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Complementary and Alternative Medicine – Legal Issues

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Introduction

Have you ever been to a massage therapist for an ache or a pain; a chiropractor or an osteopath for a sore back or been to a naturopath because you haven't been feeling too good. You are not alone. In Australia and all round the world millions of people use complementary medicine and alternative medicine (CAM) to deal with health issues. In some countries that may be the only form of healing available but in the West many people choose CAM to supplement the services provided by orthodox medicine or rely primarily on CAM for many maladies. But are these practitioners licensed or regulated in what they do? Where do they fit into the legal regulatory structure? This article deals with the legal issues that may arise in relation to the application of healing regimes outside of orthodox medicine. These healing regimes will be globally referred to as complementary medicine and alternative medicine (CAM). The importance of CAM is reflected in the increasing use of complementary medicine by medical doctors¹ and the substantial level of demand for these therapies. A recent survey in the USA suggested that in 1997 forty-two percent of U.S.A adult population used at least 1 of a list of sixteen CAM therapies in a year².

What is complementary and alternative medicine?

It is important to discuss a general definition of CAM. CAM can be defined as that part of the health sector that relies primarily on holistic, homoeopathic, traditional or natural therapies rather than an allopathic approach to medicine that characterises western or orthodox medicine.³ Allopathy is the method of healing that relies upon counteracting the effects of disease or sickness with drugs or surgical intervention. The distinction between complementary and orthodox medicine is becoming somewhat blurred as complementary medicine is increasingly recommended or practiced by medical practitioners and is incorporated into medical school curricula.

CAM can encompass a huge variety of modalities and techniques but the modalities that most people would immediately recognize as CAM are acupuncture; chiropractic; osteopathy; naturopathy; herbal medicine; homoeopathy; therapeutic massage and traditional Chinese medicine.

Organization of the Health Care Sector

Medical and Allied professions. The orthodox medicine health care sector is divided into general practitioners, specialists and allied professions. Most of these practitioners have their own statute that sets up a Board that reviews the educational standards of applicants for registration and then discipline registrants if they act negligently or unethically. For example in Queensland the *Medical Practitioners Registration Act 2001* is the statute that regulates medical doctors in that state.

Working within the health sector are a number of allied professions who are entitled to practice either subject to the supervision of the medical profession or within a narrowly defined scope of practice. Professional registration statutes in all jurisdictions provide registered status for medical practitioners; dentists; physiotherapists; podiatrists; optometrists and nurses under separate registration statutes. In NSW the *Physiotherapists Registration Act 2001* regulates physiotherapists in that state.

The medical acts in some jurisdictions (not Qld or Vic) specify that only medical doctors can practice medicine. The term 'practice medicine' is not defined in any detail in any statute except to include surgery. All jurisdictions make it an offence to hold out as a medical practitioner. Similar provisions apply in regard to the allied professions following the medical model eg Physiotherapists. This means that unless you are registered as a medical doctor; physiotherapist or a podiatrist you would not be able to use those titles in advertising. If you did you would be liable to prosecution by the relevant board.

Registered CAM practitioners. Outside orthodox medicine only chiropractors and osteopaths have registered status in all jurisdictions. Chiropractors and osteopaths may argue that their registered status entitles them to be considered part of orthodox medicine. Their registered status, obtained against a background of vehement medical opposition, is secured by registration statutes that follow the medical act model. Each involves broadly the establishment of a professional board and provisions against unregistered persons holding out as a chiropractor or osteopath.

Until the passing of the *Victorian Chinese Medicine Registration Act 2000* (CMRA) no other CAM practitioners had registered status. The CMRA regulates the practice of acupuncture; Chinese herbal medicine and Chinese herbal medicine dispensing in that state. The legislation limits the use of titles such as acupuncturist; Chinese herbal medicine practitioner and Chinese herbal dispenser to persons registered under this act.⁴ Registered status is only available to practitioners who are able to satisfy required educational standards.

Unregistered CAM Practitioners. No other complementary medicine practitioners currently enjoy registered status in Australia. These professions are self regulated. This means they are not regulated under a piece of legislation but rely on professional associations that a practitioner may choose to join enforcing ethical standards. A practitioner need not join any professional association and can practice without such membership. However some statutes do impact on these practitioners.

