
- *setting entry and practice standards*
- *deciding whether an occupational regime should be administered by practitioners or by government and, if by government, the most appropriate form of government administration*
- *deciding when several related tasks can be administered by a single administrative body*
- *deciding when one task should be administered by more than one administrative body*
- *deciding whether practitioners offering a regulated service should be permitted to incorporate*
- *reviewing licensing and certification regimes and the form of their administration at regular intervals*

Oversight of regulatory regimes

- *reviewing the annual reports submitted by self-governing bodies*
- *reviewing the programs developed by administrative bodies to identify breaches of practice standards and, where necessary, either suggesting or requiring changes to those programs*
- *monitoring and investigating the activities of administrative bodies*
- *approving or rejecting requests for delays in the investigation of complaints*
- *hearing appeals from decisions not to proceed with complaints and, where appropriate, ordering that a complaint proceed to a disciplinary hearing*
- *considering and, where appropriate, approving requests from administrators of occupational regimes to bring a prosecution for unauthorized practice*
- *supervising the implementation and administration by each self-governing body of the uniform disciplinary procedure*

General responsibilities

- *appointing public representatives to bodies administering regulatory regimes*
- *holding periodic public meetings at which members of the public can comment on and question the activities of self-governing bodies generally*
- *designing rules and procedures for use in a uniform disciplinary system*

RECOMMENDATION 81

The regulatory body should have appropriate powers to carry out its functions, including:

(a) the power to revoke self-governing status temporarily or permanently and to arrange for government administration of the regime when a review of a self-governing body's activities reveals that practitioners are not able to administer the regime on the basis of the principles which we have recommended and in the public interest;

(b) the power to inspect the records of self-governing bodies;

(c) the power to order self-governing bodies to comply with legislation or regulations and to issue reprimands and impose fines on bodies which are acting improperly;

(d) the power to order that the financial administration of a self-governing body be placed in the hands of a receiver when financial irregularities or improprieties are revealed;

(e) the power to provide support, information and advice to administrative bodies; and

(f) the power to administer oaths, compel testimony and obtain expert evidence.

RECOMMENDATION 82

The regulatory body should report to a designated member of Cabinet; in keeping with the principle that occupational regulation should be conducted in the interests of the public rather than in the interests of practitioners, we suggest that this person should be the Minister responsible for consumer affairs.

RECOMMENDATION 83

Members of the regulatory body should be appointed by the provincial Cabinet on the recommendation of the responsible Minister. Members should hold office for a fixed term, subject to removal for cause, at a fixed level of remuneration. In light of the expertise which the members of this body should develop, a reasonable term of office might be seven years.

RECOMMENDATION 84

The terms of the members of the regulatory body should be renewable on a staggered basis.

RECOMMENDATION 85

The regulatory body should have appropriate staff support and at least its chair should be a full-time employee.

RECOMMENDATION 86

In order to deal with the substantial workload which we propose assigning to the regulatory body, it should have a relatively large number of members, perhaps ten to twelve. However, it should be permitted to operate with smaller panels with quorums of as few as three.

RECOMMENDATION 87

All decisions of the regulatory body should be made public and should have binding effect; major decisions in respect of the appropriate form of regulation for a service, scope of practice, entry and practice standards, form of administration and availability of incorporation should be made in the form of published regulations. However, such major decisions affecting the regulation of entire services should be subject to a veto by the responsible Minister to be exercised within 30 days of their public release; although the Minister should have this right of veto, he or she should not be able to alter or amend the draft regulations except through legislation.

RECOMMENDATION 88

The initial regulation of a service and the periodic review of regulated services should be a public process involving consultation with practitioners of the services being examined, practitioners of associated services, educational institutions, representatives of consumer groups and members of the public. Public hearings should be seriously considered.

RECOMMENDATION 89

Any person or organization, including the government, members of the public and the regulatory body itself, should be permitted to apply to have an unregulated service considered for regulation or to have some aspect of a regulated service reconsidered. Subject to the right of the supervising body to priorize the applications it receives, evidence of the threat of significant harm to the public and the ability of licensing or certification to address that harm should obligate the supervising body to consider the application.

RECOMMENDATION 90

All aspects of the operation of the regulatory body should be conducted in accordance with principles of accountability and openness. Its hearings should generally be conducted in public and the public should have full access to all of its decisions and to all regulations which it passes. The regulatory body should publish and submit to the responsible Minister an annual report setting out, at a

minimum, the number of regulatory assessments made in the past year and decisions made with respect to them, the number and nature of complaints made against self-governing bodies and the steps taken by the regulatory body to deal with them, the actions taken to determine whether self-governing bodies are meeting their public protection mandate and steps taken to resolve any problems discovered.

CHAPTER 10

CONCLUSION AND LIST OF RECOMMENDATIONS

As we noted in Chapter 1, the recommendations contained in this Report amount to a new model or approach to occupational regulation. Among other things, our approach stresses a careful consideration of all the costs and benefits of a particular regime before its implementation, a decision on the form of regulation prior to a decision as to the administration of the regime, greater government supervision of self-governing bodies and more public access to and involvement in occupational regulation. This model differs from the traditional approach to occupational regulation by focusing on services, rather than occupations or professions.

While breaking with the past, however, our model retains links with it. It is based, for example, on the traditional principle that occupational regulation should be designed to serve the public rather than to benefit practitioners. In addition, our model still places faith in the ability of practitioners to act in the public interest when granted a self-governing regime. Moreover, when appropriate, related services will still be jointly administered and a single service will sometimes be administered by more than one self-governing body under our approach, just as at present.

A description of our recommendations as a model of occupational regulation suggests the close relationship between its various elements. Although this Report is separated into Chapters, each addressing specific issues, their links with one another should not be forgotten. For example, we have tried to make clear that an assessment of a regime's costs and benefits cannot take place without knowledge of its scope of practice and entry and practice standards. Similarly, we have concluded that a decision to grant self-government will not be in the public interest unless safeguards are established to ensure that self-governing powers are used appropriately.

We believe that the adoption of our new approach, which recognizes these essential links, will result in a system of occupational regulation which is rational, efficient and responsive, a system which better serves and protects the public.

The following is a summary of the recommendations contained in this Report:

CHAPTER 2 - LICENSING AND CERTIFICATION

1. The purpose of occupational regulation should be to protect the public from harm resulting from the improper performance of an occupational service; it should not be used to benefit or reward practitioners.

2. Certification and licensing should be considered for use in situations where harm results from incompetence or unethical behaviour on the part of practitioners. Certification can be effective in addressing a lack of consumer information and licensing can be effective in addressing both a lack of consumer information and harm to third parties. However, each can also result in higher prices, greater inefficiencies and reduced access to the service. Accordingly, neither certification nor licensing should be implemented unless their benefits exceed their costs.

3. Because of its substantial costs, licensing should be used sparingly and cautiously. In general, licensing should not be implemented unless the threatened harm to the public from the inadequate performance of the occupational service is serious. The seriousness of the threatened harm should be evaluated by considering the likelihood of its occurrence, its potential effect on individual victims and the number of potential victims it may affect.

4. Certification should only be implemented when the threat of harm is less serious and when it affects only the consumer of the service or its effects on third parties are minor.

5. Neither licensing nor certification should be implemented unless it is capable of reducing the identified threat of harm to acceptable levels.

6. In order to make clear to the consumers the quality signal intended by a certification regime, a specific term, such as "certified" should be reserved for the exclusive use of groups which are certified by government.

7. Forms of regulation other than certification or licensing should be considered and should be implemented if they can adequately protect the public at a lower cost than certification or licensing.

8. If more than one form of regulation will adequately protect the public from the threat posed by the improper performance of the service, the least costly form should be selected.

CHAPTER 3 - SCOPES OF PRACTICE AND REGULATED SERVICES

9. The traditional occupation-based approach to delineating scopes of practice should be replaced by a task-based model of occupational regulation in which tasks and services are regulated, rather than practitioners or occupations.

10. Rather than grouping together and regulating all the tasks or services which are considered to be part of an occupation, the activities of an occupation should be broken down on the basis of practical considerations into discrete services which are provided to the public; each of those tasks or services should be examined separately in order to determine the extent to which the improper performance of each threatens the public and the extent to which entry and practice standards are capable of reducing the threat of harm.

11. Tasks or services performed by members of an occupation which do not pose a threat to the public or in which the potential harm cannot be meaningfully reduced by entry and practice standards should not be regulated or should be regulated by regimes other than certification or licensing.

12. A regulated task or service (that is, one which will be governed by either a certification or licensing regime) should be described in clear and specific terms; vague or expansive language should be avoided. Descriptions should be broad enough to take into account future developments yet narrow enough to avoid unnecessary regulation.

13. Practitioner specialization in one or only a few tasks should be permitted as long as this task (or tasks) can be adequately performed without the need to be able to perform other tasks.

14. The possibility of having one structure jointly administer more than one regulated service should be explored and implemented where appropriate. This will be particularly useful for tasks or services which have been traditionally grouped together in an occupation.

15. To account for differences in approach to providing a service, it should be permissible for a licensed or certified service to be administered by more than one administrative structure and for a practitioner to choose to belong to one or another of the regimes. That is, overlapping scopes of practice should be permitted.

16. Licensed tasks or services should not be delegated to unlicensed individuals; that is, unlicensed individuals should not perform all or substantially all of a licensed task. To permit delegation of this sort would, by definition, expose the public to the serious risk of harm. If a licensed task or service can be safely delegated, then either it should not be licensed (as its improper performance does not, in fact, pose a serious threat of harm to the public) or the standards for practising the task or service have been set inappropriately.

17. Due to the close relationship between the costs and benefits of a particular regime and its scope of practice, government decision-makers should set appropriate scopes of practice for licensing and certification regimes.

18. Scopes of practice should be reviewed at regular intervals by the governmental body which designed them.

CHAPTER 4 - ENTRY AND PRACTICE STANDARDS

19. Entry and practice standards should be designed to address the underlying causes of improper performance of the occupational service.

20. Entry and practice standards should be aimed at addressing all causes of improper performance.

21. Entry and practice standards should not contain superfluous requirements which are irrelevant to the proper performance of the service.

22. Testing should focus on the qualities needed to practise competently; practical tests should be instituted whenever possible.

23. Setting and administering entry and practice standards should not be delegated to educational institutions unless the contents of the curriculum and the standards adopted by the institution correspond closely to those required for competent practice. When these functions are delegated to educational institutions, alternative methods of entry should be provided to allow applicants who have not attended these institutions to demonstrate their competence and be permitted entry. Furthermore, when educational institutions fail to address all of the qualities required for proper practice, additional requirements should be imposed on graduates from the educational institutions.

24. Administrators of occupational regimes should develop and implement a program to ensure that practitioners remain capable of meeting entry standards after their entry into a regime.

25. Anti-competitive elements in practice standards should be discouraged and should not be permitted unless they are demonstrably necessary for the protection of the public.

26. Entry and practice standards should be set neither too high nor too low, but at the level necessary to protect the public adequately from the identified harm which may flow from the improper provision of the task or service.

27. Although entry and practice standards may be slightly adjusted to take advantage of the benefits of national standards, the primary goal when setting entry and practice standards should be adequate public protection at the least cost for consumers and the public. Therefore, adherence to national standards ought to be secondary to the principles set out in this Report. Where national standards exceed the standards required for adequate public protection, certification within a licensing regime might be considered.

28. "Grandparent" clauses should not be permitted; when entry standards are raised, existing practitioners should be required to meet them within a reasonable period of time.

