

SUNRISE ANALYSIS OF PROPOSALS TO  
REGULATE THE PRACTICE OF ACUPUNCTURE

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In 1984, the Legislature amended the Hawaii Regulatory Licensing Reform Act, or the "Sunset" law, to incorporate a "Sunrise" provision calling on the Legislative Auditor to evaluate proposed regulation of unregulated occupations.

Chapter 436D, Hawaii Revised Statutes, the law regulating acupuncture practitioners, expired on December 31, 1984, as scheduled by the Sunset law. In the 1984 legislative session, the Legislature did pass a bill which would have continued the regulation of acupuncture but in an amended form under the Board of Medical Examiners. However, the bill was vetoed by the Governor. Consequently, there is currently no regulation of acupuncture practitioners.

Several regulatory measures (two in each house of the Legislature) are now being proposed for enactment. These measures have been referred to the Legislative Auditor pursuant to Section 26H-6, HRS, for analysis of whether their enactment would be consistent with the State's regulatory policies under the Sunset law and to assess alternative forms of regulation. The following is our analysis of the proposals for regulating acupuncture practitioners.

## The Need for Regulation

According to the Sunset law, regulation is justified only where there is sufficient evidence of physical, mental, social, or financial harm resulting from the actions of the occupational group seeking regulation.

We evaluated the need to regulate acupuncture practitioners in our Sunset Evaluation Report, Acupuncture, Chapter 436D, Hawaii Revised Statutes, in January 1984. Our findings on the need for regulation remain pertinent.

As we stated in our previous report:

"There is general agreement in the scientific literature that acupuncture is a safe mode of treatment when practiced by competent practitioners. However, there is considerable risk if it is performed by untrained or unqualified acupuncturists.

"Improper insertion of acupuncture needles can cause injury or even death. There are points in the body where insertion of needles into these points can cause death. There are also points that are known to cause loss of consciousness or collapse. Improper use of needles may also result in broken needles or the penetration or the perforation of nerves, organs, and blood vessels. These could cause hematomas (bleeding from a blood vessel into the surrounding tissues), hemorrhages, possible neurological complications, and aggravation of existing symptoms."

In addition to the potential for physical damage due to the improper use of acupuncture, there is also the danger that the use of acupuncture could delay more appropriate treatment for illnesses, such as infectious diseases, which are not responsive to this form of treatment. An incompetent acupuncturist may not have the diagnostic skill to be able to distinguish between those diseases that respond to acupuncture treatment and those that do not.

For these reasons, we concluded in our 1984 evaluation that there is a potential danger to public health and safety in the practice of acupuncture.

For very much the same reasons, we draw the same conclusion in this analysis and continue to find that there is a need to regulate the practice of acupuncture.

### Provisions of the Bills

Currently, there are two approaches to the regulation of the acupuncture profession: the companion bills Senate Bill No. 172/House Bill No. 226, and the companion bills Senate Bill No. 665/House Bill No. 487. The table on the next page compares the two sets of bills with each other and with the expired Chapter 436D.

Senate Bill No. 172/House Bill No. 226 are patterned after the recently sunsetted Chapter 436D. They differ from Chapter 436D in one major respect by placing responsibility for regulation with the Director of the Department of Commerce and Consumer Affairs instead of a Board of Acupuncture. Under the bills, the director may delegate the duties of regulating the profession to a committee composed of acupuncturists and lay persons. The director is empowered to ratify the actions of the committee. Another significant change to the previous acupuncture law is a restriction on the use of professional titles.

Senate Bill No. 665/House Bill No. 487 provide for the reestablishment of a Board of Acupuncture with several significant additions to the previous law, including the following:

- . Broadening the scope of practice from the insertion of needles to "stimulation by the use of acupressure, electrical, mechanical, thermal or traditional therapeutic means."