Therapeutic Goods Act 1989 (Cmwth) – This federal legislation mirrored in New South Wales and Victorian legisla-

tion attempts to regulate the supply; marketing; export, import and manufacturing of therapeutic goods including pharmaceuticals and complementary medicines such as herbal substances; vitamins and minerals and homoeopathic remedies. Many CAM practitioners have exemptions from the registration, listing and manufacturing provisions for certain homoeopathic and herbal substances.

Health Rights Complaints Legislation – All orthodox medicine practitioners; chiropractors, osteopaths, massage therapists or masseurs, naturopaths, acupuncturists and others in the alternative health care or diagnostic fields in all states and territories are within the umbrella of this legislation. This legislation allows formal complaints to be made and dealt with respect to the quality of the health service provided.⁵

Under the GST legislation services and goods for chiropractic; osteopathy, acupuncture; naturopathy, herbal medicine including traditional Chinese herbal medicine is GST free subject to specific conditions.⁶

Acupuncturists are subject to Skin Penetration Regulations in all jurisdictions. These regulations attempt to protect against the spread of disease by these procedures. These regulations prescribe certain hygiene requirements.

Many health funds provide refunds for fees associated with complementary medicine. Almost without exception health funds provide coverage for chiropractic and osteopathy to a defined limit. Many funds provide coverage for naturopathy; acupuncture; herbal medicine; homoeopathy and remedial massage. Some smaller funds cover a very wide variety of modalities including the Alexander technique; kinesiology and rolfing.⁷

Ethical Standards

A statutory board of practitioners and other non-professional representatives administer the chiropractic and osteopathy professions in each state under the various state registration statutes. These boards administer a register of practitioners; hear complaints, deal with professional misconduct and when appropriate impose penalties such as warnings, fines and deregistration. Chiropractors and osteopaths also have separate national professional associations that police their respective codes of ethics.

Professional bodies through codes of ethics provide ethical discipline for unregistered practitioners. There are numerous professional associations and bodies that represent practitioners. The largest professional association is the Australian Traditional Medicine Society that has in excess of 8,000 members; Australian Chiropractors Association 2,000 members; National Herbalists Association 2000 members; Australian Natural Therapists Association 1,800 members and Australian Acupuncture and Chinese Medicine Association 800 members.

Most codes of ethics include reference to:

- the importance of the duty of confidence;
- the need to avoid conflict of interest;
- the importance of continuing professional development;
- avoiding of criticism of colleagues;
- non discrimination in their practice;
- the necessity for safe and hygienic premises;
- the requirement to hold professional indemnity insurance;
- practicing within their scope of practice and their level of training;

- avoiding sexual relationships with clients;
- the importance of personal honesty;
- the need for honest advertising;
- the need for complete thorough client records.

Most codes of ethics provide for disciplinary proceedings on receipt of complaints to the professional body. The codes of ethics vary in complexity, sophistication and thoroughness. The concern for the various unregistered professions and the general public is that the most severe penalty that could be applied by a professional organization, being the removal from membership, will still permit the former member to continue practicing though without the advantages of membership.

Most associations have minimum education qualifications for membership but the extent of these requirements varies greatly. Most associations encourage members to take out professional indemnity insurance as part of a group policy. As these associations are voluntary associations and the

professions are substantially unregulated a person can practice without professional indemnity insurance; with little or no training and with no pretence at ethical practice. This is of course a matter of great concern for these professions and provides some impetus to the move towards national standards and/or registration status.

Specific Legal Issues for Practitioners

Other than the legislative provisions discussed above the unregistered CAM practitioner is unregulated by specific legislation. These practitioners inhabit a potentially uncomfortable place between the scope of practice provisions of the registered professions. There are many concerns for unregistered and even registered complementary medicine practitioners in the current legal framework. The major concerns can be summarised as follows:

The practice of medicine. In some jurisdictions (not Qld or Victoria) the relevant medical act states that only medical



