

SUNSET EVALUATION REPORT
DENTAL HYGIENISTS
Chapter 447, Hawaii Revised Statutes

A Report to the Governor and the Legislature of the State of Hawaii

Submitted by the
Legislative Auditor of the State of Hawaii

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FOREWORD

Under the "sunset law," licensing boards and commissions and regulated programs are terminated at specified times unless they are reestablished by the Legislature. Nationally, the first sunset law was passed in 1976. Within three years, 30 more states had enacted similar legislation. The rapid spread of sunset legislation reflects increasing public concern with what it sees as unwarranted government interference in everyday activities.

Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, terminated 38 occupational licensing programs over a six-year period. These programs are repealed unless they are specifically reestablished by the Legislature. In 1979, the Legislature assigned the Office of the Legislative Auditor responsibility for evaluating each program prior to its repeal.

This report evaluates the regulation of dental hygienists under Chapter 447, Hawaii Revised Statutes. It presents our findings as to whether the program complies with the Sunset Law and whether there is a reasonable need to regulate dental hygienists to protect public health, safety, or welfare. It includes our recommendation on whether the program should be continued, modified, or repealed.

Our approach to the evaluation of the regulation of dental hygienists is described in Chapter 1 of this report under "Framework for Evaluation." That framework also serves as the framework for conducting other sunset evaluations. We used the policies enunciated by the Legislature in the Sunset Law to develop our framework for evaluation. The first and basic test we apply is whether there exists an identifiable potential danger to public health, safety, or welfare arising from the conduct of the occupation or profession being regulated. If the program does not meet this first test, then the other criteria for evaluation are not applied. However, if potential harm to public health, safety, or welfare exists, then the other evaluation criteria, as appropriate, are applied.

We acknowledge the cooperation and assistance extended to our staff by the Board of Dental Examiners, the Department of Regulatory Agencies, and other officials contacted during the course of our examination.

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Chapter 1

INTRODUCTION

The Hawaii Regulatory Licensing Reform Act of 1977, or Sunset Law, repeals statutes concerning 38 state licensing boards and commissions over a six-year period. Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.

In 1979 the Legislature amended the law to make the Legislative Auditor responsible for evaluating each licensing program prior to its repeal and to recommend to the Legislature whether the statute should be reenacted, modified, or permitted to expire as scheduled. This is our evaluation of Chapter 447, Hawaii Revised Statutes, on the licensing of dental hygienists, which statute is scheduled by the Sunset Law to expire on December 31, 1980.

Objective of the Evaluation

The objective of the evaluation is: To determine whether, in light of the policies set forth in the Sunset Law, the public interest is best served by reenactment, modification, or repeal of Chapter 447.

Scope of the Evaluation

This report examines the history of the statute on licensing of dental hygienists and the public health, safety, or welfare that the statute was designed to protect. It then assesses the effectiveness of the statute in preventing public injury and the continuing need for the statute.

Organization of the Report

This report consists of three chapters: Chapter 1, this introduction and the framework developed for evaluating the licensing program; Chapter 2, background information on the regulated industry and the enabling legislation; and Chapter 3, our analysis, evaluation, and recommendation.

Framework for Evaluation

Hawaii's Regulatory Licensing Reform Act of 1977, or Sunset Law, reflects rising public antipathy toward what is seen as unwarranted government interference in citizens' lives. The Sunset Law sets up a timetable terminating various occupational licensing boards. Unless reestablished, the boards disappear or "sunset" at a prescribed moment in time.

In the Sunset Law, the Legislature established policies on the regulation of professions and vocations. The law requires that each occupational licensing program be assessed against these policies in determining whether the program should be reestablished or permitted to expire as scheduled. These policies are:

1. The regulation and licensing of professions and vocations shall be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose must be the protection of the public welfare, not that of the regulated profession or vocation.

2. Even where regulation is reasonably necessary, government interference should be minimized; if less restrictive alternatives to full licensure are available, they should be adopted.

3. Regulation shall not be imposed except where necessary to protect relatively large numbers of consumers who, because of a variety of circumstances, may be at a disadvantage in choosing or relying on the provider of the service.

4. Evidence of abuses by providers of the service shall be accorded great weight in determining whether government supervision is desirable.

5. Regulation which artificially increases the costs of goods and services to the consumer should be avoided.

6. Regulation should be eliminated where its benefits to consumers are outweighed by its costs to taxpayers.

7. Regulation shall not unreasonably restrict entry into professions and vocations by all qualified persons.

We translated these policy statements into the following framework for evaluating the continuing need for the various occupational licensing statutes.

