7 Conclusions

The 'monopoly situation'

7.1. We are required to report whether a complex monopoly situation[1] exists in relation to the supply of services of professionally regulated osteopaths. We are also required to limit our consideration to agreements and practices relating to the advertising of these services.

7.2. We explain in Chapter 2 that we have identified 12 professional bodies to which osteopaths belong which lay down rules for professional conduct. All have rules which to some extent limit the freedom of their members to advertise. The largest body, the General Council and Register of Osteopaths, whose register includes about three-quarters of all professionally regulated osteopaths, allows members to advertise only on setting up a new practice, on changing their address or through directory entries, all in approved form. They may not publicise the cost or type of service they provide. Provisions on similar lines to those of the GCRO, but sometimes different in detail, are observed by eight further bodies, British Naturopathic and Osteopathic Association, the Osteopathic Association of Great Britain, the College of Osteopaths, the British and European Osteopathic Association, the Natural Therapeutic and Osteopathic Society, the Osteopathic and Naturopathic Guild, the Guild of Osteopaths London and the International Guild of Natural Medicine Practitioners. One body, the British Osteopathic Association, has no rules but its members are nearly all medical practitioners, and as such are bound by the rules on professional conduct of the General Medical Council. Finally two bodies, the London and Counties Society of Physiologists and the Faculty of Osteopathy, have brief rules that simply state that professional notices and advertisements shall be kept to a dignified wording and to approved publications only. These provisions are interpreted differently by the two bodies (paragraphs 4.16 and 4.18) but both place some restrictions on the form of advertising allowed.

7.3. Thus the majority of professionally regulated osteopaths are subject to detailed rules which limit severely the ocassions on which they can advertise and the form the advertisements can take. The remainder are also subject to rules on the form of advertising they may use. Most of the bodies have disciplinary powers which they use to enforce their rules and we are satisfied that the rules of all the bodies are generally accepted and observed by their members.

7.4. Observance of these rules must affect both the means by, and the extent to which, professionally regulated osteopaths can compete with one another. Accordingly we conclude that a complex monopoly situation exists in favour of the professionally regulated osteopaths belonging to the bodies listed above by virtue of section 7 (1) (*c*) and (2) of the Fair Trading Act 1973.

7.5. We are asked to consider whether any steps are being taken by these osteopaths for the purpose of exploiting or maintaining the monopoly situation and whether any action or omission on their part is attributable to the existence of the monopoly situation. In the circumstances of this reference and the terms in which it was made these questions are largely technical. We do not find that any steps by way of uncompetitive practices or otherwise are being taken by professionally regulated osteopaths for the purpose of exploiting or maintaining the monopoly situation we have found to exist (paragraph 7.4), nor do we find that any action or omission on the part of these osteopaths is attributable to the existence of the monopoly situation.

[1] See note on the complex monopoly situation at Appendix 7.

7.6. Finally we have to consider whether any facts found by the Commission in pursuance of their investigations operate, or may be expected to operate, against the public interest. We are required to limit our consideration to the effects on the public interest of the agreements and practices relating to advertising. In doing so, however, we are, as a practical matter, bound to take account of the general context in which the services are supplied.

The public interest

7.7. In considering the public interest we have identified the following issues:

(*a*) Whether the restrictions reduce the stimulus to competition within the profession and in particular whether they hamper the establishment and development of practices, limit price competition or hamper regulated osteopaths in competing with those who can advertise freely;

(*b*) whether they encourage other forms of publicity; and

(*c*) whether they deprive the consumer of the information about osteopathy and the services of individual osteopaths.

We have also considered whether any such adverse effects under (*a*), (*b*) or (*c*) are outweighed by benefits from the restrictions in protecting patients, in preserving trust between patient and osteopath, and in protecting the standing of osteopaths and of their profession.

7.8. In considering these issues we have had in mind two general considerations.

7.9. First we have taken into account conclusions reached in earlier inquiries by the Commission, most notably the 1970 report on the general effect of certain restrictive practices including restrictions on advertising in the professions, and the series of 1976 reports on advertising restrictions in a number of individual professions (see paragraphs 3.2 and 3.5).

