

# Paradigm Lost: A Summary of the Manitoba Law Reform Commission's *Regulating Professions and Occupations*

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IN 1990, THE MANITOBA LAW REFORM COMMISSION was asked by the Minister of Justice and Attorney General to consider and report on all aspects of professional regulation in the province. After extensive research, the Commission released a Discussion Paper, *The Future of Occupational Regulation in Manitoba*.<sup>1</sup> This document aroused substantial interest; over 750 copies were requested and 78 individuals and groups responded to the issues it raised.<sup>2</sup> Their comments were taken into account as the Commission prepared its final Report which was released to the public in December 1994.<sup>3</sup>

*Regulating Professions and Occupations* represents a self-conscious break with the philosophy which has guided professional regulation for most of the past century and is, in this sense, the most radical proposal put forward by any governmental body in Manitoba and, arguably, in Canada to date. It is clear that, if implemented, the Commission's recommendations would have a profound impact on the design of any new occupational legislation. Perhaps more significantly, however, the Commission's approach could also have a far-reaching effect on the operation of the more than 150 currently regulated occupations, including all existing professions. Moreover, the government has given every indication that it is taking the Commission's recommendations seriously. In these circumstances, it is unfortunate that little public discussion of the new paradigm proposed by the Report has taken place.

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<sup>1</sup> Manitoba Law Reform Commission, *The Future of Occupational Regulation in Manitoba* (Discussion Paper, 1993).

<sup>2</sup> This represents the greatest response to a consultation document in the history of the Commission.

<sup>3</sup> Manitoba Law Reform Commission, *Regulating Professions and Occupations* (Report #84, 1994). In future footnotes, this document will be referred to as *Regulating Professions*.

This article is an attempt to initiate discussion of the Commission's Report, not by advancing provocative positions, but by outlining the contents of the Report and illustrating its implications.<sup>4</sup>

## I. BACKGROUND

THE LAW REFORM COMMISSION describes Manitoba's current approach to professional regulation as "*ad hoc*." No guidelines or criteria have been established by which requests for professional legislation may be judged and no formal structure is in place to process these applications. Decisions as to the creation of new legislation and the revision of existing statutes are made in an uncoordinated fashion, usually by a Minister or another member of the legislature who sees the request as relevant to his or her jurisdiction or agenda. The result is that groups seeking legislation are forced to lobby Ministers or other M.L.A.s whose responses will often be dictated by the political pressure which can be brought to bear on them by those supporting or opposing the request. Since each piece of legislation is the result of a different dynamic, it is not surprising that no attempt has been made to coordinate the various statutes which emerge from this "process."<sup>5</sup>

Despite the chaotic nature of the current "approach" to professional regulation, the Commission was able to discern some patterns. "Professional legislation," as it is commonly understood, delegates to practitioners of an occupation the power to administer a regulatory regime which controls the provision of the services they offer. One of two regimes is almost always administered by these self-governing bodies. The first is certification, which gives qualified practitioners the exclusive right to use a name or title. The second is licensing, which not only commonly reserves for qualified practitioners an exclusive title, but also grants them the exclusive right to provide certain services to the public. Professional legislation typically allows the members of the profession's governing body, most of whom are elected by practitioners, both to create and administer entry standards (the qualifications aspiring practitioners must have in order to obtain a licence or certificate) and practice standards (the rules practitioners must follow in order to retain a

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<sup>4</sup> For the most part, this article will simply summarize the contents of the Commission's Report. However, occasional attempts will be made to illustrate its implications by referring to specific occupational or professional groups. Unless expressly stated otherwise, these references are not drawn from the Report but are the writer's conjecture as to the potential impact of the principles it adopts.

<sup>5</sup> The Commission has appended to its Report a list of 156 occupational groups which are regulated by government. Of these, 36 are self-governing and could be considered "professions." So uncoordinated is the current "system" of occupational regulation that this catalogue appears to be the first attempt by a Manitoba government agency to provide a more-or-less complete inventory of current "professional" legislation.

licence or certificate). In addition, legislation creating a licensing regime is often vague as to the services which are restricted to members of the regime.<sup>6</sup> Since a self-governing body generally has the right to prosecute for unauthorized practice, an ill-defined “scope of practice” also grants it a significant level of de facto control over the activities which only qualified practitioners can perform.

Another pattern is also identified by the Commission; legislation which grants self-governing powers is typically reserved for occupational groups which demonstrate the classic attributes of professions. Among these attributes are a theoretical foundation for the profession’s activities, a university-based educational program, demanding admission standards, codes of conduct and a claim that the services the profession provides are important for both consumers and society at large. The Report contends that this pattern can only be understood in the context of the modern and widespread view of professionals as idealized figures embodying the virtues of modernity.

