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LAW REFORM COMMITTEE

Inquiry into powers of entry, search, seizure and questioning by authorised officers

Melbourne – 13 December 2001

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Witnesses

Mr S. Marty, Registrar; and
Mr D. Newgreen, Project Pharmacist, Pharmacy Board of Victoria.

**Necessary corrections to be notified to
executive officer of committee**

The CHAIRMAN — Stephen and David, on behalf of the Victorian parliamentary Law Reform Committee I welcome you to this hearing. I introduce my colleagues and the staff. The evidence given today will be recorded by Hansard. You will have the opportunity of proofreading the transcript and making any amendments as appropriate, or even following up any further points. It is a useful background document, which will be of assistance to us as we embark upon our inquiry on the powers of entry, search and seizure and a number of other related matters.

I invite you to now speak to your paper, following which we would be pleased to ask questions of you.

Mr MARTY — Thank you for the opportunity. By way of introduction, my name is Stephen Marty. I was a community pharmacist for some 23 years and joined the pharmacy board as an education officer visiting pre-registrants during their supervised practice period prior to registration. I was then appointed as the deputy registrar and subsequently, in 1998, as the Registrar of the Pharmacy Board of Victoria. I will let my colleague David Newgreen introduce himself.

Mr NEWGREEN — I am David Newgreen. I have worked for the pharmacy board for the last year and a half in a part-time capacity as project officer responding to various discussion papers such as this. Before that I was a pharmaceutical adviser in the Department of Human Services for a number of years. Before that, in the same department, I was a director of drug information services. Before that again I was a pharmaceutical officer in what was then the Department of Health, Victoria, where I had authority under both the Health Act 1958 and the former Poisons Act of 1962. So I have had a good deal of inspectorial experience as well as having had, before that again, experience in pharmacy practice. I have also had experience in the medical corps of the Australian Army as a pharmaceutical consultant, and I am a member of the medicines evaluation committee set up under the commonwealth Therapeutic Goods Act 1989.

Mr MARTY — I think one of the differences for pharmacists as a category of registered health practitioners is that they have this link with a retail outlet in many cases. Pharmacists in the main practise in community pharmacies, which have a range of poisons from those available without prescription, often known as over-the-counter medicines, to those on prescription for supply from authorised persons as a result of a prescription being presented which are then dispensed by the pharmacist.

The difference between those requirements is that pharmacists in general are custodians of a range of significant scheduled substances and poisons of which they are responsible for the custody, the storage, the supply and records. In general, pharmacists can only practise in approved premises, being either a community pharmacy or a hospital pharmacy department, or in such other circumstances approved by the board, which is different to the circumstances that most other health practitioners practise in. They do not have approval of their premises. Our approach is a proactive one, which we would rather than a reactive one. Obviously there are reactive circumstances as a result of a complaint being made, be it an allegation of a breach of legislation or because of a dispensing error or something of that nature, whereas our routine inspections are about the monitoring of standards.

When we visit practices it is to look at the maintenance of standards, including compliance with legislation, and to have an educational role. Part of that is being aware of the circumstances at that given time in a pharmacy or pharmacy department and looking at that. We hope that at the end of a visit there is a positive outcome — that our inspectors can comment on issues of practice and give some guidance on and some suggestions for things that may be improved, whether it is, under the forthcoming privacy legislation, for methods that might need to be introduced to ensure that there is privacy, particularly in interactions with consumers so that people receive their medications in a suitable environment. There are also suggestions about practices which could lead to a minimisation of possible dispensing errors, because while we have humans involved we will always possibly have some sort of an error to a varying degree at some stage.

In the premises we are looking to ensure that safety is being maintained, that there is hygiene and security of the premises and the areas where drugs and poisons are stored, that there is suitable equipment, including access to current reference material, and that the equipment that is there is suitable for the purpose.

What are the problems that arise? Absences of pharmacists occur fairly infrequently, thank goodness. There have been some notable cases over the years, and that is something that is looked at very seriously by the board. You would find it very difficult to ascertain if a pharmacist was absent from a premises without being able to go in and detect that that was the case and unless you could gather first-hand evidence by being there — and it might be that you have to go back and visit a number of times. There would be some limitation if a warrant was put in.

In fact, there have been instances — an example is the case of *Choi v. The Pharmacy Board* of a number of years ago, where an inspector visited and observed sales being made from a dispensary while the pharmacist had decided to deliver a dispensed medicine to a facility down the road. He was absent for some 25 minutes. That, of course, is considered a serious breach of our legislation, because there is a failure to supervise a practice and the supply of scheduled medicines, which can have adverse outcomes for the consumer who is purchasing without advice or determination of the appropriateness of that medication for their particular circumstance. A detection of illegal supply — —

The CHAIRMAN — I have one question. Did the departure from the premises mean that drugs were still being dispensed or were they not able to be dispensed?