29. Because the development of entry and practice standards is integral to the costs and benefits of regulatory regimes, a governmental body ought to retain for itself the task of setting entry and practice standards. In doing so, this body should be required to consult with practitioners and other experts, as well as with members of the public.

30. Entry and practice standards should be reviewed on a regular basis by the same governmental body which established them.

CHAPTER 5 - ADMINISTRATION OF THE REGIME

31. The power to administer a licensing or certification regime should only be delegated to practitioners when it is in the public interest to do so and not merely because practitioners desire this power.

32. A decision on whether there is a need to regulate a service by licensing or certification should precede a decision on whether to grant self-government; the question of self-government should be considered only after it is decided that a licensing or certification regime is needed to protect the public from harm.

33. The power of self-government should only be granted when its advantages outweigh its disadvantages. This will only be the case when practitioners demonstrate the qualities needed to sustain self-government in the public interest and when adequate safeguards have been adopted to protect the public interest.

34. The qualities needed to sustain self-government in the public interest are adequate human and financial resources, a democratic structure and a genuine and demonstrated willingness to act in the public interest.

35. Self-government should not be granted to bodies which intend also to act as an association or trade union dedicated to promoting the interests of its members.

36. In granting self-government, the existence of a standardized body of knowledge, affiliations with national or international bodies and a code of ethics should be disregarded as irrelevant except to the extent that they provide evidence of the qualities necessary to sustain self-government in the public interest.

37. Joint administration of several regimes should be considered where occupational groups lack the human or financial resources to administer occupational regimes separately.

38. When administration by practitioners is inappropriate, the regime should be administered by government unless the costs of this form of administration outweigh the benefits of establishing the regime (in which case the regime ought not to be established). Government administration may take the form of direct administration by a government department or the form of indirect administration.

39. When direct or indirect government administration is required, the possibility of imposing fees on practitioners to defray the costs of administration should be considered.

CHAPTER 6 - SAFEGUARDS FOR SELF-GOVERNING BODIES

40. Self-governing bodies are not private organizations, but exercise powers granted to them by the Province of Manitoba for the purpose of protecting the public. Accordingly, all aspects of the operation of self-governing bodies should be governed by the principle of openness and accountability to the provincial government and to the people of Manitoba generally.

41. Annual reports to government should be mandatory for all self-governing bodies and should be made available to members of the public. These reports should include as much information as possible in order to allow government and the public to assess the performance of the self-governing body and to provide information valuable to consumers; they should include at least the following information:

    (a) an up-to-date description of the structure of the self-governing body, including the names of all permanent or *ad hoc* committees and the functions of each;

    (b) the names of all individuals (practitioners and public representatives) serving on the governing council and its committees during the past year;

    (c) a copy of all by-laws, rules and regulations enacted in the past year;

    (d) a description of the assessment process used for applicants for entry during the past year, including the specific skills assessed and the method of assessment of each;

    (e) the number of applications for entry received in the past year and their disposition;

    (f) the number of complaints against practitioners filed in the past year and their disposition;

    (g) the names of practitioners disciplined in the past year, the reasons for the discipline and the sanctions imposed; and

    (h) the methods and mechanisms used to provide for the continuing competence of practitioners and their results during the past year.

42. Government and the public should have access to each self-governing body's rules, regulations and by-laws.

43. Each self-governing body should have a register of members which sets out the names of member practitioners, their practising status and any restrictions or conditions on their practice. Government and the public should have access to this register, subject to the self-governing body's right to prevent its use for commercial purposes.

44. The disciplinary hearings of self-governing bodies should be open to the public unless there are compelling reasons compatible with the public interest for keeping a particular hearing closed.

45. Governing bodies should be required to reveal practitioners' disciplinary records for at least the three years preceding a request for this information. In order to make this

information meaningful, disciplinary "charges" should reflect the particular actions for which a practitioner is being disciplined; vague descriptions should not be used.

46. Self-governing bodies should be required to publish in the *Manitoba Gazette* and in a newspaper widely distributed in the area in which a practitioner practises information concerning the removal or suspension of a practitioner's licence or certificate or any restrictions or conditions which have been attached to practice. Self-governing bodies should be free to disseminate further information concerning the practice of a practitioner where revealing that information would be in the public interest.

47. Subject to circumstances where issues of privacy outweigh the need for public accessibility (such as in financial or personnel matters), the meetings held by self-governing bodies should be open to the public and the public should have access to minutes of meetings.

48. Periodic public meetings, sponsored by government, should be held at which representatives of one or more self-governing bodies would explain their role and activities to members of the public and members of the public would have the opportunity to question these representatives. Each self-governing body should be required to participate in one of these meetings at least once every two years.

49. Since an independent governmental body will be setting scopes of practice and entry and practice standards for self-governing bodies, there is no need for a requirement that government approve all significant regulations made by them. However, a governmental body should be assigned the task of overseeing the activities of self-governing bodies to ensure that they comply with the legislation creating them and regulations passed pursuant to that legislation.

50. The approval of the supervisory body should be required before a self-governing body prosecutes an unlicensed person for providing a licensed service or an uncertified person for holding himself or herself out as certified (that is, for unauthorized practice).

51. At least one-third of the governing council of each self-governing body should be composed of public representatives (that is, non-practitioners). At least one-third of the members of all committees should be public representatives.

52. The government body responsible for supervising self-governing bodies should also be responsible for appointing, in a timely fashion, the public representatives to the governing councils of the self-governing bodies. The supervising body should seek nominations and applications from the public and should consult with practitioners, consumer groups and others representative of the community. In selecting public representatives, regard should be given to the need to provide for a wide range of experiences and perspectives, especially those which would not otherwise be present on a self-governing body.

53. The role of public representatives in self-governing bodies as advocates for the public interest should be explicitly set out in legislation.

CHAPTER 7 - ENFORCING PRACTICE STANDARDS

54. Each self-governing body should develop preventative measures which attempt to ensure that practitioners remain competent and ethical. A full range of measures should be made available to self-governing bodies, including mandatory or optional education programs, confidential assistance programs, professional consultation programs, published decisions of disciplinary bodies, practice circulars and professional activity studies.

55. A disciplinary process which is standard in its key elements should be administered by each self-governing body.

56. The disciplinary process, while protecting the rights of practitioners, must be effective in protecting the public.

57. Self-governing bodies should not rely solely on consumer complaints to identify breaches of practice standards. They should actively supplement consumer complaints with other forms of detection, including practitioner-initiated complaints, routine testing of practitioner competence and periodic practice checks.

58. The body responsible for supervising self-governing bodies should be required to review and approve the programs of detection employed by self-governing bodies.

59. An investigatory stage should form part of a standard disciplinary procedure: self-governing bodies should conduct an investigation of the merits of a complaint prior to a disciplinary hearing.

60. If, following an investigation of a complaint, the investigator decides that the complaint should be dismissed without a hearing, the complainant should be permitted to appeal that decision to the body responsible for supervising self-governing bodies. If that body agrees with the complainant that a hearing should be held, it should appoint the prosecutor.

61. Investigations into a complaint should be completed within 90 days of receiving it. If further investigation is required, the investigators should be required to seek permission to extend the deadline by informing both the complainant and the body responsible for supervising self-governing bodies of the need for further investigation, the reason for the delay and the length of additional time which is being requested. If the complainant and the supervising body are satisfied with the explanation given and raise no objection to the request, the request for additional time should be granted automatically. However, if unsatisfied, the supervising body should be allowed to investigate the reason for the delay and should be obliged to do so at the request of the complainant. After investigating the matter, the supervising body should approve the request for additional time, reduce the additional time being sought or require the investigators to make an immediate decision on whether to proceed to a hearing. If additional time is approved but proves to be insufficient, another request for additional time should be made to the supervising body and the complainant should again be notified.

62. Mediated settlements of complaints are appropriate only where the dispute involves only the complainant and the practitioner. Where the complaint involves a possible breach of practice standards and raises concerns about the safety of other consumers or the public generally, mediation should not be employed. Mediated settlements should be open to the scrutiny of the body responsible for supervising self-governing bodies: the facts of all matters which are settled by mediation and the terms of these settlements should be reported to the body responsible for supervising self-governing bodies.

63. Self-governing bodies should adhere to the rules of natural justice when conducting disciplinary hearings.

64. At least one-third of every disciplinary panel should be made up of public representatives. At least one practitioner and one public representative should sit as a member of every panel conducting a disciplinary hearing.

65. Disciplinary panels should not be required to follow all of the rules of evidence which govern proceedings before a judge. The body responsible for supervising self-governing

bodies should instead design suitable evidentiary and procedural rules for use by disciplinary panels.

66. Subject to Recommendation 60, the self-governing body should appoint the person who will prosecute complaints before the disciplinary panel. The complainant should not act as prosecutor.

67. Although a prosecutor should be permitted the discretion not to bring a matter to a hearing, complainants should have the right to appeal such a decision in the same manner as a decision of investigators not to proceed to a hearing.

68. Plea bargains in disciplinary matters should be permitted; however, disciplinary panels should not be bound by the agreement between the prosecutor and the practitioner and the details of all plea bargains should be forwarded to the body responsible for supervising self-governing bodies. This information should be retained and reviewed as an indicator of whether the self-governing body is carrying out its mandate appropriately.

69. Complainants should be given notice of the disciplinary hearing at which their complaint will be heard, be permitted to attend and be informed of any decision reached.

70. While self-governing bodies should not be required to order practitioners to compensate complainants or be required to create a compensation fund to reimburse complainants, they should not be prohibited from creating a compensatory fund or from ordering practitioners to pay restitution to complainants to the extent that such an order is constitutional. This limitation will likely restrict orders of restitution to the reimbursement of out-of-pocket losses and the refunding of excessive fees.

71. Both practitioners and prosecutors should be permitted to appeal the decision of disciplinary panels (as to both verdict and disposition) to the Court of Queen's Bench.

CHAPTER 8 - INCORPORATION

72. The questions of incorporation and non-practitioner involvement in the provision of a regulated service should be considered for each service and form of regulation on an individual basis. Incorporation and non-practitioner involvement should be permitted where its advantages to the public outweigh its disadvantages (as offset by any safeguards).

73. The decision to permit or prohibit incorporation and non-practitioner involvement in the provision of a service which is currently unregulated should be made by the body responsible for assessing applications for regulation as part of that assessment process.

74. The decision to permit or prohibit incorporation and non-practitioner involvement in the provision of a service which is currently regulated should be made by the body responsible for assessing applications for regulation as part of its review of the form of regulation of all existing regulated services.

CHAPTER 9 - TRANSITION AND IMPLEMENTATION

75. All applications for the regulation of services which are not currently regulated (including decisions as to the form of regulation, setting of scopes of practice and entry and practice standards, form of administration and advisability of incorporation) should be assessed and dealt with in accordance with the recommendations set out in this Report.

76. All existing licensing and certification regimes should be reviewed in accordance with the recommendations set out in this Report. The review should identify all the services currently controlled by the regime and, in respect of each identified service, determine the most appropriate form of regulation, if any, entry and practice standards, form of administration and advisability of incorporation.

77. The review of all existing licensing and certification regimes should be completed within a reasonable period of time established in legislation. A period of ten years after the adoption of our approach in legislation seems a reasonable deadline for the completion of this review. A schedule should be created at the outset of this process which indicates when each specific existing regime will be assessed.