The modern image of professions has its roots in the Enlightenment belief in the power of science and rationality to create something approaching a perfect world. Professionals embodied this faith. One prerequisite for an occupation seeking professional status, therefore, was an association with an institute of higher education, ideally a university, where academics could refine and aspiring practitioners could be taught the scientific theories which grounded the practice of the occupation. However, although they were distinguished from mere tradespeople by their mastery of science, professionals were not theoreticians; they applied their superior knowledge for the benefit of their clients and society at large. In doing so, they claimed to act on the basis of altruism rather than a desire for wealth. They were committed to a life of “good works,” an ideal which was incorporated in and reinforced by codes of professional conduct.<sup>7</sup>

The professional ideal — a highly educated, deeply practical and devoutly ethical individual — has had an important effect on government policy. Widespread respect for their scientific training has allowed professionals to argue that only those who understand the theory behind the practice of a profession are qualified to set and apply appropriate entry and practice standards. Moreover, professionals have been able to contend that the delegation of self-governing powers to them is justified by their obvious commitment to the public interest.

For governments, professional legislation has often been seen as a “can’t lose” proposition. Not only has professional legislation permitted governments to escape the financial burden of administering these regimes themselves, it has allowed them

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<sup>6</sup> The services which are regulated are commonly referred to as the regime’s “scope of practice.”

<sup>7</sup> The Report cites a number of historical sources as well as modern scholars in support of this description: *Regulating Professions*, *supra* note 3 at 2–4.

to claim to be acting in the public interest by ensuring that high levels of service are being provided. Economic analyses of the implications of professional regulation have rarely been carried out; it has simply been assumed that higher standards of education and practice will be beneficial to the public. The benefits of professional legislation for practitioners have also been largely ignored; the chief benefit of professional legislation for practitioners has often been seen as due recognition for their years of training and their high ethical standards.<sup>8</sup> To the extent that practitioners have been recognized as benefitting financially from professional legislation, this has been viewed as necessary in order to ensure that competent, ethical people enter and remain in professional life.

The result of this traditional paradigm has been material and status gains for members of many professions, the proliferation of professional groups and a continuing drive towards professional status for many of the occupations which have not yet achieved it. Nevertheless, in recent years, doubts about the reliability of the current model of professional regulation have begun to surface. Widely reported cases have exposed members of respected professions as incompetent or unethical. This, together with an increased level of public education, has helped to undermine the previously unassailable position enjoyed by doctors, lawyers and others. A willingness to challenge the opinions of individual practitioners has, in some cases at least, been translated into a skepticism of the ability of professional bodies to ensure the competence and ethics of their members.

More significantly, some critics have begun to cast doubt on the claim that professions are in fact interested only in promoting the public interest.<sup>9</sup> They wonder whether the interests of the public are really being served when professional regulation, which is almost never sought by the public, is generally granted to occupational groups without significant public involvement.<sup>10</sup> They note the aggressive lobbying of politicians by both an increasing number of occupational groups seeking professional legislation and those existing or other aspiring profes-

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<sup>8</sup> The Report cites records of debates in the Manitoba Legislature to support this contention: *Regulating Professions*, *supra* note 3 at 5.

<sup>9</sup> For example, the author of a 1978 Manitoba government study of professions noted in a 1979 newspaper article: "...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": S.M. Cherniack, "Governing Professional Bodies" *Winnipeg Free Press* (4 May 1979) 6.

<sup>10</sup> See, for example, S.D. Young, *The Rule of Experts: Occupational Licensing in America* (Washington, D.C.: Cato Institute, 1987) at 32 and M.J. Fulton and W.T. Stanbury, "Comparative Lobbying Strategies in Influencing Health Care Policy" (1985) 28 *Canadian Public Administration* 269.

sions who oppose their quest.<sup>11</sup> They point to sometimes ugly “turf wars” in which two occupational groups with diametrically opposed views each claim to be acting solely in the public interest while casting doubt on the bona fides of the other. Many thoughtful observers have concluded that, far from serving the public interest, professional legislation is in fact introduced and maintained primarily for the benefit of practitioners.<sup>12</sup> This view has been strengthened by reputable academic and governmental studies which have raised questions about the economic benefits for practitioners and the economic and other costs to the public of professional regulatory structures.<sup>13</sup>

The increasing unease over the efficacy of the current model of professional regulation has prompted governments to study and, in some cases, to take action to reform the current structure of professional regulation.<sup>14</sup> The Commission’s Report represents the third such study in Manitoba since 1970.<sup>15</sup> However, unlike the others, this Report proposes to abandon the traditional model of professionalism as the basis for regulation and recommends that it be replaced by something new.

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<sup>11</sup> It is worth noting that, in many cases, the group aspiring to professional status is opposed by an occupational groups whose members have traditionally dominated (economically or otherwise) the members of the aspiring group. One such example is that of dentists and several occupational groups whose members are typically employed by dentists.

<sup>12</sup> See, for example, M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977) and R.L. Abel, *American Lawyers* (New York: Oxford University Press, 1989).

<sup>13</sup> Among the studies and articles cited in the Report are Economic Council of Canada, *Reforming Regulation* (Ottawa: Economic Council of Canada, 1981); C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation* (Bureau of Economics, Federal Trade Commission (U.S.), Staff Study, 1990); S. Ostry, “Competition Policy and the Self-Regulating Professions” in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978) 17.