Mr MARTY — In the circumstance prescriptions were not being dispensed, but there was a product, nicotinic acid, which was sold. Its scheduling required that it be not available for self-selection and that it be within the dispensary, but a shop member went into the dispensary, selected the stock, sold it, and the person received no advice. There is some advice that you need to give people when they receive nicotinic acid, particularly about some of its side effects, such as flushing, et cetera.

The most notable case, and it is a legal precedent that is well established for us, is the case of *Mercer v. The Pharmacy Board* heard by Mr Justice Pape. That set a precedent for a number of things, including supervision. Mr Mercer was absent from the pharmacy for a period of 45 minutes. It was open for business. A sale was not made; nevertheless, the keys to the drug-of-addiction cabinet and the range of medicines were left there and the possibility could have happened. It gave us a precedent for what is known as discreditable conduct. It is referred to in some of the other legislation as unprofessional conduct. It was determined to be any action which brings either the conduct of the pharmacist or the profession as a whole into disrepute, that is either by way of commission of an offence or omission of an action which should be taken in the public interest.

Internet supply presents a whole new range of potential difficulties for us, because it is very difficult to determine what is happening on the Internet. In fact there is no effective mechanism for monitoring Internet traffic. However, you may be able to look at computer records and work through them without them being tampered with or altered. We had a case where a pharmacist was making an illegal supply of a medication. To justify the quantities he deleted the records of some bona fide patients so that their quantities did not appear overall. We subsequently went to a lot of trouble and were able to obtain a computer specialist who was able to determine when the records were deleted. But that took a lot of work. Being pharmacists, our own inspectors know the dispensing systems and can go and use them, look at the records and do print-outs. If you had to go back as a result of a warrant, having initially announced your intention, there would be a possibility that the records may no longer exist or may have been altered to substantiate the supply that you are looking for.

On substances subject to abuse, at the moment you may well be aware that products containing pseudoephedrine are being purchased and converted to methylamphetamine, with a 200-fold increase in price on the street from the purchase of the first product through to the end product. These have serious consequences for our community. Pharmacists have been very good and very responsible about removing them from display and only selling one packet, at our recommendation. However, there are those who find it easier to allow representatives from the company to put up displays or to maintain supplies contrary to our advice. They would be very minimal. There are measures to get the information, but it would be difficult if you had to go and get a warrant.

A lot of the times when we go in we are working to suggest to the pharmacists how they may protect themselves, their staff and their customers from potential armed hold-ups. We have had in excess of 400 burglaries of pharmacies this year. They are looking at obtaining predominantly Temazepam, which comes in a soft gelatine capsule. It is injected, and as well as the effects that the person injecting desires it has an unfortunate side effect in that some people will develop gangrene and lose the tips of their fingers, nose, ears and subsequently possibly limbs.

The CHAIRMAN — Has that happened at all that you are aware?

Mr MARTY — Yes, I am aware of two cases of loss of arms and two of loss of legs. Two of those amputations occurred at the Alfred hospital. One of the problems is that the vehicle that is in the capsule to hold the drug is too large to pass through very small capillaries, so it blocks those and you end up with gangrene, which is a tragic circumstance. The capsules were banned in the United Kingdom back in 1996, but at a federal level there are people who do not want to listen to that evidence.

The CHAIRMAN — What is the medication used for?

Mr MARTY — It is a sleeping preparation; it is one of the benzodiazepines. It is probably the most commonly prescribed drug. A way around the problem is to ban the capsules and use tablets. The problem with the tablets at the moment is that they are too small for elderly people to manage. You could then look at increasing the size if you did not increase the effect of the drug.

There is also the matter of the supervision of ancillary staff. Pharmacists use trained dispensary assistants under their personal supervision to assist them in the dispensing process by entering data into the computer records and by filling out what are known as dose administration containers. These are the blister packs that people might use at home because they may have difficulty remembering when to take their medication. They are also used by non-nursing staff in residential care facilities to assist in the administration protocol for residents of those facilities. They also work in those areas.

If pharmacists leave their assistants to do that without checking the three requirements we have in place — always check the patient's medication history, check the overall safety of the prescription and counsel the patient on the safe and effective use of the medication — the system will break down and there is a possibility of patient harm. Obviously in the public interest that is something we are very keen to maintain. Once again that is fairly infrequent, but you will detect it only by being present and observing the circumstance at the time. Most of the time it is not something we have a suspicion of occurring unless there has been a complaint of that nature. If it is picked up you can take appropriate action, firstly to try and educate the pharmacist about complying with those requirements, and only taking disciplinary action if it is really necessary.

