Council meeting, 27 March 2013

The regulation of unregistered health practitioners in New South Wales

Executive summary and recommendations

Introduction

In New South Wales, Australia the Health Care Complaints Commission operates a 'negative registration scheme' for unregistered health practitioners. This scheme applies to all practitioners who are not otherwise statutory regulated and provides a mechanism by which those unfit to work in healthcare can be removed from practice.

In February 2013, Marc Seale, Chief Executive and Registrar and Anna van der Gaag, Chair of Council, undertook a fact-finding visit to New South Wales to find out more about these arrangements.

The attached report looks at the operation of the negative registration scheme in New South Wales.

Decision

The Council is invited to discuss the attached paper. No decision is required.

Background information

The HCPC's policy statement on the regulation of adult social care workers in England, including proposals for a negative registration scheme, is here: http://www.hcpc-uk.org/aboutregistration/aspirantgroups/adultsocialcareworkersinengland/

Resource implications

None as a result of this paper.

Financial implications

None as a result of this paper.

Appendices

See paper.

Date of paper

15 March 2013

The regulation of unregistered health practitioners in New South Wales

1. Introduction

1.1 This paper gives an account of the regulation of unregistered practitioners working in health care settings in New South Wales (NSW). 'Unregistered' health practitioner in this context refers to a wide range of professionally qualified individuals, and occupational groups, such as care assistants working in homes for the elderly, who are not on a statutory register. In NSW, all complaints about health practitioners and facilities are directed to the Health Care Complaints Commission (HCCC), which has powers to investigate the complaint under different provisions depending upon whether the complaint is about a facility, a registered individual, or an unregistered individual.

1.2 To date, NSW is the only Australian state or territory that has a statutory negative registration scheme ('the Scheme' throughout the remainder of this paper) for this unregistered workforce, although a similar scheme will be introduced in South Australia shortly, administered by the state's Health and Community Services Complaints Commissioner. The Australian Health Ministers' Advisory Council (AHMAC) is currently considering proposals to extend the Scheme across Australia. A national consultation on introducing the Scheme was conducted in 2010. One hundred and seventy responses were received and a cost benefit analysis and regulatory impact assessment report was submitted to Ministers in December 2011.[1] This work is due to be considered by AHMAC in April 2013, and a decision on whether or not The Scheme will be implemented Australia-wide is expected in June 2013. Those in favour of the Scheme have an expectation that AHMAC will recommend negative registration for all 'self- regulating' professions - this includes, for example, professions who have voluntary registers and other groups of unregulated practitioners, such as healthcare assistants. This is in the context of growing public concern in Australia about the quality of care for the elderly, and the lack of accountability in this sector, particularly in facilities owned by independent providers.

1.3 As with many changes in regulation, the NSW scheme was triggered by a high profile case of a convicted fraudster who set himself up as a biochemist following release from prison. He began selling 'cures' for cancer at around $17,000 per treatment. Other high profile cases and long standing cases included a former dentist who established a private clinic offering bogus treatments, and a practitioner offering hair loss treatments using toxic levels

[1] Australia Health Ministers' Advisory Council (2011). Options for regulation of unregistered health practitioners.
www.ahmac.gov.au

and combinations of chemical treatments.[2]

1.4 The NSW Ministry of Health adapted an existing legislative scheme, derived from fair trading laws, and produced a 'negative registration' scheme for unregulated health practitioners (including psychotherapists, hypnotherapists and nursing assistants). The Victoria Department of Human Services first published proposals for a negative registration scheme but NSW led the way in implementation in December 2006 as a response to public concerns about unregulated practitioners.[3] The first prohibition order was listed two years later, in October 2008.

1.5 The Scheme is comprised of a statutory code of conduct (see Appendix 1) and powers to issue a prohibition order that prevents an individual who has breached the code from continuing to practise. The Scheme specifies in legislation which practitioners are subject to the code (see Appendix 2).

1.6 Before the Scheme was established in NSW, there was extensive consultation on the code of conduct. It was designed to set the minimum threshold, or to 'catch the worst' according to one member of the legal team who drafted the code. The Scheme was deliberately designed to provide robust prosecutorial powers and where necessary, a clear directive. It was designed primarily for those working as independent practitioners, but is increasingly being used to investigate complaints against assistant level health care practitioners described as 'assistants in nursing' working in the health and care sectors, in particular, in elderly care..