<sup>14</sup> A summary of reforms in Quebec, Alberta and Ontario may be found in Chapter 2 of the Commission’s Discussion Paper: Manitoba Law Reform Commission, *The Future of Occupational Regulation in Manitoba* (Discussion Paper, 1993).

<sup>15</sup> In 1970, an all-party Special Committee of the Legislature was struck to establish criteria for the delegation of self-governing powers to occupational groups: Manitoba, *Study Group on Professional Associations* (convened by the Manitoba Law Reform Commission), *Report to the Special Committee on Professional Associations, Part II* (1972). Another study focusing on architects, chartered accountants, dentists, engineers, lawyers, registered nurses, occupational therapists and physiotherapists was commissioned in 1978 and headed by Saul Cherniack: Manitoba, *Report on the Legal Status of Professionals in Manitoba: Proposals for a Legislative Framework Governing Professional and Occupational Associations in the Province* (1978).

## II. A NEW PARADIGM

THE COMMISSION'S APPROACH IS GROUNDED on the assumption that professional regulation should not take place unless it is in the public interest to do so. It makes clear that, in this context, "the public" means consumers of professional services and third parties who may be affected by those services; it does not include practitioners. The 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.<sup>16</sup>

This basic principle was put forward in the Commission's Discussion Paper in the following terms:

... occupational regulation should exist to serve the best interests of the public and the costs and benefits to the public of regulation ought to be the sole consideration of decision-makers. In particular, any advantages which may accrue to practitioners through the establishment of a licensing or certification regime should be given no weight or consideration by decision-makers.<sup>17</sup>

This principle appears innocuous, largely because every professional body claims it to be the foundation for all its activities. It is significant that none of the responses to the Discussion Paper opposed this assumption and many, including several from professional bodies, supported it.<sup>18</sup> Nevertheless, it is the logical and consistent application of this principle which leads the Commission to the "radical" conclusions it eventually reaches.

With this principle in mind, the Report proceeds to assess the benefits to the public of professional legislation and, in particular, of licensing and certification. It notes that both of these regimes are intended to reduce the threat of harm to the public posed by incompetent or unethical practitioners.<sup>19</sup> This is accomplished by

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<sup>16</sup> *Regulating Professions*, *supra* note 3 at 8.

<sup>17</sup> *The Future of Occupational Regulation in Manitoba*, *supra* note 1 at 31.

<sup>18</sup> *Regulating Professions*, *supra* note 3 at 8 (note 33).

<sup>19</sup> The Report defines incompetence as "the lack of the ability needed to perform an occupational service at an acceptable level. This inability may be due to insufficient education, training and practice or it may be the result of a physical or mental incapacity." Unethical behaviour is described as "unacceptable conduct which arises in the context of the performance of a particular service." Criminal activities, such as theft or fraud, are cited as examples of unethical behaviour as are misrepresentations, unnecessary prescriptions of a service, negligent practice, revealing confidential information and taking advantage of a position of trust by, for example, engaging in inappropriate

means of entry and practice standards. Entry standards can ensure that practitioners have the knowledge and skills needed to perform the regulated service properly. Practice standards can ensure that practitioners maintain their competence and knowledge of ethical standards and, more importantly, put them into practice. Although even the best entry and practice standards can never guarantee that practitioners will always act in a competent and ethical manner, the Report concludes that, properly designed and applied, they can be effective in increasing the likelihood that a consumer will receive at least an adequate level of service.

Consumers typically require the protection of licensing and certification regimes because they suffer from a lack of knowledge about the regulated service. This makes them vulnerable to a variety of harms, such as being charged for services which were never performed, being provided with unnecessary services or service at a higher level of quality (and price) than needed and being provided with service of a lower quality than required. Certification regimes address the problem of insufficient information by providing consumers with a quality signal; although uncertified practitioners may perform the service adequately, a properly designed and administered certification regime will increase the chances that a consumer who selects a certified practitioner will receive competent and ethical service.

Licensing regimes also solve the consumer information problem and do so even more effectively than certification regimes because they eliminate the possibility that a consumer will select an unqualified practitioner to provide the service. In addition, unlike certification, licensing protects third parties from harm which may flow from the improper provision of a service. By preventing consumers from choosing a practitioner who has not met the regime's entry and practice standards, licensing reduces the risk that individuals will suffer harm as a result of incompetent or unethical service provided to someone else.

However, although well-crafted licensing and certification regimes can benefit the public by reducing the risk of harm, the Report argues that their costs must also be recognized. While the traditional approach to professional regulation appears to assume that the principal costs of regulation are administrative, the Report relies on economic studies to demonstrate that, by disrupting the market for the regulated service, professional legislation tends to

... 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.<sup>20</sup>

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sexual relations with a consumer of the service: *Regulating Professions*, *supra* note 3 at 11–12.

<sup>20</sup> United Kingdom, Monopolies Commission, Part I: The Report (1970) 69 as cited in Ostry, *supra* note 13 at 23.

Because it prohibits those practitioners who have failed to meet entry and practice standards from offering a regulated service to the public, licensing represents a much more substantial intrusion into the market for the regulated service than certification. To the extent that it restricts the supply of practitioners compared to that which would be available in an unregulated market, licensing reduces public access to the service. In addition, because it reduces the level of competition between practitioners, licensing tends to inflate the price of the service. Pressure to increase prices is also exerted by the investment of time, energy and money practitioners are forced to make in qualifying for a licence.