COMPARISON OF CHAPTER 436D AND PROPOSED REGULATORY MEASURES

	<i>Chapter 436D</i>	<i>SB 172/HB 226</i>	<i>SB 665/HB 487</i>
Scope of Practice	Insertion of needles into the human body by piercing the skin of the body for the purpose of controlling and regulating the flow and balance of energy in the body.	Same.	Stimulation of a certain acupuncture point or points on the human body for the purpose of controlling and regulating the flow and balance of energy in the body; includes the techniques of piercing the skin by inserting needles and point stimulation by the use of acupressure, electrical, mechanical, thermal, or traditional therapeutic means.
Licensing Body	Seven member board consisting of five acupuncturists and two lay persons.	Director, who may delegate duties to a committee of not less than three acupuncturists and as many lay persons as the director deems appropriate.	Five member board consisting of three acupuncturists; chairperson must be licensed acupuncturist.
Qualifications for Licensure	Resident of State; good moral character; completed course in acupuncture and received a certificate or diploma from a private institute or private tutorship approved by board; training shall be for not less than two years; pass an examination.	Resident of State; has reputation for competence, trustworthiness, and fairness; has completed formal course of study in acupuncture and has received a certificate or diploma from an approved school or qualified tutor approved by the director; training shall be for not less than two years; pass an examination.	Completed a course of acupuncture or traditional oriental medicine and received a diploma from an institute or private tutorship approved by the board (tutorships begun after December 1984 no longer acceptable); training shall be for not less than three years and 1500 hours with 600 hours in academic study and 900 hours in clinical training internships;* clinical training shall be for not less than one year; pass an examination.
Exemptions	Licensed dentists, physicians, osteopaths.	Same.	Dentists, physicians, osteopaths if certified by their boards as being qualified to practice acupuncture;** students who are under the direction of a school and under the supervision of a licensed acupuncturist; visiting acupuncturists for lectures and demonstrations; students in tutorships prior to December 31, 1984.
Use of Titles	Not mentioned.	Prohibitions on use of titles "Acupuncture Physician", "Doctor", "Dr.", "CA", "D.O.M."	Prohibits anyone other than licensed acupuncturist from using titles "Acupuncturist", "D.Ac.", "D.O.M."
Penalties for Violations	Petty misdemeanor.	Misdemeanor.	Misdemeanor and fine of not less than \$50 nor more than \$1000 for each violation.

\* HB 487 differs by requiring not less than two years and not more than 1500 hours.

\*\*We assume that licensed dentists, physicians and osteopaths are the health professionals intended to be exempted even though SB 665 in its present form exempts chiropractors instead of dentists and HB 487 exempts collection agencies.

- . Exempting doctors, dentists, and osteopaths, but only if they have been certified by their respective licensing boards as being qualified to practice acupuncture. (We assume that the intent is to exempt dentists although Senate Bill No. 665 exempts chiropractors instead of dentists and House Bill No. 487 exempts collection agencies.)
- . Extending exemptions to students during their clinical training and visiting acupuncturists for demonstrations and lectures and "grandfathering" students who started in a program approved by the board prior to December 1984.
- . Establishing requirements for training beyond those provided for in the expired statute. Senate Bill No. 665 specifies a training period of not less than three years and 1500 hours, including 600 hours in academic study and 900 hours in clinical training internship, with the latter being for not less than one academic year; House Bill No. 487 specifies training of not less than two years and a total of not more than 1500 hours with 600 hours in academic study and 900 hours of clinical internship.
- . Eliminating provisions for acupuncture training through tutorships.
- . Restricting the chairmanship of the Board of Acupuncture to only acupuncturists.
- . Increasing penalties for the unlicensed practice of acupuncture. (In combination with the increased scope of practice in this bill, this provision would broaden the number of activities that would be illegal without a license from the Board of Acupuncture. This

provision also gives acupuncturists exclusive rights to any titles, or connotations that an individual might use to indicate practice in acupuncture.)

### Analysis of the Proposals

Occupational licensing is not justified, even where the practice poses a potential danger, unless regulation reasonably protects consumers from the potential danger. There must be a valid relationship between regulatory provisions and protection from harm. In the case of acupuncture, regulation should seek to accomplish the following:

- . Only those who are sufficiently trained in and competent to perform acupuncture should be allowed to practice.
- . Objective, consistent, and valid evaluations must be made to ensure that practitioners have the skills necessary for safe practice and accurate diagnosis.

Regulatory provisions that provide no public protection should not be enacted, whether for acupuncture or for any other occupational field.

Examples of these are:

- . Provisions that extend the scope of practice beyond that necessary for public protection;
- . Regulations that seek to enhance the image, prestige, and power of the occupation seeking licensure; and
- . Provisions that unduly restrict entry into the profession.

Our analysis of proposed regulatory measures is based on the aforementioned criteria.

Our analysis found certain deficiencies in both Senate Bill No. 172/House Bill No. 226 and Senate Bill No. 665/House Bill No. 487. The problems with Senate Bill No. 172/House Bill No. 226 are those of omissions, such as the following:

- . Exempting from licensing those visiting acupuncturists who are licensed elsewhere and who are in the State for the purpose of giving lectures and demonstrations. It seems altogether reasonable that the law should facilitate, rather than hinder, the provision of training to students and acupuncturists in this State.
- . Allowing students to practice on human subjects while under the supervision of a tutor or qualified instructor. As we pointed out in our 1984 sunset evaluation report, students under proper supervision should not be denied the opportunity to develop their techniques or to gain experience in using acupuncture on human subjects. Most other health related professions allow students to practice on human subjects under direct supervision or controlled circumstances.
- . Requiring acupuncturists to obtain the informed consent of patients prior to any treatment. The purpose of such informed consent is to alert the patients to the scope of practice of acupuncture and its limitations in treating certain conditions. Patients should be told that acupuncture is not effective for all illnesses and that certain illnesses do not respond to acupuncture. Patients will then be able to make a more informed decision whether they wish to proceed with the acupuncture treatment or seek other modes of treatment.