1.7 There is no direct equivalent in NSW to the role of the Disclosure and Barring Service (DBS) (or its equivalent in Scotland) in barring those unsuitable to work with children or vulnerable adults. Criminal investigations and convictions do interact with the Scheme, but the police operate a higher standard of proof and generally do not pursue cases concerning poor care. Convictions for serious offences can however lead to a prohibition order. HCCC argues that any practitioner working in health care has a duty of care to their patients, and as such must be accountable for their actions.

1.8 The Scheme is described as a 'reactive' system for dealing with cases that are either 'very trivial ' or 'very serious'. There is no policing, no inspection, nor has there been any specific publicity for the Scheme, but since it began in 2006 there has been a steady increase in the number of cases referred.

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[2] Please see:
http://www.health.vic.gov.au/hsc/downloads/report_noel_campbell_3.pdf
http://www.hccc.nsw.gov.au/Publications/Media-Releases/Public-Statement-in-relation-to-Mr-Samuel-Cohen-

[3] Victorian Government, Department of Human Services (2003). Regulation of the Health Profession in Victoria – A discussion paper.
http://www.health.vic.gov.au/pracreg/hp-review
Victorian Government, Department of Human Services (2005). Review of Health Practitioner Regulation in Victoria – Options paper.
http://www.health.vic.gov.au/pracreg/hp-review

2. Attitudes towards the Scheme

2.1 The evidence suggests that consumer groups are in favour of the Scheme, as they perceive it as a form of redress for those outside statutory regulation. The regulated health professional associations are in favour of the Scheme, as they perceive it as a method of removing bad practitioners who have been struck off statutory registers only to re-appear under another title. These individuals are often reported in the press as former doctors or dentists, and therefore there are important implications for maintaining public confidence in the profession.

2.2 For some unregulated professional groups, there continues to be a lobby for full statutory regulation, as this is seen as the gold standard. Self-regulation is viewed as an important part of 'professionalisation' but statutory systems are required to ensure high standards across the board. The National Alliance of Self Regulating Health Professions (NASRHP), which includes clinical perfusionists, sonographers, speech and language pathologists and prosthetists, support the introduction of the Scheme nationally, but have concerns that the Scheme should not be viewed as a substitute for full statutory regulation for all health professions.[4] National registration by the Australian Health Practitioner Regulation Agency (AHPRA) continues to be seen as a way of validating the professions, whereas negative registration is welcomed as a tool for occupational groups and assistants.[5] (See appendix 2 for more information about the national registration scheme). Professions that are registered with AHPRA are perceived as higher status, although many consumers are not aware of which professions are regulated and which are not.

2.3 Since the NSW scheme was introduced, there have been a number of public consultations, and feedback sought from consumers. There have been no suggested changes to the Scheme. However, officials would like to see an amendment that takes account of whether the practitioner is deemed a 'fit and proper person' i.e., takes into account their behaviour outside the work environment. Some argued that this would not be appropriate for unregistered practitioners, as the character test could only be applied to those who were on a statutory register.

3. Breakdown of cases

3.1 Table 1 gives a breakdown of all complaints dealt with by the HCCC for the period 2010-2011 and 2011-2012. The figures include complaints against

[4] Allied Health Professions Australia (2012). Harnessing self regulation to support quality and safety in healthcare delivery.
www.ahpa.com.au/Home.aspx

[5] Australian Health Practitioner Regulation Agency (AHPRA)
www.ahpra.gov.au/

registered health practitioners, unregistered health practitioners and health organisations. The majority of complaints to date have come from employers and patients and their families.

Table 1: Total number of complaints

	2010-11	**2011-12**
Complaints assessed	4,073	4,103
Investigations finalised	203	222
Legal matters finalised	107	94