The Report notes that consumers who are denied access to a service (either because of a shortage of practitioners or because the service is unaffordable) are left with three choices: they can perform the service themselves, obtain it from a practitioner who is practising illegally or go without the service entirely. All of these options are likely to expose both the consumer and third parties to an unacceptably low level of service quality. In this case, even if the quality of service offered by licenced practitioners is high, the implementation of a licensing regime may have actually reduced the quality of service received by consumers as a whole.

Although the market disruption created by certification is much less severe than that of licencing, certified practitioners are granted a market advantage over their competitors. This may result in many of the same costs as licencing if consumers wrongly conclude that only certified practitioners are capable of providing a service adequately. If this belief is widespread, certification may become a *de facto* requirement for practitioners and the effect may be very similar to that of a licensing regime. On the other hand, certification may fail to provide any benefit if consumers are ignorant of its meaning. In order for the quality signal to be effective, consumers must be aware of the qualifications of certified practitioners and of the link between these qualifications and the services they perform.

The Report concludes its analysis of certification and licensing with several recommendations, a few of which are key:

- certification and licensing should only be implemented when harm from the incompetent or unethical performance of a service threatens the public;
- neither licencing nor certification should be implemented unless its benefits (protection of the public) exceeds its costs;
- no form of regulation should be implemented unless it is capable of reducing the threat of harm to acceptable levels; and
- the least costly form of regulation which can reduce the threat of harm to acceptable levels should be implemented.<sup>21</sup>

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<sup>21</sup> The Report notes that there may be other forms of regulation than certification or licensing which are capable of accomplishing this task: *Regulating Professions*, *supra* note 3 at 22–23. For example, health inspections have traditionally been used to ensure the quality of food offered at restaurants rather than a licencing regime for cooks and chefs.



Again, these recommendations may appear obvious and innocuous. However, one of their immediate implications is to alter one of the key aspects of the current approach to professional regulation. The focus of traditional decision-making in this area has been on the ability of an occupational group to wield self-governing powers in the public interest. Typically, only after this question has been answered affirmatively is a decision on the form of regulation made. This approach is rejected by the Commission. Because the costs of a regulatory regime are not limited to its administration, the Commission recommends that this pattern of decision-making should be reversed. In its view, the proper sequence is to consider first whether regulation is required and, if so, the appropriate sort of regulation. The question of self-government should arise only after these issues are determined.

A reversal of this sequence means that the scope of the Report must be expanded; discussion can no longer be restricted to professions (that is, self-governing occupational groups) but must necessarily include all occupations whose services are or could be governed by licensing or certification regimes. Rather than affecting only 36 existing professions, therefore, the Report has implications for at least 150 existing occupational regimes in addition to those being considered for future regulation.

Besides reversing the decision-making sequence, the recommendations made at this early stage also have significant implications for the extent and manner in which government should be involved in decisions about the specifics of the licensing or certification regime selected.

Two features characterize certification and licencing regimes: the regulated services which licenced or certified practitioners are deemed qualified to perform (its scope of practice); and the entry and practice standards which they are required to meet in order to receive and maintain this status. Since a regime's scope of practice and its entry and practice standards will determine its costs and benefits for the public, these features must be carefully calibrated to provide the greatest net benefit to the public. The Report argues that a decision concerning the implementation of the regime be made can only be made once its scope of practice and entry and practice standards have been set.

### III. SCOPES OF PRACTICE

TRADITIONALLY, PROFESSIONAL LEGISLATION HAS BEEN applied to all of the services which members of the group provide to the public. However, as the Report points out, such expansive scopes of practice are unlikely to meet the criteria it has just established. It will be rare that all of the services performed by a particular occupational group will pose the same level of harm to the public if performed improp-

erly.<sup>22</sup> Although a licensing scheme may be required to protect the public adequately from services which pose a serious risk of severe harm, certification or some other form of regulation may be sufficient for other services and still others may pose no danger to the public or, at least, none which can be remedied by regulation. By regulating all of the services provided by a group of practitioners identically, the traditional approach to occupational regulation risks over-regulating some (resulting in unnecessary costs to the public) while under-regulating others (thereby exposing the public to an unacceptable risk).

The Commission proposes to address this problem by regulating each service separately rather than applying the same regulatory regime to all of the services performed by an association of practitioners. It recommends that each profession or occupation be broken down into tasks or services which are capable of independent regulation. Each should then be assessed to determine whether regulation is warranted and, if so, which form of regulation will adequately protect the public at the least cost.

