

**Report of the Review
of the Physiotherapists
Registration Act 1945**

March 2001



EXECUTIVE SUMMARY.....	4
1. INTRODUCTION.....	22
1.1 BACKGROUND TO THE REVIEW	22
1.2 CONDUCT OF THE REVIEW	22
1.3 THE REPORT	22
2. THE REGULATION OF PHYSIOTHERAPISTS	23
2.1 INTRODUCTION	23
2.2 THE PHYSIOTHERAPISTS REGISTRATION ACT 1945	23
2.2.1 <i>Restriction on titles and practice</i>	23
2.2.2 <i>Registration requirements</i>	24
2.2.3 <i>Regulation of the conduct of physiotherapists</i>	24
2.3 OTHER LEGISLATION.....	25
2.4 THE ROLE OF PROFESSIONAL ASSOCIATIONS	26
2.5 OTHER SERVICE PROVIDERS	26
2.6 THE REGULATION OF PHYSIOTHERAPY IN OTHER JURISDICTIONS	26
2.7 IMPACT OF THE LEGISLATION ON COMPETITION	26
3. THE OBJECTIVES OF LEGISLATION REGULATING PHYSIOTHERAPISTS.....	28
3.1 OBJECTIVES OF THE CURRENT ACT.....	28
3.2 SUBMISSIONS	29
3.3 CONCLUSIONS	29
4. THE REGULATION OF PHYSIOTHERAPISTS AND COMPETITION.....	31
4.1 INTRODUCTION	31
4.2 SUBMISSIONS	31
4.3 OPTIONS TO ACHIEVE THE OBJECTIVE	32
4.3.1 <i>Option 1 – No regulation</i>	32
4.3.2 <i>Option 2 – Co-regulation</i>	32
4.3.3 <i>Option 3 – Registration with title protection only</i>	32
4.3.4 <i>Option 4 – Registration with title and core practice restrictions</i>	33
4.3.5 <i>Option 5 – Registration with title and complete practice restrictions (the current system)</i>	33
4.4 ASSESSMENT OF OPTIONS	33
4.4.1 <i>Option 1 – No regulation</i>	33
4.4.2 <i>Option 2 – Co-regulation</i>	35
4.4.3 <i>Option 3 – Registration with title protection only</i>	36
4.4.4 <i>Option 4 –Registration with title and core practice restrictions</i>	37
4.4.5 <i>Option 5 – Registration with title and complete practice restrictions</i>	38
4.5 REGULATORY SYSTEM	38
4.5.1 <i>Restricted titles</i>	40
4.5.3 <i>The core practices of physiotherapy</i>	40
5. ENTRY REQUIREMENTS	46
5.1 INTRODUCTION	46
5.2 REGISTRATION PROCEDURES	46
5.3 GOOD CHARACTER	48
5.4 AGE.....	49
5.5 POST-GRADUATE EXPERIENCE	49
5.6 OTHER REGISTRATION REQUIREMENTS / GROUNDS FOR REFUSAL OF REGISTRATION.....	50
5.6.1 <i>Physical and mental capacity</i>	50
5.6.2 <i>Proficiency in English</i>	50
5.6.3 <i>Recency of practise</i>	52
5.6.4 <i>Criminal convictions</i>	53
5.7 FORMS OF REGISTRATION	54
5.8 MUTUAL RECOGNITION.....	55
5.9 APPEALS	55
6. REQUIREMENTS FOR CONTINUING REGISTRATION.....	56