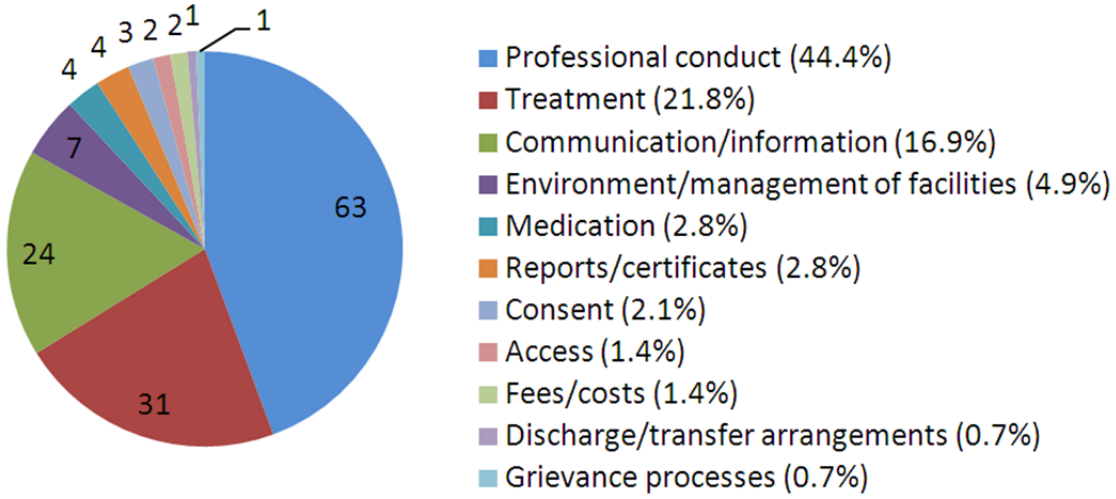
3.2 Table 2 gives a breakdown on the number of complaints about unregistered practitioners received by the HCCC as a proportion of overall complaints received. Cases that have been subject to prohibition orders include health care assistants, hypnotherapists, psychotherapists, acupuncturists, and dentists. To date, the majority of healthcare assistants have been referred through the Commonwealth (i.e. federal) Department for Health and Ageing, the systems regulator.

Table 2: Proportion of complaints received about un-registered health care practitioners compared to all complaints received about health practitioners

	2006-07	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**
Complaints received	30	32	47	80	104	88
As a % of all complaints received about health practitioners	1.8%	1.8%	2.2%	3.6%	4.0%	2.1%

3.3 In 2012, 44 per cent of the cases concerned professional conduct, 17 per cent related to poor communication, and 22 per cent were about ‘treatment’ issues. The remaining cases concerned false advertising, false credentials, and supply of products and medication. Recent cases include physical and verbal assault of elderly patients (see Appendix 3 for example), sexual contact during massage therapy and hypnotherapy, issuing forged prescriptions, practising as a dentist without qualifications, and puncturing a patient's lung during acupuncture.

Figure 1: Reasons for complaints about unregistered practitioners



4. Threshold

4.1 The threshold for referral to the Scheme is based on the following criteria.

- Threat to public health or safety (i.e. the incident raises significant issues of public health or safety or significant questions as to the appropriate care provided).

- Gross negligence or a breach of the code of conduct.

4.2 Both must be met in order for a prohibition order to be issued. The HCCC can issue an interim order, if risks to public safety and breach of the code are considered to be so serious. Such orders can either:

- prohibit the practitioner from providing health services or specified health services; or

- place such conditions as the Commissioner thinks appropriate on the provision of health services or specified health services.

4.3 Interim orders remain in force for up to 8 weeks.

4.4 Once an order is issued, any advertising of other services which are offered by that individual must specify that the person is subject to an order. HCCC issues a notice of prohibition to the AHPRA and to the relevant professional association as well as placing the order on its website. Employers will contact the HCCC to check the status of individuals and if there is evidence that the person is continuing to practise, this can be referred to the courts.