78. Even before their scheduled assessment, existing regimes should be required immediately upon the adoption of our proposals by government to:

    (a) grant the public access to their operations as described in Recommendations 42, 43, 44, 45 and 47 (the register of members, including practising status; all rules, regulations and by-laws; minutes of meetings held after the adoption of our proposals; practitioners' disciplinary records for the preceding three years; access to meetings of governing councils and disciplinary hearings);

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    Existing regimes should be required to provide annual reports (containing at least the information which we have already proposed) at the end of the first fiscal year following the adoption of our proposals.

79. To the extent that administrators of an existing regime wish to comply with other requirements of our proposals in advance of the regime's review and assessment (such as one-third public representation on all committees or adopting the standard disciplinary system), all efforts should be made to facilitate and expedite changes to its governing statute. However, more fundamental changes (such as changes to scope of practice or to entry and practice standards) should only be considered as part of that regime's review and reassessment and not before.

80. A single, independent entity, operating at arm's length from government, should be established to perform the various functions which we have recommended for government or a supervising or regulatory body. These include the following:

    Regulatory assessments

    - determining whether unregulated occupational services should be regulated
    - determining whether occupational services regulated prior to the implementation of reform should be deregulated or regulated differently
    - where regulation is necessary, deciding on the form of regulation
    - setting scopes of practice for practitioners offering regulated services to the public

- setting entry and practice standards

- deciding whether an occupational regime should be administered by practitioners or by government and, if by government, the most appropriate form of government administration

- deciding when several related tasks can be administered by a single administrative body

- deciding when one task should be administered by more than one administrative body

- deciding whether practitioners offering a regulated service should be permitted to incorporate

- reviewing licensing and certification regimes and the form of their administration at regular intervals

Oversight of regulatory regimes

- reviewing the annual reports submitted by self-governing bodies

- reviewing the programs developed by administrative bodies to identify breaches of practice standards and, where necessary, either suggesting or requiring changes to those programs

- monitoring and investigating the activities of administrative bodies

- approving or rejecting requests for delays in the investigation of complaints

- hearing appeals from decisions not to proceed with complaints and, where appropriate, ordering that a complaint proceed to a disciplinary hearing

- considering and, where appropriate, approving requests from administrators of occupational regimes to bring a prosecution for unauthorized practice

- supervising the implementation and administration by each self-governing body of the uniform disciplinary procedure

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- designing rules and procedures for use in a uniform disciplinary system

81. The regulatory body should have appropriate powers to carry out its functions, including:

(a) the power to revoke self-governing status temporarily or permanently and to arrange for government administration of the regime when a review of a self-

governing body's activities reveals that practitioners are not able to administer the regime on the basis of the principles which we have recommended and in the public interest;

(b) the power to inspect the records of self-governing bodies;

(c) the power to order self-governing bodies to comply with legislation or regulations and to issue reprimands and impose fines on bodies which are acting improperly;

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(e) the power to provide support, information and advice to administrative bodies; and

(f) the power to administer oaths, compel testimony and obtain expert evidence.

82. The regulatory body should report to a designated member of Cabinet; in keeping with the principle that occupational regulation should be conducted in the interests of the public rather than in the interests of practitioners, we suggest that this person should be the Minister responsible for consumer affairs.

83. Members of the regulatory body should be appointed by the provincial Cabinet on the recommendation of the responsible Minister. Members should hold office for a fixed term, subject to removal for cause, at a fixed level of remuneration. In light of the expertise which the members of this body should develop, a reasonable term of office might be seven years.

84. The terms of the members of the regulatory body should be renewable on a staggered basis.

85. The regulatory body should have appropriate staff support and at least its chair should be a full-time employee.

86. In order to deal with the substantial workload which we propose assigning to the regulatory body, it should have a relatively large number of members, perhaps ten to twelve. However, it should be permitted to operate with smaller panels with quorums of as few as three.

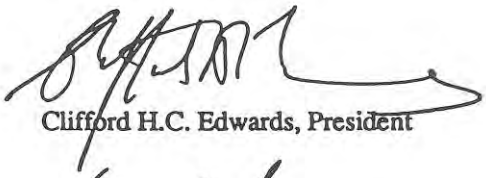
87. All decisions of the regulatory body should be made public and should have binding effect; major decisions in respect of the appropriate form of regulation for a service, scope of practice, entry and practice standards, form of administration and availability of incorporation should be made in the form of published regulations. However, such major decisions affecting the regulation of entire services should be subject to a veto by the responsible Minister to be exercised within 30 days of their public release; although the Minister should have this right of veto, he or she should not be able to alter or amend the draft regulations except through legislation.

88. The initial regulation of a service and the periodic review of regulated services should be a public process involving consultation with practitioners of the services being examined, practitioners of associated services, educational institutions, representatives of consumer groups and members of the public. Public hearings should be seriously considered.

89. Any person or organization, including the government, members of the public and the regulatory body itself, should be permitted to apply to have an unregulated service considered for regulation or to have some aspect of a regulated service reconsidered. Subject to the right of the supervising body to priorize the applications it receives, evidence of the threat of significant harm to the public and the ability of licensing or certification to address that harm should obligate the supervising body to consider the application.

90. All aspects of the operation of the regulatory body should be conducted in accordance with principles of accountability and openness. Its hearings should generally be conducted in public and the public should have full access to all of its decisions and to all regulations which it passes. The regulatory body should publish and submit to the responsible Minister an annual report setting out, at a minimum, the number of regulatory assessments made in the past year and decisions made with respect to them, the number and nature of complaints made against self-governing bodies and the steps taken by the regulatory body to deal with them, the actions taken to determine whether self-governing bodies are meeting their public protection mandate and steps taken to resolve any problems discovered.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 28th day of October 1994.



Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Tewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

SURVEY OF MANITOBA LEGISLATION

In an effort to gain an understanding of the current status of occupational regulation in Manitoba, we conducted a brief survey of Manitoba legislation. This survey was not intended to be exhaustive or comprehensive; it was intended only to provide some idea of the number of licensing and certification regimes currently in existence.

We excluded from our list regimes which appear to have as their primary purpose the creation and distribution of quotas.[1] Our list therefore sets out only those regulated occupations whose regulation is intended, at least in part, to protect the public from the improper performance of the service being provided.

In some cases, a distinction between licensing and certification regimes was difficult to make. For example, some provisions prohibited non-members of a regime from practising as an X.[2] These provisions are ambiguous and could mean that the person who is not a member must refrain from calling himself or herself an X or they could mean that they are prohibited from doing the things that Xs do. In other cases, regulatory regimes did not fall into a classic pattern of either a licensing or certification regime. For example, those occupations which fall under *The Apprenticeship and Trades Qualifications Act*[3] clearly have entry standards but it is not clear that they contain practice standards. In other words, it may be that practitioners can never be decertified; once the certificate is awarded, it is permanent.

We have used our best judgment in placing these regimes into appropriate categories and believe that, for the most part, this list represents a fair assessment of most of the regulated occupations in the province. We have categorized occupations as having a licensing or a certification regime; within each of the two categories, those occupations which are self-governing have been marked with asterisks. The name of the relevant statute and its chapter number in the Continuing Consolidation of the Statutes of Manitoba follows the name of each occupation.

Licensing Regimes

*agrologist (Agrologists Act - A50, s. 15)

ambulance attendant (Ambulance Services Act - A65, s. 3(1))

ambulance driver (Ambulance Services Act - A65, s. 3(2))

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[1]Legislation regulating taxis and commercial fishing appear to us to be examples of this sort of legislation.

[2]See, for example, *The Opthalmic Dispensers Act*, C.C.S.M. c. O60, s. 16; *The Registered Psychiatric Nurses Act*, C.C.S.M. c. P170, s. 9(1); *The Architects Act*, C.C.S.M. c. A130, s. 15(1); *The Naturopathic Act*, C.C.S.M. c. N80, s. 12(1); *The Manitoba Institute of Registered Social Workers Incorporation Act*, R.S.M. 1990, c. 96, s.14.

[3]*The Apprenticeship and Trades Qualifications Act*, C.C.S.M. c. A110.

*architect (Architects Act - A130, s. 15)

assistant adjuster (Insurance Act - I40, s. 386)

barber (Barbers Act - B10, s. 7)

beekeeper (Bee Act - B15, s. 2(1))

boxing/wrestling exhibitor (Boxing and Wrestling Commission Act - B80, s. 11)

broker-dealer (Securities Act - S50, s. 6(1))

cemetery operator (Cemeteries Act - C30, s. 25(1))

cemetery plot vendor (agent) (Cemeteries Act - C30, s. 25(3))

cemetery plot vendor (owner) (Cemeteries Act - C30, s. 25(2))

child day care provider (Community Child Day Care Standards Act - C158, s. 7(1))

*chiropodist (Chiropodists Act - C90, s. 29)

*chiropractor (Chiropractic Act - C100, s. 16)

collection agent (including bailiffs) (Consumer Protection Act - C200, s. 76(1))

commodity trader (Commodity Futures Act - C152, s. 2(1))

crematory operator (Cemeteries Act - C30, s. 19(4))

dairy operator (Dairy Act - D10, s. 7)[4]

dealer in used farm equipment (Farm Machinery and Equipment Act - F40, s. 37)

*dentist (Dental Association Act - D30, s. 20(1))

*denturist (Denturists Act - D35, s. 9)

direct seller (i.e. door-to-door salespersons) (Consumer Protection Act - C200, s. 75)

elderly persons care home operator (Elderly and Infirm Persons Housing Act - E20, s. 27)

electrician (Electrician's Act - E50, s. 4)

embalmer (Embalmers and Funeral Directors Act - E70, s. 8)[5]

employment agent[6] (Employment Services Act - E100, s. 3)

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[4]Although there is a quota component to this licence, licensees are held to certain practice standards.

[5]Interestingly, section 10(1) says: "For the purpose of serving the public in sparsely settled areas of Manitoba, the board may issue a permit to a person who is not the holder of a certificate of qualification."

[6]Someone who helps people find jobs.

*engineer (Engineering Profession Act - E120, s. 14)

fertilizer/pesticide applicator (commercial) (Pesticides and Fertilizer Control Act - P40, s. 2)

fertilizer/pesticide distributor (Pesticides and Fertilizer Control Act - P40, s. 2)

film distributor/vendor (Amusements Act - A70, s. 42(2))

film exhibitor (Amusements Act - A70, s. 42(2))

funeral director (Embalmers and Funeral Directors Act - E70, s. 8)

funeral director (pre-arranged plans) (Pre-arranged Funeral Services Act - F200, s. 2(2))

hairdresser (Hairdressers Act - H10, s. 9)[7]

hazardous waste disposal facility operator (Dangerous Goods Handling and Transportation Act - D12, s. 8(4))

hazardous waste handler (Dangerous Goods Handling and Transportation Act - D12, s. 8(1))

hearing aid dealer (Hearing Aid Act - H38, s. 12)

hospital operator (Hospitals Act - H120, s. 3)

insurance adjuster (Insurance Act - I40, s. 385)

insurance agent (Insurance Act - I40, s. 369)

insurer (Insurance Act - I40, s. 24)

investment counsel (Securities Act - S50, s. 6(5))

investment dealer (Securities Act - S50, s. 6(1))

*land surveyor (Land Surveyors Act - L60, s. 54)

*lawyer (Law Society Act - L100, s. 56)

*licensed practical nurse (Licensed Practical Nurses Act - P100, s. 9)

liquor manufacturer (Liquor Control Act - L160, s. 85)

liquor vendor (Liquor Control Act - L160, s. 60)

livestock dealer (Livestock and Livestock Products Act - L170, s. 2(j))