Complimentary medicine

doctors can practice medicine. The term 'practice medicine' is not helpfully defined and based upon admittedly old authority could cover virtually any treatment of people for any ailment. In the USA a very broad interpretation of this term contained in the medical legislation of many states has permitted in the last century and in more recent times the criminal prosecution of complementary medicine practitioners for practicing medicine. In Australia there appears to be a reluctance to bring action under these provisions unless the practitioner has stepped outside the normal practice of CAM such as by purporting to treat cancer or other serious illnesses. This needs to be considered carefully by these practitioners when pondering their scope of practice. In South Australia specific legislation states the medical doctors only can treat certain diseases and conditions.⁸

Holding out as a registered practitioner. All jurisdictions have medical acts that provide it is an offence to 'hold-out' as a medical practitioner. This may occur when the practitioner uses the term 'doctor' or 'physician' or other term in a context where a person may be led to believe they are dealing with a medical doctor.

Many successful prosecutions of CAM practitioners for 'holding out' as a medical practitioner occurred early last century even when the term 'doctor' or 'physician' was not used. As the test for the breach of these provisions is the impact the holding out has on an ordinary intelligent person a better educated general public today may suggest practitioners would today be less at risk of prosecution given similar fact scenarios.⁹

The Role of CAM in Litigation

Owing to the influence of orthodox medicine in the health sector to date there has been limited involvement by complementary medicine in personal injuries and worker compensation litigation. Owing to the registered status of chiropractors and osteopaths their role is more pronounced.

Chiropractors have been accepted as an expert in regard to musculoskeletal injuries in personal injuries and negligence actions. In one of the few Supreme Court cases on the negligence of a chiropractor in *Bawden v Marin*¹⁰ the Full Court of South Australia preferred the evidence of the defendant's chiropractor expert witness over the orthopaedic surgeon called by the plaintiff. The primary issue there was what was the most appropriate procedure in that case involving a patient who sustained broken ribs as a result of a spinal manipulation. The court concluded that as the chiropractor had provided reasonably competent treatment there was no liability for the injury which was deemed a misadventure.

In Commonwealth legislation and all states there is provision for workers compensation payments to be paid in relation to chiropractic care.¹¹

In relation to transport accident legislation there is partial or full provision for coverage for chiropractic care in New South Wales, Victoria, South Australia, Western Australia, Tasmania and ACT.¹²

Increasingly CAM practitioners are becoming more integrated and accepted in the medical rehabilitation and compensation schemes.

The use of expert reports as to the medical condition of a plaintiff seeking recovery of personal injuries for an accident will likely be confined to medical doctors and on occasion chiropractors.

Conclusion

In the next few years the appropriate role for CAM will be debated. One question for policymakers will be whether, based upon the public interest, some modalities require registration or licensing and whether others are sufficiently regulated by the current legal framework.

Many CAM practitioners see registration as recognition of their status as health practitioners.

Certainly registration would:

- provide statutory acknowledgment
- assist in setting and maintaining standards of education and training
- achieve the policy objective of providing information to health consumers allowing them to choose an appropriate practitioner with a minimum level of education and adherence to ethical standards.

Debate:

Should complementary and alternative medicine practitioners be required to register and regulated by statute? If so what protections might that provide for client?

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- 3 2 Weir Complementary Medicine: Ethics and Law Promethens Publications 2000
- 4 section 61
- 5 Refer to section 3 Schedule 1 Part 1 (10) Health Rights Commission Act (Qld).
- 6 s38-10 A New Tax System (Goods and Services) Tax Act 1999; s21 A New Tax System (Goods and Services Tax Administration) Act 1999.
- 7 Journal of the Australian Traditional-Medicine Society September 2000 Volume 6 Issue 3 P123.
- 8 South Australia. Refer to Medical Practitioners Act 1983 SA s31 (1)(a); s31 (3).
- 9 *Allchurch v Harden* (1927) SASR 26
- 10 Unreported 1447 of 1989 Full Court of South Australia
- 11 eg NSW Workers Compensation Act 1987 s59 Chiropractor, Osteopath, Masseur; Cwth Safety Rehabilitation and Compensation Act 1988 s4 (1) Osteopath, Chiropractor and Masseur; Vic Accident Compensation Act 1985 Chiropractor and Osteopaths s5(1);
- 12 Freckelton and Selby *Expert Evidence* 42.400