I have included in the paper I have given to you today a couple of examples of cases we have investigated in the past few years. The first example is on page 3, where a member of the public complained that containers of vitamins and baby food were sold by a particular pharmacist with the use-by dates having been removed by tampering. The matter was investigated and an inquiry was held into the pharmacist's conduct. It submitted that had prior consent to enter the premises been required, on-site evidence might have been destroyed; and as harm to the consumer was unlikely, it might have been difficult to convince a judicial officer to issue a warrant. Nevertheless, the complaint was justified, and the conduct of the person in question would have been enough to bring both the pharmacist and the profession into disrepute. Had the investigation not been able to be carried out, the board's role in protecting the public would have been compromised.

Example 2 makes reference to the Choi case. It is settled law that a pharmacist must be in an attendance when the pharmacy is open for business. The superintendence must be personal on the part of the pharmacist, and it must be continuous and systematic, not intermittent or casual. Without a power to enter the premises in the absence of consent or under a warrant, breaches of this law would be difficult to detect. Contravention of this requirement is considered an example of discreditable conduct and has been so held by the courts in the examples I gave you previously.

I will ask Mr Newgreen to talk about the comparison with the jurisdictions in other states and the circumstances that require inspection, perhaps without warrant.

Mr NEWGREEN — I do not know if it is on the copies submitted to you, but a further example comes from the New South Wales Supreme Court in the case called *Brown and Weir*. I have a reference to the *Australasian Journal of Pharmacy*, 1956, volume 37, page 244, but I am sure it will be in the New South Wales law records. In that case, which the Victorian one of 1968 followed on from, the pharmacy was on Circular Quay. It was unattended when it opened for business, and no-one bought anything, but the full court of the Supreme Court of New South Wales ruled that that was enough to contravene the legislation of that state at the time.

We have submitted to you a set of pieces of corresponding legislation from other states in Australia. Most of them are very similar to what we have and have had in the state of Victoria in terms of entry. As we have indicated, the two exceptions are, firstly, South Australia, where the lead-in words in the particular section of the act are that the inspector's entry is for the purposes of carrying out an investigation. You can do various things, but you must have an investigation in contemplation rather than being in a particular area such as a country town or suburban area and visiting all the pharmacies in sequence. I understand from our colleagues in South Australia that the carrying out of an investigation is considered in the widest possible terms.

Nevertheless, if the current powers in Victoria were tightened along the lines that we felt we could detect in the discussion paper, one of our concerns would be that the time-honoured routine visits would probably stop. If you were in a country town and you wanted to go into a pharmacy to see that the act was being complied with but

the pharmacist said you could not come in, you would have to go, and to get a warrant you would have to have sufficient evidence to convince a judicial officer that you should go in in any case. From my experience in practice when I was with the department, admittedly under other legislation, in many cases it was not until you got there that you found there were various contraventions.

The CHAIRMAN — Isn't it a different matter of entering without needing a warrant to enter if you just wanted to do a general inspection? What is the legal situation if you did find a contravention once in there? If you entered innocently as part of your normal duties, would you then have the right to inspect the books?

Mr NEWGREEN — Yes. While the South Australian system does not seem to require a warrant, very new Queensland provisions that have not come into force yet but I understand will do so in February 2002 are extraordinarily detailed and run to 22 sections. That was my response too. Whereas the rest of us have one section, the Queensland act goes into an extraordinary discussion about what inspectors can and cannot do. It would seem that by making it so complicated it may lend itself to considerable legal argument and perhaps defeat the main intention of the legislation.

I did not submit this earlier, but in addition the commonwealth Therapeutic Goods Act 1989 has been in operation since February 1991. It conferred various authorisations on officers under warrant and by consent. There was a third provision that enabled authorised officers to enter any licensed manufacturing premises as a condition of their licence. It turned out that those provisions were not enough, and in 1996 the federal act was amended by insertion of two new sections, sections 46A and 46B, which give appropriately authorised officers powers more or less similar to those which pharmacy boards throughout Australia have in relation to pharmacy premises. However, there are various safeguards written into it. It does not extend to private residential areas unless they are part of the business premises, the officer must show his identification card, and so on. There are certain limits put on it, but nevertheless it seems to be a model that the committee might like to consider in its further deliberations on this.

As to monitoring warrants, I had some discussions recently with one of the officers in the Therapeutic Goods Administration. The Therapeutic Goods Administration is a division of the commonwealth Department of Health and Aged Care. I spoke to the officer there and asked whether they used monitoring warrants at all — they are under the commonwealth act. His response was that they found them to be completely purposeless; they did not serve any purpose at all. Therefore, sections 46A and 46B were inserted in addition to their other offence-related warrants and consent. That might be a model that could be considered, but the Queensland model seemed to be very unusual to say the least compared with other jurisdictions. We also looked at existing Queensland legislation under the Pharmacy Act. Interestingly, pharmacy board inspectors are appointed under by-laws. However, when you look into the current Queensland act more carefully you are then referred to yet another act to do with the medical act, I have forgotten the full title. It again has a number of very circumscribed powers which we believe would not be in the interests of public health given that they curtail the activities of authorised officers.