[7]Practitioners must be licensed in Winnipeg and Brandon only: Hairdressers Regulation, Man. R. Reg. H10-105/87, s. 14. It is anticipated that both *The Hairdressers Act* and *The Barbers Act* will be repealed and brought under the exclusive purview of *The Apprenticeship and Trades Qualifications Act*, C.C.S.M. c. A110: Telephone conversation with D. Miller, Director, Apprenticeship and Trades Qualification Branch, Department of Education and Training (Manitoba), August 24, 1994.

manufacturer or importer of denatured alcohol (Gasoline Tax Act - G40, s. 4)[8]

margarine manufacturer (Margarine Act - M39, s. 7)

margarine wholesaler (Margarine Act - M30, s. 7)

mortgage dealer (Mortgage Dealers Act - M210, s. 2)

motive fuel (non-gasoline) refiner (Motive Fuel Tax Act - M220, s. 5(6))[9]

*naturopath (Naturopathic Act - N80, s. 12)

*occupational therapist (Occupational Therapist Act - O5, s. 11)

*ophthalmic dispenser (Ophthalmic Dispensers Act - O60, s. 16)

*optometrist (Optometry Act - O70, s. 19)

pari-mutuel betting operator (Pari-mutuel Tax Act - P12, s. 3)

*pharmacist (Pharmaceutical Act - P60, s. 2)

*physician or surgeon (Medical Act - M95, s. 15)

*physiotherapist (Physiotherapists Act - P65, s. 11)

pipe line operator (Pipe Line Act - P70, s. 19)

power engineer (Power Engineers Act - P95, s. 4)

private hospital operator (Private Hospitals Act - P130, ss. 2 and 4(2))

private investigator (Private Investigations and Security Guards Act - P132, s. 4)

private vocational school agent/representative (Private Vocational Schools Act - V70, s. 3)

private vocational school operator (Private Vocational Schools Act - V70, s. 3)

*psychiatric nurse (Registered Psychiatric Nurses Act - P170, s. 9)

racetrack operator (Pari-mutuel Tax Act - P12, s. 3)

real estate "salesman" (Real Estate Brokers Act - R20, s. 40)

real estate broker (Real Estate Brokers Act - R20, s. 40)

*registered nurse (Registered Nurses Act - R40, s. 8)

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[8]The licensing of dealers in gasoline likely has more to do with the collection of gasoline taxes than protecting the public in any way; therefore, they have not been included in this list. However, there may be a stronger occupational component with respect to licences for gasoline refiners and manufacturers of denatured alcohol.

[9]Although unclear from the Act, it is conceivable that there is an occupational regulation component to this license.

*respiratory therapist (Registered Respiratory Therapists Act - R115, s. 11)

scaler[10] (Forest Act - F150, s. 16)

securities advisor (Securities Act - S50, s. 6(6))

security guard (Private Investigations and Security Guards Act - P132, s. 4)

security issuer (Securities Act - S50, s. 6(1))

seller of stocks (Securities Act - S50, s. 6(3))

special insurance broker[11] (Insurance Act - I40, s. 381)

*speech and hearing therapist (Manitoba Speech and Hearing Association Act, R.S.M. 1990, c. 101, s. 11)

stock broker (Securities Act - S50, s. 7(5))

stockyard operator (Livestock and Livestock Products Act - L170, s. 2(j))

stove/furnace installer (Gas and Oil Burner Act - G30, s. 3)

sub-broker-dealer (Securities Act - S50, s. 6(1))

taxi driver (Taxicab Act - T10, s. 4)

underwriter (Securities Act - S50, s. 6(4))

*veterinarian (Veterinary Medical Act - V30, s. 18)

well driller (Ground Water and Water Well Act - G110, s. 3)

Total Licensed - 90 Self-governing - 22

Certification Regimes

*certified general accountant (Certified General Accountants Act - C46, s. 9(1))

*certified management accountant (Society of Management Accountants of Manitoba Incorporation Act, R.S.M. 1990, c. 184, s. 11)

*certified management consultant (Institute of Certified Management Consultants of Manitoba Act - C47, s. 13)

*certified professional purchaser (Manitoba Institute of the Purchasing Management Association of Canada Act - P310, s. 13)

[10]Someone who measures timber.

[11]Someone who negotiates contracts of insurance, other than life, accident or sickness insurance, with unlicensed insurers.

*certified public accountant (Certified Public Accountants Act, R.S.M. 1990, c. 29, s. 13)

*chartered accountant (Chartered Accountants Act - C70, s. 21(1))

*chartered piano tuner (Institute of Chartered Piano Tuners of Manitoba Incorporation Act, R.S.M. 1990, c. 73, s. 20)

dental assistant, (Dental Health Workers Act - D31 and Dental Association Act - D30, s. 2(2))

dental hygienist (Dental Health Workers Act - D31 and Dental Association Act - D30, s. 2(2))

dental nurse (Dental Health Workers Act - D31 and Dental Association Act - D30, s. 2(2))

dental technician (Dental Health Workers Act - D31 and Dental Association Act - D30, s. 2(2))

designated trade (Apprenticeship and Trades Qualifications Act, A110, ss. 9 and 10:[12]

aircraft maintenance engineer (must be licensed federally)
automotive machinist
baker
boilermaker
bricklayer
building construction crane operator
cabinet maker
carpenter
construction electrician
construction electrician (must be licensed under The Electricians Act)
consumer electronic technician
cook
drywall mechanic
electric motor winder
esthetician
glazier
hairstylist
heavy duty equipment mechanic
industrial electrician
industrial instrument mechanic
industrial mechanic
industrial pipefitter
industrial welder
interior systems mechanic
iron worker

[12]Apprentices who meet prescribed standards will be issued a certificate in a trade. These standards typically include written examinations and training programs of a given duration under the supervision of an experienced tradesperson. The legislation empowers the provincial Cabinet to pass regulations prescribing causes for which a certificate may be suspended or cancelled (that is, practice standards); however, a perusal of the regulations passed to date suggests that this regulatory power has not been exercised. The *Trade of Aircraft Mechanic Regulation*, Man. R. Reg. A110-65/87, for example, does not contain any provisions listing behaviours or activities which might result in a certified tradesperson losing his or her certificate. In fact, the possible suspension or cancellation of a certificate is not addressed anywhere in the regulation.

landscape technician
lather
machinist
mechanical systems testing and balancing technician
miner
motor vehicle body repairer
motor vehicle mechanic
mould and pattern maker
painter and decorator
parts person
pipe fitter
plumber
power electrician
refrigeration and air conditioning mechanic
roofer
sheet metal worker
sheeter, decker and cladder
sprinkler and fire protection installer
steam fitter
steel fabricator
tool and die maker

*professional home economist (Professional Home Economists Act - H70, s. 44)

*professional interior designer (Professional Interior Designers Institute of Manitoba Act - I57, s. 8)

*psychologist (Psychologists Registration Act - P190, s. 11)

*registered dietitian (Registered Dietitians Act - D75, s. 7(1))

*registered industrial accountant (Society of Management Accountants of Manitoba Incorporation Act, R.S.M. 1990, c. 184, s.11)

*registered music teacher (Manitoba Registered Music Teachers Association Incorporation Act, R.S.M. 1990, c. 100, s. 11)

*registered social worker (Manitoba Institute of Registered Social Workers Incorporation Act, R.S.M. 1990, c. 96, s. 14)

teacher (Education Administration Act - E10, s. 6(1))

Total Certified - 66 Self-governing - 14

Total Regulated - 156 **Self-governing - 36**

APPENDIX B

LIST OF PERSONS AND ORGANIZATIONS WHO RESPONDED TO THE DISCUSSION PAPER

R.P. Purves, Inter-Ocean Grain Co. (1988) Ltd., Winnipeg

Subcommittee on Professional Registration of Geoscientists in Manitoba

Steve Jaslowski, Winnipeg

Earl McGill, Superintendent of Insurance, Province of Manitoba

Office des professions du Québec

Marie Berry, Health Care Consultant, Winnipeg

Association of Occupational Therapists of Manitoba

Dorothy Dalgliesh, Winnipeg

Susan Caine, Winnipeg

Professional Interior Designers Institute of Manitoba

Manitoba Speech and Hearing Association

Standards Committee of Family Mediation Manitoba

Dental Auxiliaries Association of Manitoba representing the Manitoba Dental Assistants Association, the Manitoba Dental Hygienists Association and the Manitoba Dental Nurses Association

Manitoba Dental Association

Manitoba Association of Social Workers/Manitoba Institute of Registered Social Workers

Manitoba Orthotics/Prosthetics Association

Manitoba Real Estate Association

Canadian Information Processing Society - Winnipeg Section

Natural Science Societies of Canada, Downsview, Ontario

Manitoba Society of Medical Laboratory Technologists

Association of Physiotherapists of Manitoba

Certified General Accountants Association of Manitoba

Institute of Chartered Accountants of Manitoba

Association of Professional Engineers of the Province of Manitoba

Manitoba Association of Medical Radiation Technologists Inc.

Association of Manitoba Land Surveyors

Manitoba Association of Optometrists

Manitoba Dental Technicians Association

Dr. Peter Kirkby, Islington, Ontario

Manitoba Association of Landscape Architects

Michelle Kaminski, Dauphin

Manitoba Association of Home Economists

Vision Council of Canada, Etobicoke, Ontario

Manitoba Society of Certified Engineering Technicians and Technologists Inc.

Jo-Ann McKenzie, Lecturer, Faculty of Nursing, University of Manitoba

Manitoba Association of Architects

Manitoba Society of Clinical Chemists Inc.

Manitoba Chiropractors Association

Manitoba Association of Registered Respiratory Therapists

Ophthalmic Dispensers of Manitoba/Opticians Association of Canada

Manitoba Association of Registered Nurses

Manitoba Health (Evaluation and Audit Secretariat)

Canadian Society for Professional Engineers, Toronto, Ontario

Greg Mulla, Winnipeg

SHL Systemhouse, Winnipeg

Canadian Federation of Independent Business in Manitoba

Committee Against Abuse by Counsellors, Saint Boniface

Manitoba Pharmaceutical Association

Tom Farrell, Deputy Minister, Department of Labour, Province of Manitoba

Manitoba Activity Therapists Association

Manitoba Veterinary Medical Association

Association of the Chemical Profession of Ontario

College of Physicians and Surgeons of Manitoba/Manitoba Medical Association

Women's Health Clinic, Winnipeg

G. Gillespie, Winnipeg

Manitoba Athletic Therapists Association, Inc.

Margaret E. Benjaminson, Winnipeg

Canadian Dental Hygienists Association, Ottawa, Ontario

Manitoba Association of Registered Dietitians

Canadian Association of Physicists, Toronto, Ontario

Law Society of Manitoba

Canadian Applied Mathematics Society

Canadian Mathematical Society, Ottawa, Ontario

Psychological Association of Manitoba

Canadian Society of Environmental Biologists, Toronto, Ontario

Canadian College of Physicists in Medicine, Toronto, Ontario

Canadian Society for Chemistry, Ottawa, Ontario

Canadian Federation of Biological Societies, Ottawa, Ontario

Manitoba Naturopathic Association

Dr. W. Wesley Pue, Faculty of Law, University of British Columbia

Canadian Meteorological and Oceanographic Society, Ottawa, Ontario

Statistical Society of Canada, Waterloo, Ontario

Association of Consulting Engineers of Manitoba Inc.