6.1 INTRODUCTION	56
6.2 REGULAR COMPETENCY TESTING	56
6.3 CONTINUING PROFESSIONAL EDUCATION.....	57
6.4 ANNUAL RENEWAL	58
6.4.1 <i>Current position</i>	58
6.4.2 <i>Disciplinary action by another health registration authority</i>	59
6.4.3 <i>Impairment action by another health registration authority</i>	59
6.4.4 <i>Conclusion</i>	60
6.5 RESTORATION OF REGISTRATION	60
7. DISCIPLINARY SYSTEM	62
7.1 INTRODUCTION	62
7.2 TWO-TIER DEFINITION OF MISCONDUCT	62
7.3 POWER TO COMPEL A PRACTITIONER TO RESPOND TO A COMPLAINT	63
7.4 GROUNDS FOR MAKING A COMPLAINT.....	64
7.5 DISCIPLINARY STRUCTURES	65
7.5.1 <i>The Professional Standards Committee and Tribunal model</i>	66
7.5.2 <i>The Physiotherapy Standards Advisory Committee/Board and Tribunal model</i>	66
7.5.3 <i>Submissions</i>	67
7.6 APPLICATION OF THE TWO-TIER DEFINITION OF MISCONDUCT	68
7.7 ROLE OF THE HEALTH CARE COMPLAINTS COMMISSION.....	69
7.8 COMPOSITION OF DISCIPLINARY BODIES	70
7.8.1 <i>Composition of the Tribunal</i>	70
7.8.2 <i>Composition of the PSAC</i>	70
7.9 CONDUCT OF PROCEEDINGS	71
7.9.1 <i>Conduct of Tribunal proceedings</i>	71
7.9.2 <i>Conduct of PSAC/Board proceedings</i>	72
7.10 MEDICAL EXAMINATION	72
7.11 NOTIFICATION OF CRIMINAL CONVICTIONS AND RELEVANT SERIOUS CRIMINAL CHARGES	72
7.12 EMERGENCY POWERS	74
7.13 DISCIPLINARY ACTION AGAINST PRACTITIONERS WHO CEASE TO BE REGISTERED.....	74
7.14 WITHDRAWAL OF A COMPLAINT.....	74
7.15 MAKING OF COMPLAINTS	75
7.16 CODES OF CONDUCT	75
8. ALTERNATIVES TO THE DISCIPLINARY SYSTEM.....	79
8.1 IMPAIRED REGISTRANTS PANELS	79
8.2 COMPOSITION OF IMPAIRED REGISTRANTS PANELS.....	80
9. COMMERCIAL ISSUES.....	81
9.1 ADVERTISING	81
9.2 OWNERSHIP OF CORPORATIONS PROVIDING PHYSIOTHERAPY SERVICES	84
10. BOARD ISSUES	85
10.1 COMPOSITION.....	85
10.2 TERMS OF BOARD MEMBERS	87
10.3 DELEGATION	87
10.4 COMMITTEES.....	88
11. OTHER ISSUES	89
11.1 PROFESSIONAL INDEMNITY INSURANCE.....	89
11.2 MANDATORY DISCLOSURE OF FEES	89
11.3 RECORD KEEPING PRACTICES	89
11.4 ACCESS TO CLINICAL RECORDS	90
11.5 ACCESS TO INFORMATION ON THE REGISTER	91
APPENDIX A	92
APPENDIX B	93
APPENDIX C	94

APPENDIX D95

EXECUTIVE SUMMARY

1. INTRODUCTION

The Council of Australian Governments' Competition Principles Agreement provides that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of restricting competition and that the objectives of the legislation can only be achieved by restricting competition.

The Department of Health has conducted a review to assess whether the *Physiotherapists Registration Act 1945* accords with the principles outlined above. The terms of reference for the review are set out in **Appendix A**.

An Issues Paper seeking public comment was released in September 1999. The Department received twenty submissions in response to the Issues Paper. A list of submissions is attached as **Appendix B**.

The Department has prepared this Report for consideration by the Minister for Health and the NSW Government in satisfaction of the review requirements under the Agreement.

2. THE REGULATION OF PHYSIOTHERAPISTS

Physiotherapists assess and diagnose physical ailments and conditions, plan treatment programs and use a range of treatments including physical interventions, electrotherapeutic and mechanical agents, training and counselling and the provision of aids and appliances including prostheses. As at 30 June 2000 there were 5,495 physiotherapists registered in NSW. The Department of Health estimates that physiotherapy services valued at over \$400 million are provided in New South Wales each year.

The *Physiotherapists Registration Act 1945* commenced operation on 1 November 1946. The Act is the original legislation for the registration and regulation of physiotherapists in NSW. Registered physiotherapists can use the titles *physiotherapist*, *physical therapist*, *physiotherapeutist*, *physical therapeutist* and *electrotherapeutist* and practice physiotherapy as defined. The Act provides exemptions from the practice restriction for people carrying on their practices as registered chiropractors, dentists, medical practitioners, osteopaths and podiatrists. In addition, registered nurses may practise physiotherapy under the instruction of a registered physiotherapist or one of the exempted professional groups.