4.5 The HCCC is not aware of any practitioners who have continued to practise

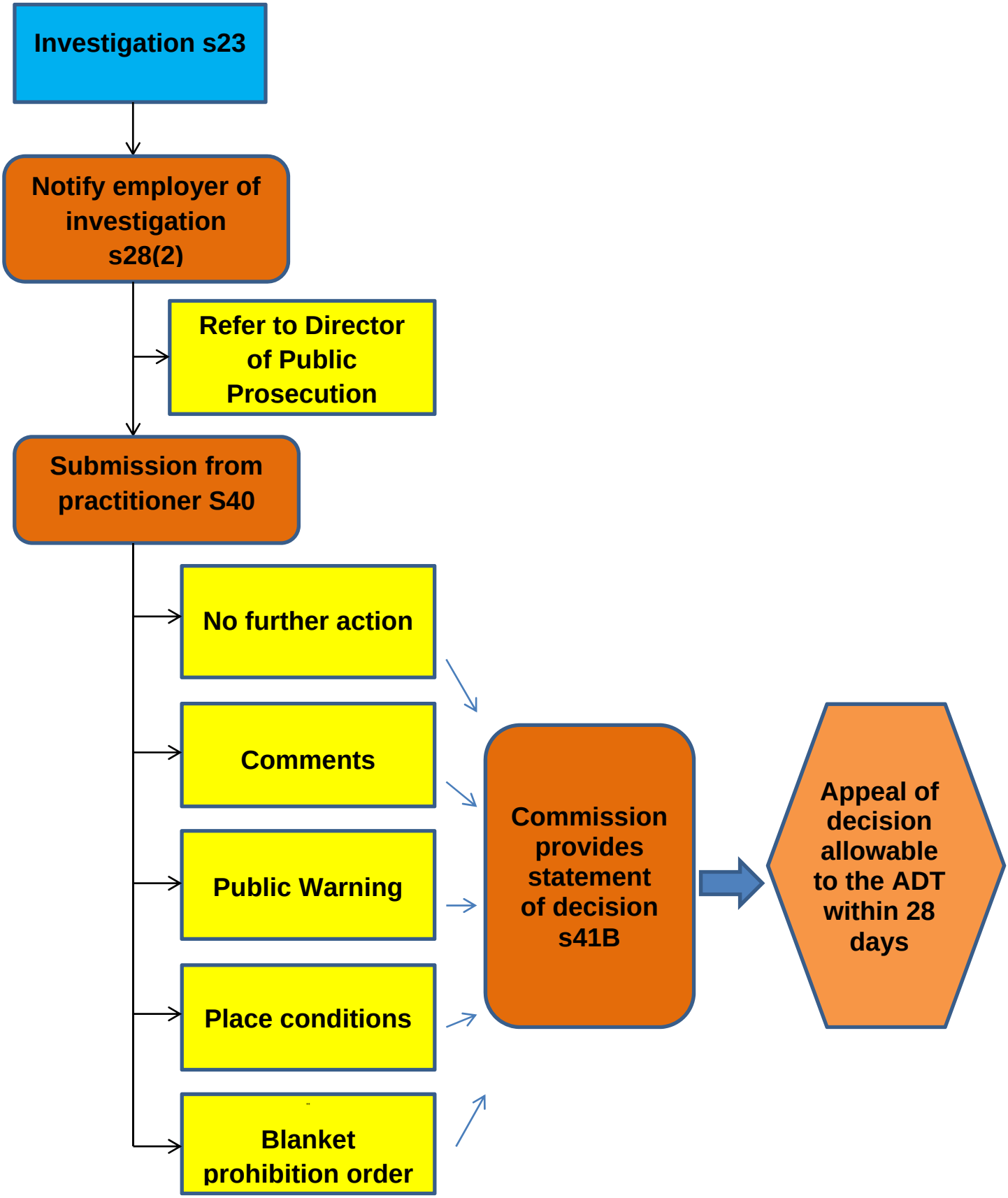
having been issued with a prohibition order. If this did come to light, the case would be referred to the courts as breach of a prohibition order is a criminal offence. Employers do contact the HCCC to check the status of individuals and there is a perception that the power of The Scheme lies in the public statement on the HCCC website. The outcome of the case is redacted to remove any information on victims, but the statement is sufficiently detailed to allow the individual to be identifiable and the details of their case are often reported in the press (see Appendix 3). The public statement is perceived as having 'as much if not more' impact than the prohibition order itself, as the prohibition order only applies in NSW. As one official observed, negative registration can only work in the age of the internet.

5. Investigation stage

5.1 Once a complaint has been received, the HCCC gathers evidence from relevant parties. This must be completed within 60 days. If the complaint is considered a 'low level' breach of the code, the practitioner will be contacted and may be issued with learning points. If the complaint is considered a breach of the code and a risk to public safety, the Commissioner may withhold notification to the practitioner, and initiate an investigation. This may be paper based, may involve interviewing witnesses either face to face or by telephone, from which file notes are produced. Formal statements are not required. In some circumstances, a search warrant may be used, for example in cases of alleged sexual abuse. The HCCC may send an investigator posing as a patient to visit the practitioner in order to obtain evidence, or may give notice to attend a hearing once evidence has been obtained.