Dr. Ed Schollenberg, Rothesay, New Brunswick

Prof. R.C. Barber, Head, Department of Physics, University of Manitoba

Consumers Health Organization of Manitoba

Manitoba Burglar and Fire Alarm Association

LIST OF PERSONS AND ORGANIZATIONS TO WHOM COPIES OF THE DISCUSSION PAPER WERE SENT[1]

Bruce MacFarlane, Q.C., Deputy Minister of Justice and Attorney General, Province of Manitoba

Ronald S. Perozzo, Assistant Deputy Minister, Province of Manitoba

Gary Doer, Leader of the Official Opposition, Province of Manitoba

Paul Edwards, Leader of the Second Opposition, Province of Manitoba

Minister of Labour, Province of Manitoba

Roland Penner, Q.C., Dean, Faculty of Law, University of Manitoba

Association of Licensed Practical Nurses, Winnipeg

Lois Tetreault Craig, President, Massage Therapy Association of Manitoba

Marie Berry, Health Care Consultant, Winnipeg

Manitoba Dental Association

Barbara Millar, Evaluation Audit Secretariat, Department of Health, Province of Manitoba

Allen Moyes, Director, Legislation and Professional Regulation, Ministry of Health, Province of British Columbia

Manitoba Optometric Society

Bill Younger, Vice-President, Manitoba Society of Medical Laboratory Technologists

Merle MacAulay, C.A.E., Canadian Society of Association Executives (Manitoba Chapter)

Canadian Society of Association Executives, Manitoba Chapter

Manitoba Association of Social Workers

Gary Simonsen, Winnipeg Real Estate Board

Peter Stachnyk, Massage Therapy Association of Manitoba

Bruce Marshall, Manitoba Athletic Therapists Association

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[1]We apologize for any spelling errors in the names of persons and organizations to whom copies of the Discussion Paper were sent. These names were received by staff members on the telephone and may have been inadvertently misspelt.

Susan Dirk, Manitoba Association of Registered Nurses

Office des professions du Québec

John Elias, Industrial Hygienist, Winnipeg

Psychological Association of Manitoba

Association of Manitoba Land Surveyors

Doug Moen, Coordinator of Legislative Services, Department of Justice, Province of Saskatchewan

Harvey Pollock, lawyer, Winnipeg

Standards Committee of Family Mediation Manitoba

Law Society of Manitoba

Registered Psychiatric Nurses Association, Winnipeg

Verna Holgate, Manitoba Association of Licensed Practical Nurses

Hugh MacKinnon, Research Assistant, Manitoba Real Estate Association

D.A. Ennis, P. Eng, Registrar and Executive Director, Association of Professional Engineers of the Province of Manitoba

E.W. Peever, lawyer, Winnipeg

Peter Hennessy, Executive Director, Law Reform Commission of New South Wales, Sydney, Australia

Margaret E. Benjaminson, Winnipeg

Rhonda Plett, President, Dental Auxiliaries Association of Manitoba

Michael Krauss, Executive Director, CARFAC Manitoba (Canadian Artists' Representation Manitoba)

William Cudney, Shiatsu Clinic of Manitoba

Opticians Association of Canada, Winnipeg

Manitoba Dental Laboratory Technicians

Manitoba Naturopathic Association

Dr. C.J. Turner, President, Manitoba Naturopathic Association

Manitoba Teachers Society

Dental Auxiliaries Association of Manitoba

Dr. John Biberdorf, Department of Health, Province of Manitoba

Heather McLaren, Legislative Analyst, Department of Health, Province of Manitoba

Patricia Stadelmeier, Massage Therapy Association of Manitoba

Conrad Santos, M.L.A. (Broadway), Province of Manitoba

Dave Chomiak, M.L.A. (Kildonan), Province of Manitoba

Judith Futter, Department of Communication Disorders, Health Sciences Centre, Winnipeg

Valerie Hachey, Director, Department of Speech-Language Pathology, Seven Oaks General Hospital, Winnipeg

Patricia Kaufert, Ph.D., Chairperson, Minister's Working Group on the Implementation of Midwifery in Manitoba

Pat Gamvrelis, Department Head, Communication Disorders and Education, Manitoba Developmental Centre, Portage la Prairie

Caesar Oliveres, President, International Professional Association, Winnipeg

Manitoba Inter-Cultural Council

P.F. Mackenzie, Winnipeg

Dr. J. Dalton, Manitoba Society of Clinical Chemists Inc.

Dwayne Forsman, President, Manitoba Pre-Hospital Professions Association

Anne Marie Konopelny, Acting Director of Immigrant Credentials and Labour Market, Department of Culture, Heritage and Citizenship, Province of Manitoba

Shirley Forsythe, Manitoba Association for Rights and Liberties

Madeline Boscoe, Women's Health Clinic, Winnipeg

Irv Simmonds, Winnipeg

Marguerite Mousseau, Executive Council Operations, Province of British Columbia

William Stoyko, Winnipeg

Jo-Ann McKenzie, Lecturer, Faculty of Nursing, University of Manitoba

Canadian Medical Protective Association, Winnipeg

Dr. Joe Rogowsky, President, Manitoba Veterinary Medical Association

President, Manitoba Association of Home Economists

Thomas Llewellin, President, Manitoba Association of Architects

President, Manitoba Association of Registered Dietitians

Sharon Eadie, Association of Occupational Therapists of Manitoba

Jeff Gunter, President, Registered Psychiatric Nurses Association of Manitoba

Manjeet Kent, Credential Assessment Coordinator, Immigrant Credentials and Labour Market Branch, Department of Culture, Heritage and Citizenship, Province of Manitoba

Joan Brockman, School of Criminology, Faculty of Arts, Simon Fraser University, Burnaby, British Columbia

John Levine, lawyer, Winnipeg

Ingrid Kort, Winnipeg

Winnipeg Chamber of Commerce

Manitoba Anti-Poverty Organization

Social Planning Council of Winnipeg

Canadian Federation of Independent Business, Winnipeg

Appraisal Institute of Canada, Winnipeg

Association of Consulting Engineers of Manitoba Inc.

Association of Physiotherapists of Manitoba

Automotive Trades Association (Manitoba) Inc.

Building Owners & Managers Association (Manitoba) Inc.

Building Professionals Association, Winnipeg

Canadian Airline Pilots Association, Winnipeg

Canadian Association of Prosthetists and Orthotists, Winnipeg

Canadian Association of Second Language Teachers, Winnipeg

Canadian Bankers Association, Winnipeg

Canadian Federation of Labour, Manitoba Council

Canadian Urethane Foam Contractors Association, Winnipeg

Certified General Accountants Association of Manitoba

College of Family Physicians of Canada, Manitoba Chapter

College of Physicians and Surgeons of Manitoba

Consumers' Association of Canada, Winnipeg

Electrical Contractors Association of Manitoba

Electronics Industry Association of Manitoba

Human Resource Management Association of Manitoba

Insurance Brokers Association of Manitoba

Keystone Agricultural Producers, Winnipeg

Manitoba Association for Rights and Liberties

Manitoba Association of Architects

Manitoba Association of Chiropodists

Manitoba Association of Home Economists

Manitoba Association of Medical Radiation Technologists

Manitoba Association of School Business Officials Inc.

Manitoba Association of School Superintendents

Manitoba Association of Sheet Metal & Air Handling Contractors Inc.

Manitoba Association on Gerontology

Manitoba Bar Association

Manitoba Chamber of Commerce

Manitoba Child Care Association

Manitoba Chiropractors Association

Manitoba Christmas Tree Grower Association

Manitoba Environmental Industries Association

Manitoba Fashion Institute Inc.

Manitoba Government Employees Union

Manitoba Heavy Construction Association

Manitoba Home Builders Association

Manitoba Institute of Agrologists

Manitoba Medical Students Association

Manitoba Motor Dealers Association

Manitoba Pharmaceutical Association

Manitoba Pre-Hospital Professions Association

Manitoba Restaurant and Food Services Association

Manitoba Society of Certified Engineering Technicians and Technologists Inc.

Manitoba Society of Seniors

Manitoba Trucking Association

Nursing Students Association, Fort Garry Campus, University of Manitoba

Ophthalmic Dispensers of Manitoba

Recreation Vehicle Dealers Association of Manitoba

Retail Merchants Association of Canada (Manitoba) Inc.

Retail Council of Canada, Edmonton, Alberta

St. Boniface Teachers Association

St. James Assiniboia Chamber of Commerce

Seven Oaks Teachers Association

Transcona Springfield Teachers Association

United Firefighters of Winnipeg

Alberta Law Reform Institute

Law Reform Commission of British Columbia

Nova Scotia Law Reform Commission

Law Reform Commission of Saskatchewan

Ontario Law Reform Commission

Law Reform Branch, Department of Justice, Province of New Brunswick

Chapter Canadian Students of Interior Design, University of Manitoba

Sue Stanton, Nursing Department, Red River Community College, Winnipeg

Lois Tessier, Nursing Department, Red River Community College, Winnipeg

Dr. W. Wesley Pue, Faculty of Law, University of British Columbia

Canadian Medical Association, Manitoba Division

Minister of Education and Training, Province of Manitoba

Assistant Deputy Minister, Advanced Education and Skills Training, Department of Education and Training, Province of Manitoba

Director, Apprenticeship and Training, Department of Education and Training, Province of Manitoba

Manitoba Institute of Registered Social Workers

Jeanette Edwards, Executive Director, Health Action Centre, Winnipeg

Public Interest Law Centre, Winnipeg

Senior Citizens Information Service, Winnipeg

Dr. Glen Bergeron, Manitoba Athletic Therapists Association

C. Curran, Department of Justice, Province of Newfoundland and Labrador

S. Amrud, Department of Justice, Province of Saskatchewan

M. Slater-Enns, Winnipeg

R. McIntyre, Manitoba Dental Association

Carolyn J. Tuohy, Faculty of Law, University of Toronto

Michael J. Trebilcock, Faculty of Law, University of Toronto, Ontario

Donald N. Dewees, Faculty of Law, University of Toronto, Ontario

Alvin Esau, Faculty of Law, University of Manitoba

Heather Clarke, student-at-law, Calgary, Alberta

Drew Johnston, Saskatchewan Health, Regina, Saskatchewan

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REPORT ON REGULATING PROFESSIONS AND OCCUPATIONS

EXECUTIVE SUMMARY

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The Report of the Manitoba Law Reform Commission, entitled *Regulating Professions and Occupations*, responds to a reference from the Minister of Justice and Attorney General. It follows the release of a Discussion Paper which produced the largest number of responses to a consultation document in the history of the Commission.

The Report sets out a model for the regulation of professional and occupational services and recommends principles and criteria for use in designing and implementing specific regulatory regimes. Although the Report is not restricted to self-governing regulatory regimes, the issue of self-government is also considered at some length; the Report makes recommendations as to the circumstances in which practitioner administration of a regime is appropriate and proposes safeguards to prevent the improper exercise of self-governing powers. The Report also addresses the traditional prohibition on the incorporation of professionals.

BACKGROUND

Professions and occupations are typically regulated in one of two ways: a licensing regime (in which only qualified individuals are permitted to provide the regulated service) or a certification regime (in which only qualified individuals are permitted to use a designated title). At least 156 identifiable occupational groups and services are currently regulated in these ways by legislation in Manitoba; of these, 90 are licensed and 66 are certified. Only 36 of these regimes are self-governing (administered by practitioners); the others are administered in different ways, primarily by government departments or agencies.

Currently, decisions to grant licensing or certification and self-government are made on an *ad hoc* basis by government departments, Cabinet Ministers and the Legislature; there is no single procedure or set of criteria by which applications for regulation are assessed. Nevertheless, despite the lack of a formal structure, a pattern of occupational regulation can be discerned. Traditionally, those occupations which can characterize themselves as "professions" have been granted self-government and a licensing or certification regime to administer. Occupations which are not considered "professions" may be granted a licensing or certification regime but are not given self-governing powers. "Professional" status is usually claimed on the basis of lengthy periods of study in a university (or similar institution), the existence of a code of conduct and an association with other groups in a national or international body.