7.10. Secondly we noted the changes since 1970 in the climate in which the professions operate and in the public attitudes to the professions. These factors, coupled with the outside competitive pressures on some professions, have together led to an increasing acceptance of the view that competition and professional status are not incompatible, provided professional standards are maintained.

Establishment and development of practices

7.11. The most frequent criticism made by those individual osteopaths who criticized the advertising restrictions was that they hindered the building up of practices. Against this it was argued, most fully by the GCRO and BNOA, that the practical effects of the rules were not significant for the reasons set out more fully in paragraphs 5.13, 5.14 and 5.32. There was enough work for competent osteopaths and although practices inevitably took time to establish growth depended on personal recommendations and referrals. Many osteopaths built up connections by taking part-time jobs as assistants or tutors which allowed them to establish their own practice gradually. A few practices failed, but not because of advertising restrictions. The GCRO pointed out that its rules allowed unlimited announcements within the first year of practice. We do not find these arguments convincing. The advertising allowed is limited in form and for the majority can only take place during the first year. This may not be a sufficient length of time for a practice to become firmly established. Furthermore it does not make any allowance for advertising by successful established practices which wish to expand. More generally we are concerned that the restrictions on advertising by osteopaths result in a lower level of awareness of osteopathy amongst the general public and that this limits the growth in demand for the services of osteopaths.

7.12. In many professions expansion of existing practices may be achieved by the introduction of new facilities and techniques. We accept the argument that in osteopathy there are limits to the scope of expansion of existing practices. Because of the nature of the osteopaths' approach the scope for introducing new equipment and techniques may be more limited than in other health professions and the number of patients that the individual osteopath can treat is primarily

limited by the amount of time available to see them. However, the efficient and popular practice can expand by taking on new assistants and partners, spreading overheads and thus providing a better service to the public. The GCRO represented to us that an increasing number of group practices among its members was evidence that possible expansion was not being hindered. However, we consider that if there are benefits from the development of group practices, for example more economic operation or the ability to offer a wider range of services, then such practices should be in a position to inform the public about their services. In particular information about new facilities may properly in our view affect patient choice and could also be important to the medical profession in making referrals to osteopaths.

7.13. We accept that there is a limit on the work which any one osteopath can do and that the speed with which osteopathy as a profession can grow is limited in part by the availability of training facilities and the length of training. This may mean that the demand for osteopaths' services may for a time outstrip supply. If so the demand for training as an osteopath will also increase. This will encourage the development of new training facilities leading to an increase in the number of qualified osteopaths.

Effects on price competition

7.14. Several bodies have told us that osteopaths' fees are currently not unreasonably high. Lack of publicity for fees prevents the profession getting this message across to those members of the public who may be deterred from approaching an osteopath because of concern about the cost. Nor do arguments about the reasonableness of the general level of fees bear on the question whether competition on fees is inhibited by the restrictions. While osteopaths are free to quote fees on request they cannot take the initiative in drawing the information to the consumers' attention by advertising and this is a significant limitation on the freedom to compete. The argument that the costs of advertising will be passed on to the patient in increased charges is one that has been put forward by a number of other professions both in this country and overseas. The evidence is not clear-cut but some studies have shown that fees and charges have fallen after freer advertising was allowed (see paragraphs 3.27 and 3.28).

Other forms of publicity

7.15. We were interested in whether the restrictions on advertising might encourage professionally regulated osteopaths to use other less open methods of attempting to secure business. We had in mind in particular such practices as editorial features in local newspapers which covertly promote the practice featured in the article. The GCRO and other bodies did not think this is a serious problem. While there may be some potential for abuse we consider it a minor concern.

Competition with unregulated osteopaths

7.16. We considered whether the observance of restrictions might hamper professionally regulated osteopaths in securing patients in competition with those who are free to advertise. The few osteopaths who gave evidence to us criticising the restrictions did not identify this as a problem and the professional bodies themselves did not consider their members suffered from competition from unregulated osteopaths. Indeed some bodies thought that advertising by unregulated osteopaths deterred many members of the public from consulting them.