Mr MARTY — In conclusion, we would like to submit that the board would seek to retain its present powers, not an extension. You may well be aware that our legislation is the last of the health registration acts to be reviewed in Victoria. It was delayed because of Council of Australian Governments provisions, but I understand the intention is that the draft bill will be considered during the spring sittings next year. We would seek to retain those powers in our future act. We are not seeking an extension but to maintain those in the public interest.

The CHAIRMAN — Thank you for an excellent presentation by both of you to our inquiry this afternoon. Time is moving on, but I would like to invite my colleagues to pose what questions they wish.

Mr LANGUILLER — I wondered if you could quickly outline the most common complaints that you deal with and what sort of a register you have in relation to the complaints that you have to investigate?

Mr MARTY — There are two types of actual complaints.

The CHAIRMAN — Could I perhaps narrow that down? We are primarily interested in complaints data relating to inspectors or officers' power rather than overall complaints. Is that a fair comment?

Mr LANGUILLER — Yes.

Mr MARTY — Most of the complaints we investigate are consumer complaints.

The CHAIRMAN — Putting them to one side, are there any complaints that come back to you regarding the role of inspectors as they go about their duties? Is there a register of that information?

Mr MARTY — Not during my time as registrar.

The CHAIRMAN — For the record, that covers what period?

Mr MARTY — From February 1998 to the present time. Somebody might ring me and ask why it is necessary to follow up something or say they did not realise the person was going to make a complaint and ask whether the inspector has to come and visit and ask all these questions again. It is not about the process, it is their concern that as pharmacists they thought they had done the right thing. They are not really complaining about the process.

Ms McCALL — Inspectors themselves, are they pharmacists by training or what are they by training?

Mr MARTY — They are pharmacists.

Ms McCALL — So they know exactly what to look for?

Mr MARTY — Yes. They have all been in practice themselves, some of them still practise part time to keep themselves up to date, which is very good. I believe it would be a conflict of interest for me to have an interest, but I am happy for my pharmacist staff to practise part time because then they have knowledge of what current practice circumstances are like and they can evaluate very well the interaction and complaints or whether something is good practice when they are visiting a pharmacy.

Ms HADDEN — You have suggested in your paper that a formal course in the technicalities of obtaining statements, the collection of evidence and the rules of fairness would enhance inspectors' effectiveness in their role. Victoria Police run a course for civil investigators three or four times a year. Are you aware of that?

Mr MARTY — Yes.

Ms HADDEN — Do you think from what you know of it that that course would be of assistance to pharmacy inspectors?

Mr MARTY — Yes. To my knowledge there are two courses. There is that one and also one conducted by the Australian National University. They advertise twice a year for their courses. I am fortunate that, out of the present staff, one worked for the state previously and has been through the detective training school and another previously worked for the commonwealth and has been through an Australian Federal Police investigators course, so we have the benefit of that. The last employee in that role has completed the course you mentioned.

Mr STENSHOLT — Without understanding in great detail, I assume the pharmacy board is made up of pharmacists, represents pharmacists and is not independent of the pharmacists?

Mr MARTY — It is a statutory authority responsible to the Minister for Health.

Mr STENSHOLT — So it is not owned by the pharmacists?

Mr MARTY — It certainly is not. We are there to act in the public interest, not pharmacists' interest.

The CHAIRMAN — My only question is, noting that a number of other acts have been reviewed in recent times and the Pharmacists Act is the last cab off the rank in this round and that there is a set of model provisions regarding the powers of inspectors, what is your view on those model inspector provisions?

Mr MARTY — There are two things. One is the difference that I alluded to right at the very beginning — that is, pharmacists being custodians and suppliers of a range of drugs and poisons either without prescription or on prescription and having a set of premises. The registrars of the boards meet every three months and look at similar problems such as how we might train our respective boards in natural justice processes, et cetera. We often talk about our powers, and I am aware of some circumstances that have made it more difficult for registrars to carry out investigations in recent times, particularly as computer crime has come to light. They have had to get a warrant as a result of being denied entry, and that has presented some difficulties for them.

The CHAIRMAN — In the absence of any other questions I would like to thank you again for your contribution and commend it on its precision, breadth and calibre. Thank you.

Mr MARTY — Thank you very much. It has been a pleasure. Compliments of the season.

Witnesses withdrew.