5.2 Figure 2 overleaf shows the end-to-end investigation process used by the HCCC.

Figure 2: HCCC investigation process



6. Hearings

6.1 These are held by the Commissioner in private. The respondent can be legally represented. Hearings can involve up to 3 or 4 witnesses, and usually take 4-5 hours. A legal officer is also present. The procedure is inquisitorial rather than adversarial, and the respondent and witnesses are usually questioned separately by the Commissioner. They are not present at the same time and so there is no opportunity for cross-examination. There is a legal requirement to cooperate with an investigation by the HCCC and this applies to the person under investigation. However, under section 37A(2) of the NSW Health Care Complaints Act 1993, if the person objects to being made to answer questions or provide information, that evidence will not be not admissible in any other civil or criminal proceedings. Questions are always put to the practitioner on all allegations. A written statement on the reasons for a prohibition order being issued is always provided.

6.2 The practitioner can appeal to the NSW Administrative Decisions Tribunal. To date, there have been no appeals.

6.3 In circumstances where the individual has been a registered practitioner, the case may be referred to the State Board. For example, if a former doctor begins practising as a psychotherapist, he or she can be referred to the Medical Board, who also have powers to issue a prohibition order.

7. Costs of the Scheme

7.1 Table 3 gives a breakdown of the average unit costs of the HCCC's complaints handling for registered practitioners. The Commission estimates that for 2011-2012, the unit cost of investigations into unregistered health practitioners is $18,174. The estimated unit cost for assessment and investigation as at July 2012 is $18,850 or £12,853. These costs are slightly higher than the combined assessment and investigation stage for regulated health practitioners because the hearings are held in house by HCCC. These costings do not include development costs such as training staff.

7.2 A full cost analysis was undertaken by the Victoria Department of Health in 2010. This gave an estimated total annual cost of $526,422 (excluding implementation) for a national negative registration scheme. This compares favourably with the estimated annual cost of $79,766,500 for full statutory regulation for all health practitioners. First year costs of implementation were estimated at $1,626,422 (compared with $96,766,500 for full statutory regulation). These figures have recently been updated in light of an increase in the number of complaints about unregulated practitioners (see Table 2 above). The revised figures give an overall costing of $688,000 to implement the Scheme across Australia.[6]

[6] Personal communication, Victoria Department of Health, February 2013

Table 3: Average costs of handling complaints by the Commission

	2010-11	**2011-12****
Complaints assessed	$644	$676
Investigations finalised (**includes** the cost of assessing the complaint)	$16,148	$16,955
Legal matters finalised (**includes** the cost of assessing and investigating the complaint).	$47,138	$49,495

Notes to table

1. Based on 2010-2011 and 2011-2012 outputs as reported in the Health Care Complaints Commission Annual Report.

2. Based on 2010-2011 expenditure as reported in the Health Care Complaints Commission Annual Report. ****** The costs calculation for 2011-12 include an estimated 5% increase to the costs, mainly relating to increases in salaries and wages of 2.5% each on 1 July 2010 and 1 July 2011.

3. It should be noted that of the over 70% of the Commission expenditure relates to employee expenditure (i.e. salaries, superannuation, payroll tax, annual leave loading, etc.). Therefore the costs stated above will vary significantly if a different "grade" of staff are employed than those employed in NSW.

8. Complaints against unregistered health practitioners 2010-2011 and 2011-2012

8.1 Table 4 below gives the number of complaints as well as the number of investigations and prohibition orders issued. The HCCC has had no prosecutions for breaches of prohibition orders since the Scheme was established. There have been several alleged breaches but these have been dealt with through letters and warnings.[7]

Table 4: Number of complaints about unregistered health practitioners

	2010-11	**2011-12**
Complaints received	104	88
Investigations finalised	14	15
Prohibition orders/public statements	6	7

[7] NSW Government. Health Care Complaints Commission (2012). Protecting the Health and Safety of the Public. Annual report 2011-12.
www.hccc.nsw.gov.au/Publications/Annual-Reports

9. Perceived disadvantages of the Scheme

9.1 This review of the Scheme did not identify any specific disadvantages. The administrators of the Scheme reported that it had been welcomed by consumer groups, professional associations and by the NSW media. Politicians welcomed the Scheme, as it provided an avenue for independent investigation of complaints about unregulated practitioners. The goal was described as 'compliance, not scalps'.