Information for the consumer

7.17. The present restrictions limit the consumer's access to a range of information, such as the practical details of fees and practice arrangements, except in reply to direct enquiry. They also prevent information being disseminated on the experience, qualifications and general approach of osteopaths, including their experience in treating certain types of patient or complaint.

7.18. We drew to the attention of several bodies the practice leaflets which general practitioners may make available at their surgeries, local libraries and other information centres, and which may give factual information on their services and practice arrangements, together with such matters as their ages, sex

and particular interests. The OAGB thought such leaflets would be useful. The GCRO's view was that such information was readily available on direct enquiry by patients but that wider dissemination would be advertising for personal gain and as such undesirable. The BNOA thought that while there might be a case for making such leaflets available to the public in such places, the information in them should be limited to qualifications, address, telephone number and hours of practice.

7.19. A member of the public who has to rely on direct enquiry has the inconvenience of needing to make a number of approaches if he wants comparative information on which to make a choice and some prospective patients may hesitate to initiate such enquiries. Some osteopaths have told us that the present restrictions prevent them informing patients of changes in the members of the partnership or of other developments in the practice which they would regard as a necessary courtesy. We noted that evidence on the attitude of prospective patients was limited. The GCRO survey described in paragraphs 2.26 and 2.27 reflected the views of those who were already patients.

7.20. Several bodies represented to us that information about specialisms and experience is not relevant since osteopathy applies a whole body therapy to the needs of the individual patient and that in any event the patient is not in a position to assess this kind of information. We were also told, however, that the recognition of specialities within the profession, linked to the establishment of specialist training, was under consideration. Differing views were put to us on the extent to which experience with a particular type of patient or type of complaint would affect the quality of the practitioner's treatment. We think that such experience must be of importance and, if so, that knowledge of it would benefit the consumer. We recognize that it may be more difficult to present information about such matters in a factual and unbiased way. This, however, is connected with issues of patient protection and of the type of advertising which might be allowed, and we revert to these later.

7.21. We conclude that the restrictions on advertising make it more difficult for the consumer to select the most convenient and suitable practitioner.

7.22. The restrictions of some bodies equally limit the ability of osteopaths to inform the medical profession of their services. The osteopathic bodies are all anxious to increase the level of referrals by GPs. The GCRO told us that its members consider that advertising to the general public would lower their standing with the medical profession and that the BMA supports this view. We revert later to this. However, the provision of information to the medical professions themselves is unlikely to mislead, nor would it be in the interests of the individual osteopath to use any form of publicity which damaged him in the eyes of a recipient from whom he hoped to receive referrals.

7.23. The limitations on advertising affect the amount of information available both to consumers and to the medical profession and this affects not only the patients' choice of osteopath but also the general awareness of osteopathy. In our view greater freedom for osteopaths to advertise is likely to lead to greater awareness of the services which the profession offers and, over the years, may result in greater demand for those services. If so this, in the longer term, will encourage new practitioners into the profession.

The protection of the patient

7.24. The GCRO and other bodies present, as their main argument for the present restrictions, the need to protect the patient from the harm caused by misleading or exploitative advertising.

7.25. We accept that there is a danger that a patient, perhaps anxious or in pain, may be vulnerable to advertising encouraging him to seek treatment which may be incompetent, inappropriate or unnecessary. We have been told there are cases where such treatment may cause positive harm to a patient, as opposed to failing to benefit him.

7.26. A number of bodies have represented to us that their members are trained to an established standard and that this is the best guarantee of satisfactory treatment. If the osteopath has reached this standard we see no reason why freedom to advertise should lead him to lower his standard of care. There is always a danger that an unscrupulous osteopath may exploit a patient by offering unnecessarily expensive or prolonged treatment, but this danger exists at the present time, and we see no reason why advertising should increase it. Indeed if advertising increases the general level of awareness about osteopathy and the standards required by the various osteopathic bodies it might lessen the danger.