Licensing of an occupation or profession is warranted if:

1. There exists an identifiable potential danger to public health, safety, or welfare arising from the operation or conduct of the occupation or profession.
2. The public that is likely to be harmed is a substantial portion of the consuming public.
3. The potential harm is not one against which the public can reasonably be expected to protect itself.
4. There is a reasonable relationship between licensing and protection of the public from potential harm.
5. Licensing is superior to other optional ways of protecting the public from the potential harm.
6. The benefits of licensing outweigh its costs.

The potential harm. For each regulatory program under review, the initial task is to identify the purpose of regulation and the dangers from which the public is intended to be protected.

Not all potential dangers warrant the exercise of the State's licensing powers. The exercise of such powers is justified only when the potential harm is to public health, safety, or welfare. "Health" and "safety" are fairly well understood. "Welfare" means well-being in any respect and includes physical, social, and economic well-being.

This policy that the potential danger be to the public health, safety, or welfare is a restatement of general case law. As a general rule, a state may exercise its police power and impose occupational licensing requirements only if such requirements tend to promote the public health, safety, or welfare. Under particular fact situations and statutory enactments, courts have held that licensing requirements for paperhangers, housepainters, operators of public dancing schools, florists, and private land surveyors could not be justified.¹ In Hawaii, the State Supreme Court in 1935 ruled that legislation requiring photographers to be licensed bore no reasonable relationship to public health, safety, or welfare and constituted an unconstitutional encroachment on the right of individuals to pursue an innocent profession.² The court held that mere interest in

1. See discussion in 51 *American Jurisprudence*, 2d., "Licenses and Permits", Sec. 14.

2. *Terr. v. Fritz Kraft*, 33 Haw. 397.

maintaining honesty in the practice of photography or in ensuring quality in professional photography did not justify the use of the State's licensing powers.

The public. The Sunset Law states that for the exercise of the State's licensing powers to be justified, not only must there be some potential harm to public health, safety, or welfare, but also the potential harm must be to the health, safety, or welfare of that segment of the public consisting mainly of consumers of the services rendered by the regulated occupation or profession. The law makes it clear that the focus of protection should be the consuming public and not the regulated occupation or profession itself.

Consumers are all those who may be affected by the services rendered by the regulated occupation or profession. Consumers are not restricted to those who purchase the services directly. The provider of services may have a direct contractual relationship with a third party and not with the consumer, but the criterion set forth here may be met if the provider's services ultimately flow to and adversely affect the consumer. For example, the services of an automobile mechanic working for a garage or for a U-drive establishment flow directly to his employer, but his workmanship ultimately affects the consumer who brings a car in to his employer for repairs or who rents a car from his employer. If all other criteria set forth in the framework are met, the potential danger of poor workmanship to the consuming public *may* qualify an auto mechanic licensing statute for reenactment or continuance.

The law further requires that the consuming public that may potentially be harmed be relatively large in number. This requirement rules out those situations where potential harm is likely to occur only sporadically or on a casual basis.

Consumer disadvantage. The consuming public does not require the protection afforded by the exercise of the State's licensing powers if the potential harm is one from which the consumers can reasonably be expected adequately to protect themselves. Consumers are expected to be able to protect themselves unless they are at a disadvantage in selecting or dealing with the provider of services.

Consumer disadvantage can arise from a variety of circumstances. It may result from a characteristic of the consumer or from the nature of the occupation or profession being regulated. Age is an example of consumer characteristic which may cause the consumer to be at a disadvantage. Highly technical and complex nature of the occupation is an illustration of occupational character that may result in the consumer being at a disadvantage. Medicine and law fit into the latter illustration. Medicine and law were

the first occupations to be licensed on the theory that the general public lacked sufficient knowledge about medicine and law to enable them to make judgments about the relative competencies of doctors and lawyers and about the quality of services provided them by the doctors and lawyers of their choice.

However, unless otherwise indicated, consumers are generally assumed to be knowledgeable and able to make rational choices and to assess the quality of services being provided them.

Relationship between licensing and protection. Occupational licensing cannot be justified unless it reasonably protects the consumers from the identified potential harm. If the potential harm to the consumer is physical injury arising from possible lack of competence on the part of the provider of service, the licensing requirement must ensure the competence of the provider. If, on the other hand, the potential harm is the likelihood of fraud, the licensing requirements must be such as to minimize the opportunities for fraud.