The Report is clear that it is not proposing that each individual action of a practitioner be separately regulated. It notes that practitioners may engage in hundreds or thousands of actions daily and to regulate each would be absurd. Instead, it recommends an approach which takes into account the services consumers actually receive from a practitioner and the ability to perform each service without also having to perform others. For example, the Report would not break down the occupation of an automobile mechanic into individual actions, like placing an automobile on a hoist, operating the hoist, selecting appropriate tools, and so on. Instead, this occupation might be separated into services, such as repairing brakes, fixing transmissions or tuning engines.<sup>23</sup>

The Commission recognizes that individuals may well wish to obtain training in only the specific services they plan to offer to the public and may avoid becoming versed in all of the other services which have traditionally made up a profession or occupation. However, it sees no particular disadvantage resulting from the "specialization" this recommendation is likely to engender. Indeed, it argues that this

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<sup>22</sup> The "Schwartz Report," an official examination of Ontario's health professions, stated: "The reality is that in no profession are all the activities engaged in by members potentially harmful. To prohibit ... [others] from providing harmless services solely because they are within the scope of practice of a licensed profession maintains a useless fiction": Ontario, Health Professions Legislation Review (A.M. Schwartz), *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions* (1989) 14.

<sup>23</sup> A variation of the "task-based" approach proposed by the Commission is currently in place in Ontario. There, all potentially dangerous medical services have been divided into 13 "controlled acts" which can be performed only by medical personnel authorized to so. Physicians and surgeons are permitted to perform 12 of these acts. See the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 27(2) and the *Medicine Act*, 1991, S.O. 1991, c. 30, s. 4.

behaviour may well reduce prices and increase access for consumers because of the lower investment costs required of practitioners in order to obtain a licence or certificate for a particular service. In addition, because of these lower investment costs, it will often be easier for a practitioner to qualify to perform a number of services which have traditionally been associated with different professions. This, the Report argues, will increase the flexibility of practitioners in offering services to the public.

The Commission anticipates criticism of the “task-based” approach on the grounds that it would result in an administrative nightmare. It responds by arguing that its recommendations need not result in significant administrative changes to professions’ governing bodies. The Report suggests that a flexible approach should be taken, allowing several related tasks to be administered by the same body, even if they are governed by different sorts of regimes. This means that, after the implementation of the Commission’s model, an existing self-governing body might continue to have jurisdiction over many of the same services as before, even if some services are now licenced, others certified and still others governed by another regime altogether. On the other hand, the Report also suggests that differing philosophies or different delivery settings may dictate that a single service must be administered by two or more bodies, as is currently the case with many medical services.<sup>24</sup>

While flexible in matters of administration, the Report responds negatively to the practice of delegating licensed services to unlicensed individuals as is common in some professions.<sup>25</sup> The Report rejects this practice, arguing that it is illogical. If an unlicensed individual is in fact capable of performing a licensed service without endangering the public, then either the service should not be subject to a licensing regime (because it poses no risk of harm to the public if performed improperly) or the individual should be given a licence to perform the service (because he or she is capable of performing it properly).

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<sup>24</sup> For example, both chiropractors and physiotherapists currently enjoy a licence to manipulate bones but are nevertheless governed by separate administrative structures.

<sup>25</sup> The delegation referred to by the Report should not be confused with circumstances where an unlicensed individual assists a licensed practitioner, where practitioners of different regimes who are both licensed to perform the same service cooperate with one another or where one practitioner is licensed to prescribe a service and another is licensed to carry it out. It refers instead to a situation where the responsibility to perform a licenced service is given to an unlicensed person with little or no subsequent involvement by the licenced practitioner: *Regulating Professions*, *supra* note 3 at 30.

#### IV. ENTRY AND PRACTICE STANDARDS

BESIDES ITS SCOPE OF PRACTICE, a licensing or certification regime is defined by its entry and practice standards. The Report argues that, in order to produce a benefit to the public (the reduction of harm flowing from incompetent or unethical behaviour), these standards must reflect the qualities a practitioner requires in order to perform the service properly. Therefore, it recommends that the causes of the improper performance of a service should first be identified. Entry and practice standards should then be designed to address all these sources of harm as completely as possible. A failure to deal fully with the causes of improper performance will place the public at risk of harm.

Although this advice may appear self-evident, the Commission notes that many current professional regimes have failed to follow it by declining to require that practitioners demonstrate continuing competence after entering the regime. The Report contends that an individual's level of competence at the time of his or her entry is an unreliable guide to his or her competence ten or twenty years later. It therefore recommends that some form of regular post-entry competence evaluation should be made mandatory for all practitioners and dismisses arguments that such assessments are unnecessary, unfair to practitioners or too expensive. However, it makes clear that an assessment need not require a formal, written examination; indeed, it suggests that a variety of alternative assessment mechanisms may be suitable as a means of ensuring the continued competence of members.<sup>26</sup>

At the same time as it recommends that all potential sources of harm should be addressed by entry and practice standards, the Report also notes the danger of imposing requirements which are superfluous or excessive. Two possible examples of unnecessary requirements are provided: English language proficiency as part of an entry standard, and practice standards which result in discipline for criminal and other offensive conduct. It accepts that either or both will be appropriate in some circumstances but suggests that in many cases they will be irrelevant to the ability of the practitioner to provide an adequate level of service to the public. If imposed in such a situation, they will have the effect of excluding from practice some practitioners who do not pose a risk of harm, thereby needlessly increasing costs and reducing public access to the service.