7.27. Nor have we seen any evidence to suggest that freedom to advertise will encourage widespread use by regulated osteopaths of unprofessional or exploitative advertising. Unregulated osteopaths (and some osteopaths belonging to the smaller bodies of osteopaths) already have freedom to advertise. We have seen examples of this advertising. Some of it appears likely to play on some patients' anxiety or to create unjustified expectations. We recognize that if the present restrictions were completely removed some regulated osteopaths might decide to use this type of advertising but the evidence we have received from the bodies on their members' wish to secure professional recognition suggests that the great majority would not want to take this road.

7.28. It was represented to us that members of the public were aware that reputable osteopaths did not advertise, and that this protects the public in two ways. First some prospective patients would actually avoid consulting an osteopath who advertises (paragraph 5.22) and therefore are more likely to select a qualified practitioner, and secondly the knowledge was likely to deter many non-regulated osteopaths from advertising, or at the least from using the less desirable forms of advertising.

7.29. On the first of these arguments, an osteopath who does not advertise is not necessarily professionally qualified, and some of those who remain outside professional bodies and advertise are fully trained. The present protection to the patient is therefore at best haphazard. We recognize that greater freedom for all osteopaths to advertise might encourage non-regulated osteopaths to advertise more and in some cases in undesirable ways. But if there is any force in the argument that advertising by unregulated osteopaths is influenced by the standards observed by members of the regulated bodies, we would expect this influence to continue.

Status of the profession

7.30. The GCRO represented strongly its disapproval of advertising for the personal gain of the individual osteopath, which it considers would operate against the interests of the profession and the public. The view that it is inherently unprofessional to advertise has been widely held, not only among osteopaths. We think this view mistaken. It is proper and indeed desirable for a professional person to seek advancement in his profession and the rewards that this will bring in terms both of financial returns and professional esteem. To do this he must secure the custom necessary to demonstrate his abilities. The public is well aware that the professional is in business to earn a living and to succeed and that custom secured may be at the expense of another practitioner. Explicit recognition of this fact is unlikely to damage trust in the professional. Experience of increasing openness in competition within other professions in recent years does not suggest their professional reputation has suffered as a result. This is not to say that all forms of competition through advertising would be acceptable for a profession. For example, denigration of fellow professionals is generally accepted to be unprofessional conduct.

7.31. The GCRO and BNOA put to us two further reasons for considering advertising restrictions were necessary at this stage of the profession's development. First, as was mentioned in paragraph 7.22, they argued that advertising would lower osteopath's standing with the medical profession. This loss of confidence might affect the medical profession's willingness to refer patients to them, a view which the BMA has supported. We find it difficult to believe that

a medical practitioner, who will have the background knowledge to assess the claims and qualifications made by other health professionals, many of whom are already free to advertise, will be dissuaded by the fact that he advertises from referring a patient to an osteopath whom he regards as properly trained.

7.32. They also saw particular dangers in any relaxation of the present restrictions before statutory recognition of the profession had been secured. The loss of doctors' confidence referred to above might also affect their willingness to support current moves towards statutory recognition, to which both the GCRO and BNOA attach great importance. The GCRO also suggested that freedom to advertise at this stage would increase division within the profession by promoting short-term personal interests. We recognize the two bodies' concern about the lack of generally accepted standards in the profession and the freedom for anyone to set up in practice as an osteopath whether qualified or not. But doctors are increasingly well informed about osteopathy and we are not persuaded, for the reasons indicated above, that freedom to advertise will in itself significantly affect the medical profession's estimation either of the osteopathic bodies or their individual members. Nor do we think advertising will necessarily lead to greater divisions between osteopaths. In any event we think the effect of greater freedom to advertise on the issue of recognition is likely to be small.

Conclusions and recommendation

7.33. We have considered the effects of the various restrictions on advertising observed by professionally regulated osteopaths with these various issues in mind and have considered the general conclusions of the 1970 and 1976 reports (paragraphs 3.3, 3.4 and 3.14) on the effects of advertising restrictions. We endorse the reasoning which underlies these conclusions and adopt them as the starting point for our assessment.