The current approach is open to criticism. First, the lack of a procedure and criteria leaves legislators without a logical and consistent basis for decision-making in this area. Second, the regulatory process often takes place without significant public involvement. Since occupational regulation is almost invariably sought by practitioners themselves, this prompts concerns that regulation is a means by which practitioners can obtain enhanced status and financial benefits and that it is not, in fact, used to protect or benefit the public.

Third, the focus of the regulatory process appears to be the issue of self-government. Groups of practitioners often base their claims to regulated status on their similarity to professions which already enjoy self-government, rather than on the public need for regulation. Once their professional attributes have been established, self-government is granted; a form of regulation (either certification or licensing) is then chosen in order for the new professional body to have a regime to administer. As a result, regulation is extended on the basis of practitioners' ability to administer it, not on its necessity for public protection. This tends to result in excessive regulation.

Fourth, there has been a tendency to assume that the costs of regulation are restricted to the costs of administering a particular regime. This may explain why certification or licensing is granted so long as administrative expenses are borne by practitioners. In fact, regulation may involve other costs with detrimental effects on the public, including higher prices and less access for consumers.

Finally, although self-governing bodies are mandated to act in the public interest, they are composed of and controlled by practitioners. This places practitioner-administrators in an inherent conflict of interest. Evidence suggests that the public is increasingly dubious about the claim that these bodies invariably put aside the interests of their members to act only in ways beneficial to the public. Increasingly, concerns are expressed that self-governing bodies implement and enforce standards in a manner which reduces the level of competition faced by practitioners and preserves the image of the profession, rather than in a manner which protects consumers and others who may be harmed by incompetent or unethical practitioners.

RECOMMENDATIONS FOR REFORM

Need for Regulation The Report agrees that the current approach to occupational regulation has serious flaws and may be based on unexamined premises and outmoded thinking. It proposes a new model which is based on the principle that regulation should be designed and implemented solely in the interests of consumers and others affected by the provision of occupational services, not in the interests of practitioners. It therefore proposes that, before implementing regulation, government should consider the costs and benefits of regulation from the public's perspective.

Like most forms of regulation, licensing and certification involve both costs and benefits for the public. By requiring practitioners to meet standards for entry and continuing practice, licensing restricts the number of practitioners who are permitted to provide a service; certification gives qualified practitioners a market advantage by granting them the exclusive right to use a designated title. Assuming that the entry and practice standards of a particular regime are related to the ability to perform the service properly, these forms of regulation will raise the quality of service offered to the public by licensed or certified practitioners. They will thereby provide benefits to the public by way of increased protection from the harm which could result from the improper provision of the service.

However, licensing and certification also involve costs and disadvantages. Economic theory predicts, and studies show that, by reducing the number of practitioners who can offer the service to the public, licensing will tend to raise prices, protect inefficiencies, discourage innovation and limit public access to occupational or professional services. Although the negative effects of certification are less dramatic than those of licensing, evidence suggests that a government imprimatur in the form of a certificate will alter the patterns of public consumption of that service, with the result that consumers may purchase services at a higher level (and at a higher price) than is necessary.

The existence of regulatory costs quite apart from expenses associated with administering a regulatory regime suggests that the first question to be determined by decision-makers should be whether regulation is warranted and not whether practitioners deserve self-government; the traditional distinction between professions and occupations is therefore rejected as a basis for regulation. The Report recommends that regulation should not be introduced unless the benefits for the public of a particular form of regulation exceed its costs. The fact that a regulatory regime can be administered by practitioners may reduce its costs but will rarely, if ever, do so to the point where a regime which produces little public protection will be justified. The Report also suggests that, since the costs of licensing are usually high, this form of regulation should be

implemented only when it produces substantial benefits by way of public protection from the improper performance of a service; it should be implemented only when the public faces a serious risk from the improper performance of a service and when licensing is the least costly measure which will adequately protect the public.

Task-based Approach The traditional approach to occupational regulation typically applies a single form of regulation to all the services provided by members of an occupational group. However, most occupational groups perform a variety of services, not all of which pose the same level of risk to the public. Regulating all of these services in the same way therefore tends to result in greater regulation than necessary for some services and under-regulation for others. If regulation is to be introduced when it is required for public protection but not when the public does not face a significant risk of harm from the improper provision of a service, a more finely-tuned approach is required. Therefore, the Report recommends that a government decision-making body should break down the activities in which practitioners are engaged into discrete services which can be analyzed separately to determine whether regulation is warranted and the most appropriate form of regulation for that service.

Because the various services which have traditionally formed an occupation may each be regulated differently, a practitioner who wishes to provide just one or two will not be required to qualify for a licence or certificate in all of these services; he or she need qualify only in the service he or she wishes to provide. Legitimate specialization is therefore promoted. However, a practitioner who wishes to provide most or all of the services which have traditionally formed a profession or occupation should not be forced to participate in a separate administrative body for each service. The Report suggests that administrative efficiency and convenience can be achieved with a flexible approach to administration. For example, when several regulated services are closely related or have traditionally been associated with one another in an occupation or profession, they might well be administered together. At the same time, where groups of practitioners use markedly different methods or philosophies in providing the same service or where they provide the same service in different settings or for different purposes, a single regulated service could be administered by more than one body.

Entry and Practice Standards Besides the service to which it applies, a licensing or certification regime is defined by the standards which practitioners must meet in order to receive and retain a licence or certificate. These standards will determine the ability of a regime to benefit the public by providing protection from the improper performance of the service and will also affect the cost of a regime by determining the number of practitioners who may offer it or who receive a certificate. Because entry and practice standards are integral to the costs and benefits of a regime, the Report recommends that the same government body which selects the most appropriate method of regulating a service should also set entry and practice standards of the chosen regime after appropriate consultation.

In order to develop a regime which provides the greatest benefits at the least cost for the public, the Report suggests that a balance must be struck; entry and practice standards should be aimed at ensuring the qualities needed to provide a service properly and should be set at a level which is sufficient to protect the public but they should not be excessive or contain extraneous requirements. Inadequate standards will fail to provide public benefit by providing protection from the improper performance of the service but excessive standards will result in greater costs without providing greater public protection.

Besides entry and practice standards themselves, the Report also discusses methods of determining whether applicants and practitioners are meeting these standards. It recommends that assessment mechanisms should address all the qualities needed to provide the service properly but should not require irrelevant skills, knowledge or other attributes. Where feasible, assessments of applicants should focus on practical skills but graduation from accredited schools

or programs may be an appropriate method of assessment in some circumstances. The ability of practitioners to meet practice standards, including their possession of the knowledge and skill demanded of applicants, should be examined periodically and several means of doing so are suggested.

Self-government Assuming that licensing or certification is needed to regulate an occupational service, it may be that practitioners are in a position to administer it themselves. There are benefits to self-government; practitioners may be more likely to comply with standards which they help to administer and, since administrative expenses are borne by practitioners, self-government is likely to produce financial savings for taxpayers. However, the Report cautions that self-government will not always be in the public interest. Although their powers are to be used for the benefit of the public, self-governing bodies are composed of and elected by practitioners. This places them in a conflict of interest of which practitioner-administrators may not even be aware. Therefore, the Report recommends that self-government should not be implemented unless practitioners, as a group, meet three conditions: they must possess the financial and human resources to sustain self-government, they must demonstrate a commitment to democratic principles (including the principles of natural justice) and they must provide convincing evidence that they can and will put aside their own interests to act in the interests of the public. Among other things, this latter condition means that a self-governing body cannot also act as an association designed to benefit practitioners.

In addition to these three conditions, the Report recommends that, when self-government is granted, safeguards should be implemented to ensure that these powers are exercised in the public interest. The recommended safeguards include mandatory annual reports and public access to the register of members, to self-governing bodies' rules and regulations, to their meetings, to the disciplinary records of their members and to information about practitioners who have been expelled, suspended or have had limitations placed on their practices. The Report also proposes that self-governing bodies should participate in regular public meetings to inform members of the public of their activities and to allow the public to challenge and question them. In addition, the Report recommends that an independent government body take an active role in supervising and monitoring the activities of self-governing bodies. Finally, the Report proposes that the conflict of interest faced by self-governing bodies can at least partially be addressed by requiring that at least one-third of all positions on governing councils and committees be reserved for public representatives appointed by the government body.

Discipline of Practitioners One of the most visible and important activities of a self-governing body is the discipline of its members for a breach of practice standards. In order to facilitate public involvement in and government supervision of disciplinary matters, the Report recommends that a largely standardized disciplinary procedure should be adopted for use by all self-governing bodies. The process recommended in the Report includes active measures to provide for the continuing competence and ethical behaviour of members, mandatory investigation of all complaints against practitioners, protection for complainants from undue delay in the investigation of a complaint and the right of a complainant to appeal a decision not to prosecute a complaint. The Report also recommends that one-third of a hearing panel be composed of public representatives. Hearings would be open to the public and any plea bargain arrangements or mediated settlements would be open to scrutiny by the supervising government body. An appeal would lie from the decision of a disciplinary panel to the Court of Queen's Bench.

Incorporation Currently, practitioners of self-governing occupations are not, as a rule, allowed to provide their services in corporate form nor permitted to enter into a professional partnership with non-practitioners. The first prohibition can be traced to a traditional view of professionals as individuals devoted to public service, indifferent to profit and qualitatively different from entrepreneurs engaged in commercial enterprises. Since professionals are not

considered to be engaged in commerce, incorporation is thought to be unnecessary. The second prohibition is also based on supposed differences between professionals and other people; it is largely the result of a concern that permitting professionals to associate with non-practitioners in the provision of a regulated service would threaten their commitment to their clients and the public.

The Report suggests that a prohibition on incorporation and on the association of practitioners and non-practitioners in a professional practice cannot be sustained on this historic basis; it concludes that, while individuals may be dominated by profit-making or public service motives, entire occupations or professions are not. Nevertheless, it suggests that restrictions on incorporation and association with non-practitioners can still be justified where permitting incorporation and involvement with non-practitioners produces greater disadvantages than advantages for the public. Although it notes that a decision on incorporation will have an effect on taxes paid by professionals and the revenues of government, the Report declines to take this factor into account since it relates to fiscal policy and not law reform.

The advantages for the public in permitting incorporation and the association of practitioners and non-practitioners in a professional practice include the possibility of greater investment capital for practitioners. This may enable greater numbers of practitioners to enter practice and may permit increased use of new equipment and technologies. It is also likely to result in greater flexibility in the provision of a service and may encourage the emergence of multi-disciplinary firms.

However, loosening these strictures may also produce disadvantages, although many of these can be addressed with safeguards. For example, it is possible that non-practitioner shareholders or directors might pressure practitioners to act unethically or negligently in providing the service. A solution to this problem is to require that shareholders and directors of firms offering a regulated service be approved by the self-governing body and subject themselves to its discipline. Another potential problem is that the limited liability enjoyed by shareholders of corporations might reduce the chances of compensation for individuals injured due to the negligence of practitioners. This concern could be addressed by requiring that practitioners and corporations offering a regulated service obtain sufficient liability insurance or maintain a minimum level of capitalization.

The Report recommends that the decision to permit or prohibit incorporation and the association of practitioners and non-practitioners in a professional practice should be made with these advantages and disadvantages in mind and should be made for each service in the course of the process in which regulation is granted or reviewed.