The Report discusses at some length various methods of assessment which can be appropriately used at entry and post-entry stages. It expresses a concern that greater emphasis is often placed on written examinations than on practical tests and warns that, although the former will often reveal an individual's knowledge,

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<sup>26</sup> One of the options available is a "practice audit," in which the practitioner's practice is reviewed to assess his or her level of competence: *Regulating Professions*, *supra* note 3 at 42.

they usually disclose little about the individual's ability to put that knowledge into practice. The Report also cautions against the use of graduation from an approved educational institution as a requirement for entry; it suggests that this amounts to a delegation of the regulatory function to an educational institution which may have a different agenda than that of the regulatory body. If a reliance on degrees and other credentials is necessary for reasons of efficiency, the Report recommends that alternative paths to entry should always be made available so that an applicant who has the ability to practice properly will not be excluded simply because he or she has not attended an approved institution.

Finally, the Report criticizes as harmful any practice standards which unnecessarily restrict competition among practitioners. It cites studies which demonstrate that restrictions on advertising, offering second opinions and fee-setting have made professional services more expensive without improving the quality of service received by the public.

The Commission recognizes that even standards designed to address the causes of improper practice without imposing gratuitous requirements will be ineffective in achieving this balance without the proper administration of those standards. A particular skill may have been determined to be necessary for the proper provision of a service, for example, but it is the administrators of the entry or practice standard who must determine the level of that skill applicants or practitioners must demonstrate in order to obtain or maintain a licence or certificate. Again, the Report calls for balance in establishing an appropriate level; both the need to protect the public and the need for access to the service must be weighed. The level of skill or knowledge demanded of applicants or practitioners should be sufficient to protect the public adequately but not so high as to make the service unaffordable or otherwise inaccessible.

Although it recognizes the benefits of using national standards,<sup>27</sup> the Report recommends that they should not be adopted uncritically. The responsibility for occupational regulation has been placed in the hands of the province and must be used to benefit Manitobans, it argues. Again, it contends that standards should be set to provide adequate levels of service to Manitobans without rendering the service inaccessible.

In a marked departure from current practice, the Report rejects as illogical the tradition of exempting existing practitioners from newly-introduced entry standards.<sup>28</sup> It argues that, if a new standard is in fact necessary to protect the public adequately, those who are unable to meet it must necessarily pose a threat

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<sup>27</sup> The benefits of national standards for the public include inter-jurisdictional mobility for practitioners (allowing for greater competition) and the ability of consumers to anticipate similar levels of service throughout the country.

<sup>28</sup> This practice is commonly known as "grandfathering"; the Report refers to it as "grandparenting."

of harm to the public. It declines to accept on faith the assumption that practitioners will already have acquired the skills and knowledge demanded by the new standard and need not therefore be assessed. Instead, in keeping with its recommendation that practitioners should be regularly assessed for competence, it argues that, if practitioners are in fact competent, meeting the new standard will not pose a difficulty for them; if, on the other hand, they are not able to meet the new standard, they should not be allowed to endanger the public by continuing to practise.<sup>29</sup> The Report also expresses concern over the extent to which grandparent clauses encourage practitioners to set (or lobby government to set) increasingly higher entry standards. Rising entry standards benefit those who are not required to meet them because they gain from the increased price for the service engendered by the higher standard without having to make an additional investment of time or money. Again, the Commission reiterates that occupational regulation is to be exclusively concerned with the welfare of the public and not that of practitioners.

In another notable change from past practice, the Report recommends that entry and practice standards as well as the scopes of practice of regulatory regimes should be set by government rather than by the administrators of the regime.<sup>30</sup> Again, this proposal is based on logic. The Report concludes that it would be impossible to assess the benefits and costs of a particular regime without being aware of the service to which the regime will apply and the entry and practice standards which practitioners will have to meet in order to practice. Allowing government to establish these key boundaries for a regime will also help to ensure that its benefits for the public are maximized and its costs minimized.

In taking this position, the Report expressly rejects the traditional view that only trained practitioners are capable of setting appropriate standards. Instead, it argues that untrained individuals who are provided information by practitioners, educational institutions, consumer groups, practitioners of related services and ordinary citizens are fully capable of making wise decisions in the public interest.

## V. SELF-GOVERNMENT

THE COMMISSION BEGINS ITS DISCUSSION of self-government by reiterating that this issue must follow, not precede, a positive decision concerning the need for licensing or certification. It would be illogical to implement an unnecessary regulatory regime simply because an occupation is in a position to administer it.

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<sup>29</sup> Again, the Report would permit a variety of assessment systems to be used in ensuring that practitioners can in fact meet the new standard: *Regulating Professions*, *supra* note 3 at 42.

<sup>30</sup> In self-governing regimes, the administrators of the regime would be the occupation's ruling body, dominated by practitioners.

However, even if licensing or certification is necessary for the public's protection, self-government may not be the most appropriate method of its administration. Self-government suffers from a serious disadvantage: an inherent conflict of interest arising from the fact that the members of the governing body are elected by practitioners but are supposed to act in the interests of consumers and other members of the public. Although it is sometimes denied by professional bodies, the existence of this conflict of interest is expressly acknowledged in the Report.