7.34. The GCRO rules impose an effective ban on advertising except by means of directory entry and notices announcing the establishment of a new practice or a change in the address of a practice, all in prescribed forms. The rules of the British Naturopathic and Osteopathic Association, the Osteopathic Association of Great Britain, the College of Osteopaths, the British and European Osteopathic Association, the Natural Therapeutic and Osteopathic Society, the Osteopathic and Naturopathic Guild, the Guild of Osteopaths London and the International Guild of Natural Medicine Practitioners require observance either of the GCRO rules or of rules with similar effects. The rules are observed by the great majority of the professionally regulated osteopaths whose services are the subject of the reference. We conclude that they have specific effects adverse to the public interest in that they inhibit the establishment and development of practices and, by limiting the information available to the consumer, hinder both patients and medical practitioners in making an informed choice of osteopath. We also consider that the restrictions on advertising limits public awareness of the profession and thereby limits both the development of demand for osteopathy and the rate at which the profession could expand. These effects are likely to lessen the ability of the profession to meet the needs of the public. They are not in our view outweighed by benefits from the restrictions in protecting the patient and potential patient or in maintaining the status of the profession. Accordingly we find the observance by professionally regulated osteopaths of the rules of the bodies listed earlier in this paragraph operates and may be expected to operate against the public interest.

7.35. The London and Counties Society of Physiologists and the Faculty of Osteopathy have rules in more general terms but both apply them in forms which place some restrictions on the form of advertising allowed and the media used, those of the London and Counties Society being the more severe. Both, to a lesser extent, have the same effects on competition and the consumer that we have noted in the preceding paragraph, and these are not outweighed by benefits from the restrictions. Accordingly we find the observance of these rules by these bodies operates and may be expected to operate against the public interest.

7.36. Members of the British Osteopathic Association are almost all registered medical practitioners who are required to observe the Rules on Professional Conduct, including self-promotion, prescribed by the General Medical Council and it is our understanding that these doctors regard their practice of osteopathy as part of their general medical practice. The rules on advertising observed by medical practitioners are currently being considered in a separate inquiry by the Commission and we therefore make no finding on these rules in this report.

7.37. We have concluded above that it is the observance by their members of the present advertising rules of the osteopathic bodies named in paragraphs 7.34 and 7.35 which is against the public interest. Our terms of reference together with the relevant provisions of the Act require us to frame any recommendations in the light of this conclusion. We therefore recommend that these rules be no longer observed.

7.38. In the light of our recommendation the bodies will no doubt consider the withdrawal of the present rules and the adoption of alternative rules which avoid the adverse effects of the present restrictions. We do not think it appropriate for us to lay down detailed guidelines. We consider that professionally regulated osteopaths should be free to advertise by such means as they see fit, but that this guiding principle should be subject to the provisos in the following paragraph.

7.39. Osteopaths are already subject to certain statutory limitations on the advertising of health care and all advertisers are expected to observe BCAP which is the chief safeguard for the public interest and should ensure that advertisements are legal, decent, honest and truthful. The main principles of the Code are already written into the rules of a number of professions and are directly enforceable by them. We would see no objection to osteopathic bodies doing likewise. We accept, however, that some kinds of advertising which would be permissible under the Code might, because of either form or content, be such as to undermine the standing of the profession. We would accept the profession's wish to avoid denigration of, or claims of superiority over, other members of the profession and the view that any claims made should be capable of being substantiated. Equally we recognize the concern of the profession that patients should be protected from advertising that might be potentially harmful. Accordingly we consider that freedom to advertise could properly be qualified by two broad provisions. First that such advertising should not be of a character that could reasonably be regarded as likely to bring the profession into disrepute and secondly that advertising should not be such as to abuse the trust of potential patients or exploit their lack of knowledge.

7.40. The principles we recommend are deliberately framed in general terms. We would not expect to see a restrictive interpretation placed upon them.

M S LIPWORTH *(Chairman)*

C C BAILLIEU

L BRITZ

M B BUNTING

P H DEAN

B C OWENS

S N BURBRIDGE *(Secretary)*

23 November 1988