Application of Recommendations The Report proposes that its substantive recommendations should apply to existing regulatory regimes as well as to applications for new forms of regulation. This means that the status of currently regulated occupations or professions would be reviewed using the same criteria as would be applied to applications to regulate currently unregulated services. The process of reviewing all existing forms of regulation is likely to take several years but the Report recommends that some of its proposals, such as filing annual reports and allowing public access to the activities of self-governing bodies, should be given effect almost immediately.

The Report also provides recommendations as to the government body which is to consider applications for new regulation, review the regulatory structure of existing forms of regulation and supervise the activities of self-governing bodies. It suggests that the members of this body should represent a variety of perspectives and backgrounds and should be appointed by Cabinet. However, in order to minimize lobbying of Ministers and legislators and to ensure a consistent application of common criteria, this body should operate at arm's length from government and

should be granted significant powers. For example, its decisions with respect to the implementation of licensing or certification and the granting of self-government should take the form of regulations and should be subject only to a veto exercised by the responsible Cabinet Minister and to the power of the Minister to seek to amend these regulations by way of legislation.

CONCLUSION

Taken as a whole, the recommendations in the Report on *Regulating Professions and Occupations* represent a thoroughgoing reform of the current approach to occupational regulation and would result in a rational, efficient and responsive system based on principles which are designed to protect and benefit the public.

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SOMMAIRE DU RAPPORT
RÉGLEMENTATION DES PROFESSIONS ET DES MÉTIERS

SOMMAIRE

Le rapport de la Commission de réforme du droit du Manitoba, intitulé *Réglementation des professions et des métiers*, a été dressé à la demande de la ministre de la Justice et procureure générale. Il a été élaboré à la suite d'un document de travail qui a suscité un nombre sans précédent de réponses dans l'histoire de la Commission pour ce genre de document consultatif.

Le rapport fournit un modèle de réglementation des services professionnels et recommande des principes et des critères d'élaboration et de mise en application de modèles particuliers de réglementation. Une partie importante du rapport est consacrée à la réglementation prévoyant l'autogestion, bien que la portée du rapport lui-même soit plus vaste; il présente des recommandations sur les circonstances dans lesquelles il est approprié de mettre les spécialistes en charge de l'application de la réglementation et propose des mécanismes de protection contre l'abus des pouvoirs d'autogestion. Il traite également de l'interdiction traditionnelle touchant la constitution en corporation des spécialistes.

RENSEIGNEMENTS GÉNÉRAUX

Les professions et les métiers sont généralement réglementés soit par un système de licences (permettant seulement aux personnes qualifiées de fournir des services réglementés), soit par un système de certificats (permettant seulement aux personnes qualifiées d'utiliser un titre réservé). Au Manitoba, au moins 156 professions et métiers sont réglementés de l'une de ces façons : 90 d'entre eux sont réglementés par le système de licences et 66 par celui des certificats. Seulement 36 de ces professions et de ces métiers sont autogérés (gérés par les spécialistes eux-mêmes); les autres sont gérés de différentes façons, surtout par des ministères ou des organismes gouvernementaux.

Présentement, les ministères, les ministres et l'Assemblée législative accordent, au besoin, des licences ou des certificats ainsi que des pouvoirs d'autogestion. Il n'existe aucune marche à suivre unique et aucun critère prédéterminé pour traiter les demandes de réglementation. Malgré cette absence de formalisme, il existe une manière de faire pour la réglementation des professions et des métiers. Traditionnellement, les métiers qui sont des « professions » ont obtenu l'autogestion ainsi que la gestion d'un système de licences ou de certificats. Les métiers qui ne sont pas considérés à titre de « professions » peuvent se voir accorder la gestion d'un tel système, mais n'obtiennent pas l'autogestion. Pour les « professions », le spécialiste a habituellement suivi un long programme à l'université ou dans un autre établissement semblable, est tenu de respecter un code de déontologie et est membre d'un groupe faisant partie d'une entité nationale ou internationale.

La structure actuelle n'est pas nécessairement la meilleure. Premièrement, l'absence de marche à suivre et de critères établis prive le législateur d'un point de référence logique et constant sur lequel il pourrait fonder ses décisions. Deuxièmement, le public a rarement l'occasion de faire valoir son opinion au cours du processus de réglementation. Le fait que, dans la majorité des cas, ce sont les spécialistes eux-mêmes qui demandent à ce que leur profession ou leur métier soit réglementé soulève la question suivante : la réglementation est-elle demandée dans l'intérêt du public ou est-elle plutôt un prétexte pour obtenir un meilleur statut et des avantages financiers?

Troisièmement, le but ultime du processus de réglementation semble être l'obtention de l'autogestion. Les groupes de spécialistes qui demandent la réglementation invoquent souvent l'argument que leur profession ou leur métier est semblable à ceux qui sont déjà autogérés, plutôt que la nécessité de réglementer le domaine pour la protection du public. Une fois que leur statut professionnel est établi, ils obtiennent l'autogestion. On accorde ensuite à la nouvelle entité professionnelle la gestion d'un système de réglementation (certificat ou licence). On accorde donc la réglementation en se basant sur la capacité des spécialistes à gérer un système de réglementation plutôt que sur la nécessité de protéger le public, créant ainsi une surréglementation des professions et des métiers.

Quatrièmement, on a tendance à penser que les coûts associés à la réglementation ne sont que ceux de la gestion du système de réglementation, ce qui explique peut-être pourquoi la délivrance de certificats ou de licences est accordée tant que les dépenses d'administration sont absorbées par les spécialistes. En fait, la réglementation peut entraîner d'autres coûts qui ne sont pas dans l'intérêt du public, notamment des coûts plus élevés pour les consommateurs et un accès restreint aux services.

Cinquièmement, bien que les entités autogérées aient le mandat d'agir dans l'intérêt public, elles sont composées des mêmes spécialistes qui les contrôlent, ce qui place les spécialistes-gestionnaires en situation inhérente de conflit d'intérêts. Le public semble croire de moins en moins à l'impartialité de ces entités envers leurs membres, au détriment de l'intérêt public. On craint de plus en plus que les entités autogérées adoptent et appliquent des normes de façon à réduire la concurrence entre leurs membres et à conserver l'image de la profession ou du métier plutôt que de façon à protéger les consommateurs et les autres personnes qui peuvent subir un préjudice découlant de l'incompétence ou du manque d'éthique d'un spécialiste.

RECOMMANDATIONS DE REMANIEMENT

Nécessité de réglementer Selon le rapport, le présent système de réglementation des professions et des métiers comporte des lacunes importantes et est peut-être fondé sur des critères injustifiés et une mentalité désuète. Le rapport propose un nouveau système préconisant l'élaboration et la mise en application de la réglementation pour la protection des intérêts des consommateurs et des autres personnes touchées par la prestation de services professionnels et non pour la promotion des intérêts des spécialistes. Il suggère donc que le gouvernement étudie, du point de vue du public, les coûts et les avantages découlant de la réglementation avant de la mettre en oeuvre.

L'octroi de licences et de certificats, comme toute autre forme de réglementation, représente des coûts et des avantages pour le public. Le système de licences de prestation de services restreint le nombre de spécialistes puisque ceux-ci sont assujettis à des conditions telles que le respect de certaines normes pour être admissibles à la profession ou au métier ou pour continuer à l'exercer. Le système d'octroi de certificats donne aux spécialistes qualifiés un avantage en leur accordant le droit exclusif d'utiliser un titre réservé. À supposer que les normes d'admissibilité et d'exercice d'un système en particulier soient directement liées à la capacité de bien fournir un service, une telle réglementation entraînera une amélioration de la qualité des services que les titulaires de licence ou de certificat offrent au public. La réglementation avantage donc le public en le protégeant mieux contre les préjudices découlant d'un service dont la prestation serait mal assurée.

L'octroi de licences et de certificats comporte toutefois des coûts et des désavantages. Les théories économiques prédisent, ce que confirment les études, qu'en diminuant le nombre de spécialistes pouvant offrir des services au public, l'octroi de licences entraînera une augmentation des coûts, protégera l'incompétence, découragera l'innovation et limitera l'accès du public aux services en question. Bien que les effets négatifs de l'octroi de certificats aient une incidence moindre que ceux de l'octroi de licences, il semble qu'une telle autorisation du gouvernement, sous forme de certificat, modifiera les habitudes de consommation à l'égard du service visé, ce qui entraînera l'achat de services à un niveau plus élevé (et plus dispendieux) que nécessaire.

Puisque la réglementation entraîne des coûts en sus des dépenses associées à la gestion d'un système de réglementation, la première question que les décideurs devraient se poser n'est pas si les spécialistes devraient obtenir l'autogestion, mais bien si la réglementation est justifiée. Cette ligne de pensée écarte *de facto* la distinction traditionnelle entre les professions et les métiers à titre de critère pour l'obtention de la réglementation. Selon le rapport, les professions et les métiers ne devraient être réglementés que si les avantages que le public tire d'un système de réglementation sont plus importants que les coûts que celui-ci entraîne. Bien que les systèmes qui sont gérés par les spécialistes tendent à réduire les coûts, ceux qui offrent peu de protection pour le consommateur réduisent rarement, sinon jamais, les coûts au point de justifier leur existence. De plus, les systèmes d'octroi de

licences, vu leurs coûts habituellement élevés, ne devraient être mis en place que lorsqu'ils génèrent des avantages importants en protégeant le public contre les services dont la prestation est mal assurée. De tels systèmes ne devraient être utilisés que si le public est exposé à de sérieux risques de mauvaise prestation de services et si les systèmes en question représentent la solution la moins coûteuse pour la protection du public.

Système de groupes de travail Par le passé, chaque profession et chaque métier étaient habituellement réglementés par un seul système s'appliquant à la prestation de tous les services offerts par un groupe de spécialistes. La plupart de ces groupes fournissent cependant un éventail de services qui représente différents degrés de danger pour le public, ce qui entraîne une surréglementation pour certains services et une sous-réglementation pour d'autres si la réglementation est appliquée de façon uniforme à tous les services offerts. Un système encore plus sophistiqué doit être mis en place s'il est nécessaire, afin de protéger le public, de réglementer des services qui ne représentent pas un danger pour le consommateur si la prestation en est mal assurée. Selon le rapport, les décideurs du gouvernement devraient, par conséquent, diviser les services fournis par les spécialistes en services distincts qui peuvent être analysés séparément afin de déterminer s'ils doivent être réglementés et, le cas échéant, quel genre de réglementation serait le plus approprié.

Si les services qui forment traditionnellement une profession ou un métier sont réglementés séparément, les spécialistes qui ne désirent fournir qu'une partie de ceux-ci ne seront tenus d'obtenir une licence ou un certificat que pour les services qu'ils désirent offrir, ce qui favorisera la véritable spécialisation. Par contre, les spécialistes qui désirent fournir l'éventail complet ou presque complet de services formant une profession ou un métier ne devraient pas être tenus d'être membres de chacune des entités administratives gérant chacun des différents services. Selon le rapport, il est possible d'avoir une gestion efficace et pratique en faisant preuve de flexibilité, par exemple en amalgamant en un même système de gestion des services réglementés qui se ressemblent ou qui, par le passé, étaient inclus dans une même profession ou un même métier. Dans la même ligne de pensée, des systèmes de réglementation différents pourraient réglementer un même service pour lequel les groupes de spécialistes utilisent des méthodes ou des principes de prestation manifestement différents ou qu'ils fournissent à des fins diverses ou dans divers endroits.