The Commission notes that this conflict of interest can have negative consequences for the public even when self-governing bodies see themselves as acting in the public interest. As the New South Wales Law Reform Commission has noted: "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 to the interests of others, particularly if one has never been in their position."<sup>31</sup> For example, a self-governing body might impose (or lobby government to impose) unnecessarily high standards on applicants for practice in the sincere belief that this will result in a higher level of service for the public. However well-intentioned, this action will nevertheless cause harm (and may result in more harm than benefit) if it restricts consumers' access to the service by raising prices and restricting the number of practitioners available who can provide it.

At the same time, the Report acknowledges the benefits of self-government, including a reduced cost to government (and taxpayers), the possibility of a more efficient administration and a greater likelihood of compliance when standards are administered by colleagues. It concludes that, in some circumstances and with appropriate safeguards in place, the benefits of self-government can exceed its costs.

According to the Report, self-government will be suitable for groups which demonstrate three qualities. Adequate human and financial resources are necessary on a practical level; the Report suggest that a critical mass of practitioners may be created if small occupational groups band together with others offering related services in order to administer several regimes jointly. A self-governing body must also possess a democratic structure which permits adequate representation of practitioner minorities and an ability to apply the principles of natural justice. Finally, the body must demonstrate a commitment to the public interest; practitioners must recognize that self-governing powers are delegated by government and are to be used for the benefit of the public. Here, the Report takes particular aim at organizations which are designed to act as both a self-governing body and an association promoting the interests of its members. It expresses doubt that the latter goal can be achieved without coming into conflict with the former, at least on some occasions.

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<sup>31</sup> New South Wales Law Reform Commission, *The Legal Profession: General Regulation* (Discussion Paper #1, 1979) at 137.

The Report notes that the qualities it sees as necessary for self-government do not include factors which have traditionally been taken into account when professional legislation is created. Traditional criteria which stress the existence of a standardized body of knowledge, affiliations with national or international bodies and the existence of codes of ethics are dismissed as largely irrelevant to a decision to implement self-government.

In addition to proposing that self-governing powers be extended only to qualified groups, the Report recommends numerous safeguards to help ensure that they are used in the public interest. Accessibility by the public is emphasized in several recommendations. For example, the Commission suggests that the public should have access to a self-governing body's annual report, to its rules, regulations and by-laws, to the register of its members, to its disciplinary proceedings,<sup>32</sup> to the disciplinary records of its practitioners for the preceding three years and to all meetings of the self-governing body. It favours wide dissemination of information concerning convictions and sanctions imposed on practitioners and proposes that all self-governing bodies be required to hold periodic public meetings to respond to the public's concerns and questions. In addition, the Commission recommends that at least one third of every self-governing body and its committees should be composed of public representatives appointed by government.

The Report also recommends that government take seriously its responsibility to supervise the use of the powers it has delegated. In particular, it proposes that annual reports containing detailed information about the self-governing body's activities should be mandatory, that government should be required to approve prosecutions for unauthorized practice<sup>33</sup> and that government should monitor the efforts made by self-governing bodies to enforce entry and practice standards.

## VI. ENFORCING PRACTICE STANDARDS

AS NOTED, although the Commission recommends that practice standards should be set by government, it recognizes that the important task of enforcing these standards must fall to the administrators of the regime. However, rather than relying primarily on consumer complaints to trigger an investigation, the Report suggests specific proactive measures administrators should consider in order to

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<sup>32</sup> The Report would permit closed hearings but only on extremely rare occasions: *Regulating Professions*, *supra* note 3 at 58–59.

<sup>33</sup> This should prevent the use of this power in “turf wars” between two occupational groups who are competing to provide the same or a similar service to the public.



prevent unethical or incompetent practices and to detect inappropriate behaviour.<sup>34</sup> It recommends that all self-governing bodies should be required to develop a program of prevention and detection which is acceptable to government.

While beneficial, adequate public protection from improper conduct cannot be achieved by preventative measures alone; self-governing bodies must also be in a position to react to breaches of practice standards. Whether violations of practice standards are alleged by consumers or detected by the administrators of the regime, the Commission believes that they should be dealt with by means of a uniform disciplinary model applied by every self-governing body. Key features of the standard process proposed by the Commission include a ninety day time limit for investigations of improper conduct,<sup>35</sup> mediation only when the alleged misconduct has no implications for the public<sup>36</sup> and a complainant's right to appeal a decision not to proceed to a disciplinary hearing.<sup>37</sup> The Report recommends that disciplinary hearings should be open to the public and at least one-third of every panel should consist of public representatives. Complainants would be given notice of the hearing of their complaint and would be informed of the decision reached. Both prosecutors and accused practitioners would be allowed to appeal a decision of a disciplinary panel to the Court of Queen's Bench.

## VII. REGULATORY BODY

THE COMMISSION ACKNOWLEDGES THAT its recommendations will result in an increased governmental role in the regulation of occupational services, especially those which are administered by self-governing bodies. Its recommendations mean that, rather than being dealt with on an ad hoc basis as part of the political process, the introduction of new forms of regulation and changes to existing regimes would be accomplished by applying a uniform set of criteria. Instead of asking only

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<sup>34</sup> Among the measures which the Report suggests should be considered are mandatory or optional education programs, confidential assistance programs, professional consultation programs and the use of professional activity studies: *Regulating Professions*, *supra* note 4 at 68.