Alternatives. Depending on the harm to be protected against, licensing may not be the most suitable form of protection for the consumers. Rather than licensing, the prohibition of certain business practices, governmental inspection, the posting of bond, or the inclusion of the occupation within some other existing business regulatory statute may be preferable, appropriate, or more effective in providing protection to the consumers. Increasing the powers, duties, or role of the consumer protector is another possibility. For some programs, a nonregulatory approach may be appropriate, such as consumer education.

Benefit-costs. Even when all other criteria set forth in this framework are met, the exercise of the State's licensing powers may not be justified if the costs of doing so outweigh the benefits to be gained from such exercise of power. The term, "costs," in this regard means more than direct money outlays or expenditure for a licensing program. "Costs" includes opportunity costs or all real resources used up by the licensing program; it includes indirect, spillover, and secondary costs. Thus, the Sunset Law asserts that regulation which artificially increases the costs of goods and services to the consumer should be avoided; and regulation should not unreasonably restrict entry into professions and vocations by all qualified persons.

Chapter 2

BACKGROUND

Dental hygienists have been regulated since 1920 by the enactment of Act 7, the Hawaiian Dental Hygiene Act. Any practitioner providing clinical dental hygiene services must be licensed. This practice includes what is commonly known as cleaning and polishing teeth and applying chemicals, such as fluoride.

A History of Dental Hygiene

In the late 19th century the practice of dentistry moved into the area of "prophylaxis," or preventive dentistry. Patients were taught techniques of oral hygiene and the importance of a balanced diet in maintaining healthy teeth. Interest in prophylaxis increased in the early 20th century when stress was placed on dental care for children. The recognition of this function prompted Dr. Alfred Fones of Connecticut and Dr. C. M. Wright of Ohio, among others, to propose a "subspeciality" devoted to the cleaning and polishing of teeth.

Hawaii was a leader in promoting dental hygiene. In 1920, Mrs. George Carter established the Honolulu Dental Infirmary, now known as the Strong Carter Clinic. The clinic was to serve children whose parents were financially unable to send them to private dentists. That same year, a program to train hygienists was added to the clinic. A one-year dental hygiene course was initiated under the direction of Dr. Fones, who visited the Islands in 1921. Students in dental hygiene also took courses in education and psychology at the Territorial Normal School. It was believed that hygienists should be teachers as well as technicians so they could teach children the value of oral hygiene and diet. The Legislature appropriated \$20,000 in 1921 for the employment of dental hygienists in schools. The program was placed within the Department of Public Instruction. In 1960, the school dental health program was transferred from the Department of Public Instruction to the Department of Health, where it remains today.

The original training program terminated in 1924 after graduating 20 dental hygienists. The next training program was a two-year course offered by the Territorial Normal School between 1926 and 1930. In 1931, this course was transferred to the University of Hawaii's Teachers College, where it became a four-year baccalaureate pro-

gram. The School of Dental Hygiene was moved to its present affiliation with the School of Nursing at the University of Hawaii in 1961.

The dental hygiene program at the University of Hawaii requires one year of college work in basic sciences and liberal arts before admission to the two-year dental hygiene program. The program includes courses in anatomy, pathology, basic dental hygiene concepts and practices, and application of clinical dental hygiene skills. Dental hygienists are trained to take complete medical histories before working on a patient.

Dental hygienists were originally trained to provide oral prophylaxis in public schools. Forty hygienists were employed by the Department of Public Instruction in 1957. In 1958, emphasis began to change from public school employment to private practice. By 1961, five private dentists employed hygienists. By 1969, the number had increased to 44.¹

As of July 1979, there were 402 hygienists licensed to practice in Hawaii. There are now only 32 dental hygiene positions in the Department of Health. Many hygienists work part-time, some for more than one dental practice. Dental hygienists are also employed by eleemosynary dental clinics, private schools, and welfare centers.

Regulation of Dental Hygienists

Regulation of dental hygienists coincided with the establishment of the one-year training program at the Honolulu Dental Infirmary. Initially, dental hygienists were restricted to cleaning teeth and providing mouth washes.

The present statutory provisions relating to dental hygienists are found in Chapter 447 and Chapter 448, Hawaii Revised Statutes. Chapter 447 pertains directly to dental hygienists while Chapter 448, the Dental Practice Act, regulates all dental operations and establishes the Board of Dental Examiners. This board regulates both dental hygienists and dentists.

Although a dentist may employ a number of auxiliary personnel, the dental hygienist is the only person, other than the dentist, who may practice clinical dental hygiene. This is defined in Chapter 447 as the removal of hard and soft deposits and

1. University of Hawaii, Department of Dental Hygiene, *A Proposal for a Baccalaureate Degree Program in Dental Hygiene, Appendix E*, October 15, 1969.

stains from the teeth, the polishing of teeth, the application of preventive chemical agents, such as fluoride, to the coronal surfaces of the teeth, and the use of mouth washes. Dentists may delegate other duties to dental hygienists as are permitted by the board's rules and regulations. A dental hygienist is prohibited from performing any repair work or preparing for such work.