. "Grandfathering" (i.e, routinely licensing) all those who had a valid license for the practice of acupuncture on December 31, 1984. We do not believe that those who were licensed until recently should have to go through the entire licensing procedure.

Senate Bill No. 172/House Bill No. 226 has been criticized by those in the profession as placing too much power in the hands of one individual, the Director of the Department of Commerce and Consumer Affairs. Acupuncturists contend that they have the right to be governed by a board comprised of members of their own profession and to be able to sit on such a board. There has been testimony that the director and his staff are not acupuncturists and have little knowledge about the profession.

However, we find that the provision for an advisory committee of at least three acupuncturists would ensure an adequate degree of input from acupuncturists into regulatory operations. The committee duties could include developing regulations and examinations, conducting interviews of applicants, and serving as a source of expertise on disciplinary matters concerning acupuncturists. If there is concern about the exact size and composition of the advisory committee, it could be resolved by establishing provisions for these aspects in the law instead of leaving it to the discretion of the director.

The problem with Senate Bill No. 665/House Bill No. 487 is that the provisions have the effect of expanding and enhancing the profession and its control by acupuncturists and reflect much of the self-interest that gave rise to the problems of conflict of interest that we found in our 1984 sunset evaluation of the board. For example, the bills propose:

- . Limitations on acupuncture practice by dentists, physicians, and osteopaths by requiring that these health professionals be first certified by their respective boards as being qualified to practice acupuncture. It is very questionable whether the respective health professional boards should be in the business of certifying dentists and doctors as being qualified in specific procedures or modes of treatment.
- . Restrictions on entrance into the profession by increasing training requirements and eliminating tutorships as a means towards licensing. There is no evidence that increasing training beyond that which was required by Chapter 436D and eliminating tutorships would make for more competent acupuncturists. Its only discernible effect would be to make it more difficult for new students to enter the profession.
- . Expansion of the scope of practice, which by virtue of its exclusiveness, might make certain modes of treatment illegal by other occupations. Acupressure has been added as a mode of treatment which would be exclusive to the practice of acupuncture. Yet, acupressure is also used in the practice of Shiatsu, which is regulated by the Board of Massage.
- . Restriction on the chairperson of the proposed board to a person who is an acupunctrist. We see no reason why a public member should be barred from serving as chairperson of the proposed board, or for that matter, any professional and vocational licensing board.

It is evident that the most fundamental difference in the two sets of bills is in the structure of regulation. Senate Bill No. 172/House Bill No. 226 assigns regulatory authority to the Director of the Department of Commerce and Consumer Affairs, assisted by an advisory committee; Senate Bill No. 665/House Bill No. 487 provides, as did Chapter 436D, for the practice to be regulated by a Board of Acupuncture.

In weighing these two alternatives, we are persuaded by our findings in the 1984 sunset evaluation. In reviewing the activities of the board, we found some board members appeared to have violated the State's code of ethics by making decisions that directly affect their own personal interests. We also found that the board had failed to enforce its rules prohibiting licensees from advertising as "doctor" or appending the designation of "Dr." to the licensee's name even after the board had been advised by the Department of the Attorney General that acupuncture practitioners cannot call themselves "Dr." or "physicians." Indeed, not only did the board fail to enforce the law, some members of the board themselves were advertising in the yellow pages as "acupuncture physician."

We do not believe that these or similar situations will be alleviated with the resurrection of a new board. Whenever a profession or occupation is relatively small (there were 84 licensed acupuncturists in Hawaii in December 1984), the chances of board members finding themselves in conflict of interest situations or acting in a self-serving manner are greater. For this reason, we believe that the Legislature should consider an alternative structure for the regulation of acupuncture, and our conclusion is that regulation under the

director assisted by a committee of acupuncture practitioners, as provided for in Senate Bill No. 172/House Bill No. 226, is the better approach.

#### Recommendations

We recommend the enactment of a law substantially in the form of Senate Bill No. 172/House Bill No. 226, with the following amendments:

- . Exceptions from licensing for visiting instructors in the field of acupuncture.
- . Allowance for students under direct supervision to practice on human subjects.
- . Provisions for informed consent on the part of the patient prior to acupuncture treatment.
- . "Grandfathering" all those who had a valid license on December 31, 1984.