Normes d'admission et d'exercice En plus des services auxquels il s'applique, le système d'octroi de licences ou de certificats est délimité par les normes que doivent respecter les spécialistes afin d'obtenir ou de conserver leur licence ou leur certificat. Ces normes permettront de déterminer si un système est en mesure d'offrir des avantages au public en le protégeant contre la mauvaise prestation de services. Elles auront également un impact sur le coût du système puisqu'elles détermineront le nombre de spécialistes qui peuvent offrir les services ou qui reçoivent un certificat. Selon le rapport, puisque les normes d'admission et d'exercice sont une partie intégrante des coûts et des avantages d'un système de réglementation, l'entité gouvernementale qui choisit la méthode de réglementation la plus appropriée pour chaque service devrait aussi déterminer les normes d'admission et d'exercice pour le système choisi, après avoir consulté les personnes appropriées.

Le rapport précise également que, dans le but de mettre en place un système offrant le plus d'avantages possible au coût le moins élevé pour le public, il est important d'établir un certain équilibre : les normes d'admission et d'exercice devraient viser à assurer les qualités nécessaires à la bonne prestation des services tout en assurant un certain niveau de protection du public; elles ne devraient pas cependant être trop excessives ou contenir des exigences superflues. Des normes insuffisantes ne mettront pas le public à l'abri de services dont la prestation est mal assurée et des normes excessives entraîneront des coûts trop élevés sans pour autant améliorer la protection du public.

Le rapport traite, en plus des normes d'admission et d'exercice, des méthodes servant à déterminer si les personnes demandant une accréditation et les spécialistes satisfont aux normes en question. Selon le rapport, des mécanismes d'évaluation devraient servir à déterminer les qualités dont les personnes susindiquées et les spécialistes ont besoin pour bien fournir les services, sans pour autant exiger qu'ils aient des compétences, des connaissances ou d'autres qualités qui ne sont pas nécessaires à la prestation des services. Lorsqu'il est possible de le faire, l'évaluation des personnes présentant une demande d'accréditation devrait être basée sur les

connaissances pratiques de ces personnes, bien que l'obtention d'un diplôme d'un établissement d'enseignement ou d'un programme accrédité puisse être un critère approprié d'évaluation dans certaines circonstances. Les spécialistes devraient faire périodiquement l'objet d'un contrôle visant à déterminer s'ils satisfont toujours aux normes d'exercice et s'ils ont les connaissances et les compétences exigées des personnes demandant l'accréditation; le rapport suggère plusieurs méthodes de contrôle.

Autogestion S'il est nécessaire d'octroyer des licences ou des certificats pour réglementer les services professionnels, c'est peut-être que les spécialistes sont en mesure de s'autogérer. L'autogestion présente des avantages : les spécialistes auront probablement plus tendance à respecter des normes s'ils participent à leur application et l'autogestion entraînera vraisemblablement des économies pour les contribuables puisque les spécialistes acquittent les frais d'administration. Le rapport souligne, par contre, que l'autogestion ne sera pas toujours dans l'intérêt du public; bien que les pouvoirs d'autogestion devraient être utilisés pour protéger cet intérêt, les entités détenant de tels pouvoirs sont composées de spécialistes nommés par leurs pairs, ce qui place les spécialistes-gestionnaires en situation de conflit d'intérêts, peut-être à leur insu. La Commission recommande donc que l'autogestion ne soit mise en oeuvre que si les spécialistes, en tant que groupe, satisfont aux trois conditions suivantes : ils doivent posséder les ressources humaines et financières nécessaires à leur autogestion; ils doivent démontrer leur adhésion aux principes démocratiques (y compris les principes de justice naturelle); ils doivent démontrer de façon conclusive qu'ils ont la capacité et la volonté de mettre de côté leurs propres intérêts pour agir dans l'intérêt du public. Il est notamment sous-entendu, dans cette dernière condition, que toute entité autogérée ne peut agir à titre d'association au profit des spécialistes.

La Commission recommande, en plus des trois conditions précitées, que tout pouvoir d'autogestion soit assujetti à des mécanismes assurant la protection des intérêts du public. Ces mécanismes sont, entre autres, la préparation obligatoire de rapports annuels ainsi que l'accès du public aux dossiers des membres, aux règlements internes des entités autogérées, aux réunions des entités, aux dossiers disciplinaires des membres et aux renseignements sur les spécialistes qui ont été expulsés ou suspendus des entités ou qui se sont vu imposer des restrictions dans l'exercice de leur profession ou de leur métier. Selon le rapport, il serait également souhaitable que de telles entités participent régulièrement à des audiences publiques afin d'informer le public de leurs activités et de lui permettre de leur poser des questions. De plus, la Commission recommande qu'un organisme gouvernemental indépendant supervise et surveille activement les activités de ces entités. Afin de réduire les situations de conflit d'intérêts au sein des entités autogérées, il serait également opportun, selon le rapport, de réserver au moins un tiers des postes de leurs comités et de leur conseil d'administration à des membres du public nommés par l'organisme gouvernemental.

Discipline des spécialistes Une des fonctions les plus évidentes et les plus importantes des entités autogérées est la prise de mesures disciplinaires à l'égard des membres qui n'ont pas respecté les normes d'exercice. La Commission est d'avis, dans son rapport, que les entités autogérées devraient adopter un processus disciplinaire largement uniformisé afin, d'une part, de permettre au public une meilleure participation en matière de discipline et, d'autre part, de faciliter la surveillance que doit effectuer le gouvernement en cette matière. Selon le rapport, il serait nécessaire d'inclure, dans le processus disciplinaire, des mesures assurant la compétence continue des membres et leur respect du code de déontologie, la tenue obligatoire d'enquêtes sur toute plainte contre les spécialistes, la protection des plaignants contre les délais indus dans les enquêtes sur les plaintes et le droit d'appel des plaignants à l'encontre de toute décision rejetant une plainte. La Commission recommande également qu'un tiers du jury d'audition soit composé de représentants du public. Les audiences seraient publiques et les négociations de plaidoyers ou les règlements intervenus à la suite d'une médiation pourraient être examinés par l'organisme gouvernemental chargé de surveiller les entités autogérées. Les décisions du comité de discipline pourraient être portées en appel devant la Cour du Banc de la Reine.

Constitution en corporation Présentement, les spécialistes d'une profession autogérée n'ont habituellement pas le droit de se constituer en corporation pour fournir des services ni de s'associer avec des personnes qui ne font pas partie de la même profession. La première interdiction remonte à la tradition voulant que les membres d'une profession soient des personnes dévouées au service du public, pour qui le profit n'est pas

un but et dont la nature des services qu'ils fournissent est le critère qui les différencie des personnes gérant une entreprise commerciale. La constitution en corporation n'est donc pas considérée comme une nécessité puisque les membres d'une profession ne sont pas réputés exploiter un commerce. La deuxième interdiction est aussi fondée sur la prétendue différence entre les membres d'une profession et les autres personnes : elle découle surtout du fait qu'une association avec des personnes qui ne font pas partie de la profession en vue de la prestation des services réglementés compromettrait l'engagement du spécialiste envers ses clients et le public en général.

Selon le rapport, il est impossible de continuer à interdire la constitution en corporation et l'association des membres d'une profession avec des non-membres en se basant sur ces traditions. La Commission en est venue à la conclusion que, bien que les particuliers puissent être dominés par le désir de réaliser des profits ou de servir le public, les professions elles-mêmes et les métiers eux-mêmes ne le sont pas. Elle soutient par contre que des restrictions à la constitution en corporation et à l'association avec des non-membres peuvent être justifiées si l'absence de restrictions dans ce domaine entraîne plus de désavantages que d'avantages pour le public. Bien que le rapport souligne que la constitution en corporation aura des répercussions sur l'impôt que les spécialistes auront à payer et sur les revenus du gouvernement, la Commission a refusé de prendre ces arguments en considération puisqu'ils relèvent du domaine de la fiscalité et non de la réforme du droit.

La constitution en corporation et l'association de membres d'une profession avec des personnes qui ne sont pas membres de la même profession représentent un avantage pour le public car elles offrent notamment de plus grandes possibilités de placement en capital pour les membres, ce qui permet à un plus grand nombre de membres de pratiquer et favorise une plus grande utilisation de nouvel équipement et de nouvelles technologies. Elles peuvent également entraîner une plus grande flexibilité dans la prestation de certains services et encourager la création de cabinets multidisciplinaires.

L'adoucissement de ces exigences pourrait par contre créer des désavantages qui, pour la plupart, pourraient être évités par des mécanismes de protection. Il est possible, par exemple, que des actionnaires ou des administrateurs qui ne sont pas membres de la profession poussent les spécialistes à enfreindre le code de déontologie ou à commettre des négligences en fournissant des services. Pour empêcher de tels agissements, il suffit d'exiger que l'entité autogérée approuve les actes des actionnaires et des administrateurs des cabinets offrant des services réglementés et que ces actionnaires et administrateurs soient soumis eux aussi à des règles de déontologie. La responsabilité limitée dont jouissent les actionnaires des corporations pourrait également entraîner une diminution des chances d'indemnisation des particuliers qui ont subi des préjudices à la suite de la négligence d'un spécialiste. Ce désavantage pourrait être évité si les spécialistes et les corporations qui fournissent des services réglementés sont tenus de souscrire une assurance responsabilité d'un montant suffisant ou de maintenir un niveau minimum de capitalisation.

Selon le rapport, les avantages et les désavantages susmentionnés devraient entrer en ligne de compte lorsqu'est autorisée ou interdite la constitution en corporation ou l'association avec des personnes qui ne sont pas membres d'une profession, et chaque service devrait faire l'objet d'une décision distincte selon ces critères au cours du processus de réglementation ou de révision de la réglementation.

Application des recommandations Selon le rapport, il serait souhaitable que les nombreuses recommandations de la Commission s'appliquent aussi bien aux systèmes de réglementation qui existent déjà qu'aux demandes visant la mise en place d'une nouvelle réglementation. Le statut des professions et des métiers déjà réglementés serait réévalué sur la base des critères utilisés pour l'évaluation des services qui font l'objet d'une demande de réglementation. Même si un remaniement complet des réglementations actuelles s'étendra vraisemblablement sur plusieurs années, la Commission recommande que certaines de ses propositions, par exemple le dépôt des rapports annuels et l'accès du public aux activités des entités autogérées, soient mises en oeuvre presque immédiatement.

La Commission présente également, dans son rapport, des recommandations sur l'organisme gouvernemental qui étudiera les demandes de nouvelle réglementation, révisera les systèmes de réglementation

déjà en place et surveillera les activités des entités autogérées. Elle suggère que les membres de cet organisme soient nommés par le conseil des ministres en fonction de la diversité de leurs points de vue et de leur expérience. Il serait par contre préférable, afin de minimiser le lobbying auprès des ministres et des législateurs et d'assurer une application constante des critères d'évaluation, que l'organisme soit indépendant et qu'il ait des pouvoirs importants. Par exemple, les décisions que l'organisme prend à l'égard de l'octroi de licences ou de certificats et de pouvoirs d'autogestion devraient être prises sous forme de règlement et ne devraient être assujetties qu'au veto du ministre responsable et qu'aux pouvoirs que celui-ci détient pour modifier ces règlements par voie législative.

CONCLUSION

Dans l'ensemble, les recommandations du rapport sur la *Réglementation des professions et des métiers* représentent un remaniement en profondeur du système de réglementation actuel des professions et des métiers et pourraient mener à un système souple et efficace basé sur des principes visant la protection et l'intérêt du public.