A dental hygienist may only practice under the supervision of a licensed dentist. The law requires direct supervision in private dental practice. Only general supervision is required for dental hygienists employed by eleemosynary dental clinics, private schools, welfare centers, and state or county government.

The Board of Dental Examiners. Chapter 448, Hawaii Revised Statutes (chapter regulating dentists), prescribes the composition, organization, operations, and powers of the Board of Dental Examiners.

The board is authorized to examine and qualify applicants as dental hygienists, to issue temporary licenses, to revoke or suspend licenses, and also to accredit and license training schools for dental hygienists. Board rules and regulations specify minimum standards for these schools, e.g., the nature of the physical plant, admission, faculty, and curriculum. In actual practice, the board accepts the programs accredited by the Commission on Accreditation of Dental and Dental Auxiliary Education Programs of the American Dental Association.

The nine-member board is appointed by the Governor. It consists of seven dentists who are required to have been practicing in the State for at least five years. There must be one dentist from each of the counties. In 1978, the law was amended by adding two public members to the board. There are no dental hygienists represented on the board.

The board has met regularly six to seven times each year. These include meetings held before and after scheduled examinations in February and August. For administrative purposes, the board has been placed in the Department of Regulatory Agencies (DRA). It is staffed by an executive secretary from DRA's professional and licensing division. Additional staff support is provided by DRA for the screening of candidates for examination, administering and grading the written sections of the examination, and performing other clerical duties. The board may also refer complaints to DRA's complaints office for investigation.

Licensing requirements. The law requires that for a person to be licensed as a dental hygienist, he must be 18 years of age or older, of good moral character, a graduate of an

accredited high school, a graduate of an American dental hygiene school accredited by the Board of Dental Examiners, and pass an examination which covers subjects considered essential by the board for a dental hygienist, including a practical examination on the removal of deposits or stains from teeth.

Applicants must pass a two-part examination. The first part is a state board theory examination. Applicants who hold a national board certificate for passing a nationally standardized exam prepared by the Council on National Board Examinations of the American Dental Association are exempt from taking this theory part of the exam.

The second part consists of three sections known collectively as the "clinical series." It includes (1) a written clinical examination; (2) an examination on Hawaii dental hygiene law and rules and regulations; and (3) a practical clinical examination on removal of stains and calculus by dentists on the board. The passing score is 75.

Chapter 3

EVALUATION OF THE REGULATION OF DENTAL HYGIENISTS

This chapter contains our evaluation and findings on the need to regulate the practice of dental hygiene, and our recommendations concerning its regulation.

Summary of Findings

Our findings are as follows:

1. The practice of clinical dental hygiene by dental hygienists requires continued regulation. There exists a potential harm to patients of dental hygienists.
2. The state theory board examination is an unnecessary duplication of the national board dental hygiene examination.
3. The law requires direct supervision over a dental hygienist who is employed by a dentist in private practice, but only general supervision over one who is employed by a private or public institution. The appropriateness of this distinction in supervision needs to be evaluated.

Evaluation of Regulation

Potential harm to patients. Incompetent dental hygienists can cause injury. The most commonly cited injury is laceration of gum tissue due to excessive roughness in removing calculus or deposits from teeth. Acts of omission might also cause injury. For example, incomplete removal of calculus from patients with gum disease could contribute to continuation of the disease. Certain high-risk patients might need special attention and care, e.g., diabetics, heart patients, and hemophiliacs.

In the last seven years, the Board of Dental Examiners has received only one complaint against a dental hygienist. Records at other state offices, such as the Office of the Ombudsman and the Office of Consumer Protection, show no complaints against dental hygienists. The near absence of complaints filed with the state agencies is not necessarily indicative of the extent of complaints against dental hygienists. Patients ordinarily com-

plain directly to the dentists. According to a dentist, patients typically make comments about a dental hygienist's roughness in cleaning teeth or unsanitary procedures. The lack of complaints, however, does not necessarily mean that regulation is not needed.

The absence of substantive problems may partly be attributable to the supervision or control exercised over the work of the dental hygienist by the dentist. This may especially be so in the case of a dental hygienist who is employed by a dentist in private practice. The dental hygienist is an employee of the dentist and thus the dentist is responsible for the work done by the dental hygienist. It is in the dentist's direct interest to be sure that the dental hygienist's work is satisfactory both to the dentist and the patient. Nevertheless, the potential for physical injury exists.