<sup>35</sup> If more than ninety days is required to complete an investigation, the Report recommends that both the complainant and a governmental supervisory body should be informed of the reasons for the delay. If either objects to the delay, the governmental body should be obliged to inquire further and would have the power to force an immediate decision as to whether a disciplinary hearing should be called: *Regulating Professions*, *supra* note 3 at 71.

<sup>36</sup> The Report proposes that the terms of all mediated settlements should be reported to a governmental supervisory body to ensure that no public interest is involved: *Regulating Professions*, *supra* note 3 at 71-72.

<sup>37</sup> The Report recommends that the complainant should have the right to appeal such a decision to a governmental supervisory body: *Regulating Professions*, *supra* note 3 at 70-71.

whether a group of practitioners had acquired sufficient "professional" attributes to justify self-government and then relying on them to set appropriate entry and practice standards, government would be required to set these standards itself by applying the principles set out in the Report. Rather than trusting professions to act in the public interest, government would be responsible for active supervision of self-governing bodies.

Although these functions could be assigned to a particular Minister or government department, the Commission expresses fears that this would subject the process to continued lobbying and political pressure. In the hopes of a more objective and consistent application of the principles it recommends, the Report suggests, as an alternative, the creation of a regulatory body which would function at arm's length from Cabinet. Although a Minister responsible for occupational regulation<sup>38</sup> would have the right to veto the entire regulatory structure proposed by this independent body for a particular occupational service, he or she would not be able to modify it in response to political imperatives except by introducing specific legislation to this effect. In addition, the Report suggests that government's supervisory function should be entirely within the jurisdiction of the independent body.

The Commission envisions a regulatory body of ten or twelve members, appointed by the government and representing "the diverse elements of Manitoba's population."<sup>39</sup> It suggests that representation of consumers and the general public is particularly important. According to the Report, the members of this body need not serve on a full-time basis but should be led by a full-time chair and should enjoy adequate staff support.

Recognizing that the cost of a regulatory body is likely to be of concern to government, the Commission notes that some of the activities proposed for this body are already being performed by government departments; consolidating these functions might therefore save money elsewhere. However, to the extent that new costs will be incurred, the Commission raises the possibility of requiring practitioners of regulated occupations to provide payment, either by imposing a fee on occupational groups seeking new or revised forms of regulation or by imposing a levy on all members of regulated occupations.

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<sup>38</sup> The Report suggests that the Minister of Consumer Affairs should be given this responsibility: *Regulating Professions*, *supra* note 3 at 95.

<sup>39</sup> The Report proposes that "... women and men from a variety of cultural, educational and occupational backgrounds should be chosen ...": *Regulating Professions*, *supra* note 3 at 95.

## VIII. REACTION

AS NOTED, REACTION TO *Regulating Professions and Occupations* has been muted. Only one of Winnipeg's two daily newspapers covered its release and interest on the part of radio and television has been minimal. This may reflect the complexity of the issues addressed or skepticism as to the likelihood of positive government action. It may also be a consequence of the lack of public response on the part of existing professions. Two potential reasons for the silence of professional groups present themselves. The first is that time is needed for professional bodies to determine the potential impact of the Report on the forms of regulation they currently administer.<sup>40</sup> The second is that their reaction is hostile but that they have concluded that the best strategy is to ignore the Report publicly in the hopes that inertia will render it impotent.<sup>41</sup>

The initial reaction on the part of government was, quite understandably, cautious. The Attorney General and Minister of Justice, Rosemary Vodrey, whose office initiated the study by the Commission, was reported to have said: "Government will take a careful look at it now. It does affect professions which span all of government so not just a single department will be looking at it."<sup>42</sup> The government has followed up on this statement by creating an *ad hoc* interdepartmental committee which is actively analyzing the Report with a view to providing government with advice.<sup>43</sup> In light of the complex issues and interests involved, it is too early to speculate as to the eventual action government will take in responding to the Report.

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<sup>40</sup> The writer has been advised that numerous existing professional bodies are in fact studying the Report and have even met together to exchange ideas.

<sup>41</sup> As reported in the *Winnipeg Free Press*, initial reaction to the recommendations concerning safeguards on self-government by representatives of some professions was negative. For example, Len Hampton, executive director of the Certified General Accountants Association of Manitoba was quoted as rejecting the proposal that one-third of a self-governing body be made up of public representatives. "We find 20 per cent is a good number to have on the board because more than that and you'll have trouble getting enough committee members," he is reported to have said. "More rules rejected" *Winnipeg Free Press* (8 December 1994) B3.

<sup>42</sup> "Plan to Steer Professions Wins Praise" *Winnipeg Free Press* (9 December 1994) B7.

<sup>43</sup> Among others, the committee includes representatives of the Departments of Justice, Health, Education and Training, Consumer and Corporate Affairs and Agriculture.