9.2 The only group who saw a disadvantage were those professionals who were seeking statutory regulation, and who felt that the Scheme was likely to be implemented across Australia as an alternative to introducing more costly statutory systems across a wider range of professions (see 2.2 above). This was perceived as a two tier system of regulation for qualified practitioners.

10. Conclusions

10.1 No reservations about the administration or effectiveness of the Scheme were identified. It was judged to be successful, both in terms of bringing 'rogue' practitioners to account, and delivering cost effective regulation. There was an appetite for extending it across Australia in order to ensure that there was equitable public protection across all states and territories. The only group who voiced reservations were those professions who felt that the Scheme was seen as an alternative to the 'higher' level of protection and status afforded to professions through statutory regulation via the AHPRA.

10.2 The Australian regulatory system has a lower level of transparency than the UK, whether for regulated or unregulated practitioners. For example, AHPRA hearings are not held in public, and the outcome of hearings about regulated professionals by the national regulator are not universally reported on its website. If such a scheme were introduced in England for the adult social care workforce, the level of transparency and the nature of the hearing would need to be adapted to suit our context.

10.3 The concept of a code of conduct and a test regarding risk to public safety, would be acceptable in our context. In many ways, this reflects the work already undertaken in the adult social care sector in England.[8] The issue of education and awareness raising was discussed, and there was agreement that initiatives to promote awareness of the code amongst students would be of value. This would link directly to one of Robert Francis' recommendations that there should be more awareness raising of patient safety issues by education providers.[9] There is no investment of this kind at the moment in

[8] Skills for Care and Skills for Health work on minimum training standards and a code of conduct for adult social care workers and healthcare support workers in England. http://www.skillsforcare.org.uk/qualifications_and_training/Minimumtrainingstandardsandcodeofconduct/Minimum_training_standards_and_code_of_conduct.aspx

[9] Mid Staffordshire NHS Foundation Trust Public Inquiry (2013). Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry. Volume 3. (See Chapter 18.)

NSW, but the HCCC Commissioner welcomed this suggestion.

10.4 The NSW Scheme would need adaptations to our context, but the principle of applying a statutory code of conduct and powers to prohibit practice could be applied to the adult social care workforce in England and would provide the essential 'safety net' when serious breaches of conduct came to light. It was clear from discussions in NSW and Victoria that the Scheme was not seen as an alternative to local action by employers on low level complaints or 'employment issues,' nor was it seen as an alternative to important principles of professional self-regulation. The vast majority of practitioners were viewed as safe, effective, self-regulating. Negative registration was designed to ensure that the minority who did not meet these minimum standards of behaviour could be held to account and prevented from continuing to practice. The problem of serial offences by this minority - in different locations, often under reported as well as unreported over many years, was as much an issue in NSW as it is in the UK.

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http://www.midstaffspublicinquiry.com/report

Appendix 1

New South Wales Code of Conduct

1. Health practitioners are to provide services in a safe and ethical manner
2. Health practitioners diagnosed with an infectious medical condition must take precautions to avoid transmitting it to clients
3. Claims to cure certain serious illnesses must not be made
4. Standard precautions for infection control to be in place
5. Appropriate conduct in relation to treatment advice
6. Not practise under the influence of alcohol or drugs
7. Not practise with certain physical or mental conditions
8. Not financially exploit clients
9. Have a clinical basis for treatments
10. Not misinform their clients
11. Not engage in a sexual or improper personal relationship with a client
12. Comply with relevant privacy laws
13. Keep appropriate records
14. Keep appropriate insurance
15. Display the Code of Conduct and information on how to make a complaint to the Commission
16. Not sell or supply an optical appliance, unless permitted to do so.