Evaluation of licensing requirements. Requirements for admission to the dental hygiene examination by the Board of Dental Examiners are age 18, high school graduation, good moral character, and graduation from an accredited American school of dental hygiene.

1. *Graduation from an accredited American school of dental hygiene.* Dental hygiene requires specialized training and education which is most readily acquired through an approved training program. The statute requires applicants to be graduates of an American school with at least a two-year program recognized and approved by the Board of Dental Examiners. In this regard, the Commission on Accreditation of Dental and Dental Auxiliary Education Programs of the American Dental Association is the recognized authority. In practice, the board accepts the accreditation of the American Dental Association (ADA). The training and education requirements appear to be appropriate licensing requirements.

2. *Examination on theory.* An applicant is exempt from taking the state board theory examination if he has already passed the national board dental hygiene examination and has been awarded a national board certificate. The national board dental hygiene examination is a nationally standardized exam prepared by the Council on National Board Examinations of the ADA. It consists of 350 multiple choice test items covering such subjects as oral inspection, exposing and processing radiographs, performing prophylaxes, applying topical agents, and oral health instruction. Forty states accept this examination as partial fulfillment of requirements for licensing. Eight states require no additional written test.

The national board dental hygiene examination is offered in March, July, and December of each year. Locally, it is administered by the Counseling and Testing Service

at the University of Hawaii. Candidates must receive a score of 75 to be awarded the national board certificate. The Board of Dental Examiners recognizes the certificate as valid for five years after its issuance.

The state board theory examination is given by DRA each February and August. It also is available through the ADA. However, the results are valid only for Hawaii. The content is similar to that of the national board examination.

The only advantage of having a separate state board examination is to give applicants two additional examination dates. Since February 1977, only 14 of the 134 applicants took the state board examination. The remainder passed the national board examination. In effect, the state board examination option means duplication of expense and effort.

Supervisory requirements. Dental hygiene developed from the dental profession. It has traditionally been subsumed under, and controlled by, dentists. In most states, including Hawaii, dental hygienists are allowed to practice only under the supervision of a dentist. The extent of this supervision varies from state to state. Some states permit general supervision, while others require direct supervision.

Hawaii law requires direct supervision where a dental hygienist is employed by a dentist in private practice. The law requires direct or general supervision where a dental hygienist operates in an eleemosynary dental dispensary or infirmary, private school, welfare center, or a state or county office. The board, in its rules and regulations, has defined "supervision" to mean the prescription of work methods and the assignment of work by a resident in Hawaii. However, the terms "direct" and "general" have not been defined. The common understanding of "direct supervision" is the supervision of procedures which require the presence of a licensed dentist on the premises and the availability of the dentist for prompt consultation and treatment. "General supervision" is understood to mean supervision of those procedures which do not require the presence of a dentist on the premises but are performed with the knowledge of a dentist.

The distinction in supervisory requirements is based on the employer. It appears unrelated to the difficulty of the procedure to be performed or to the kind of patient serviced. State and institutionally employed hygienists receive the same training as privately employed hygienists. One is not necessarily more competent than the other. The state hygienists work mainly with school children, but their responsibilities include servicing bedridden patients in state-owned hospitals.

It should be noted that, while it may be expected that there would be more complaints against dental hygienists working under general supervision as compared to those under direct supervision, the records show no complaints reported on dental hygienists under general supervision. The absence of complaints does not necessarily indicate an acceptable quality of work, since most patients presumably are not qualified to judge. Nevertheless, the lack of complaints does call out for a complete reexamination of whether the distinction in supervisory requirements continues to be relevant and necessary.

Conclusions and Recommendations

We feel that the potential for injury exists and regulation of dental hygienists should continue.

There are, however, deficiencies in the dental hygienist program. The state theory board examination is a duplication of the national board examination and should be discontinued. The board should evaluate the appropriateness of the distinction in supervisory requirements between dental hygienists who are employed by dentists in private practice, as compared to those employed by private and public institutions.

Recommendations. We recommend the following:

1. *Chapter 447, Hawaii Revised Statutes, be reenacted by the Legislature.*
2. *The Board of Dental Examiners discontinue holding the state theory board examination, and in its place require applicants to possess a national board certificate before applying for the clinical series examination.*
3. *The Board of Dental Examiners evaluate the appropriateness of the present law which requires a different level of supervision of the dental hygienist depending upon whether the employer is a dentist in private practice or a private or public institution.*