Appendix 2

Legislative framework

Scope of the negative registration scheme in New South Wales

The scope of the negative registration scheme is set down in legislation - the Health Care Complaints Act 1993 defines a health service as including the following, whether provided as public or private services:

The *Health Care Complaints Act 1993* defines those terms as follows:

health practitioner means a natural person who provides a health service (whether or not the person is registered under the Health Practitioner Regulation National Law).

health service includes the following services, whether provided as public or private services:

(a) medical, hospital, nursing and midwifery services,

(b) dental services,

(c) mental health services,

(d) pharmaceutical services,

(e) ambulance services,

(f) community health services,

(g) health education services,

(h) welfare services necessary to implement any services referred to in paragraphs (a)–(g),

(i) services provided in connection with Aboriginal and Torres Strait Islander health practices and medical radiation practices,

(j) Chinese medicine, chiropractic, occupational therapy, optometry, osteopathy, physiotherapy, podiatry and psychology services,

(j1) optical dispensing, dietitian, massage therapy, naturopathy, acupuncture, speech therapy, audiology and audiometry services,

(k) services provided in other alternative health care fields,

(l) forensic pathology services,

(m) a service prescribed by the regulations as a health service for the purposes of the *Health Care Complaints Act 1993*.

This code of conduct applies to the provision of health services by:

(a) health practitioners who are not subject to the scheme for registration under the Health Practitioner Regulation National Law (including de-registered health practitioners), and

(b) health practitioners who are registered under the Health Practitioner Regulation National Law for the provision of health services and who provide health services that are unrelated to their registration.

For further information see links below.

Public Health Regulation 2012: Schedule 3 Code of Conduct:
http://www.legislation.nsw.gov.au/fragview/inforce/subordleg+311+2012+sch.3+0+N?tocnav=y

Health Care Complaints Act 1993 No 105: Division 6A Action against unregistered health practitioners:
http://www.legislation.nsw.gov.au/maintop/view/inforce/act+105+1993+cd+0+N

National registration and accreditation scheme – legislative framework

Those health professions that are subject to statutory regulation in Australia are not regulated by Commonwealth (federal) law but by a 'National Law' that was first passed in the state of Queensland and then adopted by an Act of the legislature in each of the other states and territories (in some cases with modifications). The arrangement is known as the National Registration and Accreditation Scheme (NRAS). The National Law came into effect on 1 July 2010 and the NRAS is administered on behalf of the states and territories by 14 National Boards (one for each profession) and the Australian Health Practitioner Regulation Agency (AHPRA). AHPRA manages the registration processes for the professions across Australia and maintains the national register, investigates allegations made against registered health professionals (except in NSW where it is a function of the HCCC), supports the Boards in the development of standards, codes and guidelines and provides advice to AHMAC. The 14 professions covered by the NRAS are:

- Aboriginal and Torres Strait Islander Health Practitioners
- Chinese Medicine Practitioners
- Chiropractors
- Dental Care (Dentists, Dental Hygienists, Dental Prosthetists and Dental Therapists)
- Medical Practitioners
- Medical Radiation Practitioners
- Nurses and Midwives
- Occupational Therapists
- Optometrists

- Osteopaths
- Pharmacists
- Physiotherapists
- Podiatrists
- Psychologists

Appendix 3

Example of prohibition order

Public statement in relation to Ms K Bacon: 28 Sep 2012

Under section 41A(2) of the *Health Care Complaints Act 1993*, the Commission makes the following public statement:

The Health Care Complaints Commission has conducted an investigation into the professional conduct of unregistered health practitioner, Ms Kylie Bacon, an Assistant in Nursing who was employed at the Veronica Nursing Home in Kincumber, New South Wales. The investigation found that Ms Bacon breached clause 3(1) of the Code of Conduct for Unregistered Health Practitioners by:

1. Physically assaulting an elderly patient on 19 January 2012 at the Veronica Nursing Home by slapping her in the face.

Ms Bacon was found guilty of common assault at the Gosford Local Court on 2 April 2012 and was sentenced to a 12 month good behavior bond.

Ms Bacon has advised the Commission that she has no intention of ever practicing again as an Assistant in Nursing. She has not worked as an Assistant in Nursing since her employment was terminated on 27 January 2012.

For this reason the Commission does not deem it necessary to issue a prohibition order. However, the Commission is of the opinion that it is necessary and appropriate to issue a Public Statement so that any future employers engaged in the provision of Health Services in aged care facilities are aware of Ms Bacon's conduct should she ever apply for employment as an Assistant in Nursing in the future.

The Commission also makes its Statement of Decision publicly available under section 41B(3)(c) of the *Health Care Complaints Act 1993*.

Read the Commission's Statement of Decision:

http://www.hccc.nsw.gov.au/Decisions/Public-Statements-and-Warnings/Public-Statement-in-relation-to-Ms-Kylie-Bacon