The Act seeks to ensure that physiotherapists maintain appropriate standards of professional conduct. The primary means through which this is done is the complaints system. A complaint may be made to the Board or the Health Care Complaints Commission.

3. THE OBJECTIVES OF LEGISLATION REGULATING PHYSIOTHERAPY

To comply with the Competition Principles Agreement the NSW Government is required to identify the objectives of the Physiotherapists Registration Act and to consider whether achieving these objectives through legislation remains appropriate.

Several submissions expressed the view that the objective of the Act is the minimisation of the risks of harm to those using or seeking physiotherapy services. The rationale

underpinning this objective is that in the absence of government intervention, consumers will have difficulty identifying competent and ethical service providers. In short, there is an information imbalance that has the potential to expose consumers to harm.

The misuse of physiotherapy practices can result in serious harm to consumers. The objective of the current Act to minimise the risks of serious harm or injury to consumers therefore remains valid.

Recommendation 1 – Regulatory objective

That any regulation of the physiotherapy profession have the objective of protecting the health and safety of members of the public by providing mechanisms to ensure that physiotherapists are fit to practise.

4. THE REGULATION OF PHYSIOTHERAPISTS AND COMPETITION

The restrictions on the use of the regulated titles and on who may practise physiotherapy impacts on competition in the market for manual therapy services. Submissions supported the continuation of registration and argued that not only could deregulation potentially reduce the quality and effectiveness of treatments provided as physiotherapy but also lead to serious injury to consumers.

The Department has considered the issue of whether the current arrangements produce the greatest overall net benefit for the community, and are the most effective means for achieving the objective of the Act. In order to undertake this consideration, a number of options have been considered.

Option 1 – No regulation

This option would involve the Physiotherapists Registration Act being repealed. Consumer protection legislation would prevent physiotherapists from engaging in false, misleading or deceptive conduct or anti-competitive practices. Action against an unethical or incompetent practitioner could proceed through a civil claim in negligence or for breach of contract. Complaints could be made to a professional association that would play a role in monitoring the professional standards of its members.

Option 2 – Co-regulation

Under this model, to gain the right to use a particular title, a person would be required to have membership of an accredited professional association. Under this system the professional association would administer a disciplinary system.

Option 3 – Registration with title protection only

Under this model only those people meeting certain registration requirements would be able to gain registration. Only registered physiotherapists would be entitled to use a particular title or titles and there would be no practice restrictions. Title regulation would also involve a statutory complaints and disciplinary system.

Option 4 – Registration with title and core practice restriction

This system involves title regulation and a restriction on those core practices of physiotherapy that are considered to pose a serious risk to the public if performed improperly. It is important to note that not all techniques and treatments used by physiotherapists would be restricted.

Option 5 – Registration with title and complete practice restrictions

In addition to restrictions on title, the entire scope of the profession's practice would be limited to the registered professional group, and any other approved groups. This is the current regulatory system.

The Department is of the view that substantial benefits to the public will arise where the risks of harm are minimised. As a consequence, in carrying out a comparative assessment of the options, it is likely that the option which has the highest overall benefits or advantages for the community will be the one which most effectively and simply provides information to consumers about the quality of practitioners and addresses any potential for serious adverse health consequences. In assessing the five options, option 1 – no regulation is used as the benchmark against which the other options are assessed as it imposes no regulatory costs on practitioners and no restrictions on competition.

Submissions, although unanimously in support of the retention of a statutory registration scheme for physiotherapists, were divided on the form that a registration scheme should take, however the majority of submissions favour a title and core practices system in line with those recommended for chiropractors, optometrists and osteopaths.

The Department of Health endorses the view that there is a need in the interests of public health and safety for continued statutory regulation. Furthermore the Department accepts that there are certain core practices within physiotherapy that are particularly dangerous if performed by untrained people.

As the Department has recommended a system of title and core practice registration consideration must be given to the titles that are to be restricted. The Department considers that the title *physiotherapist* should be restricted to registered physiotherapists. As the title *physical therapist* is a term widely used by physiotherapists overseas, particularly in North America, it is recommended that the title *physical therapist* be similarly restricted.

Recommendation 2 – Registration by title

That physiotherapists continue to be registered by title. That the titles *physiotherapist* and *physical therapist* be restricted to registered physiotherapists.

The core practices of physiotherapy

There was a loose consensus that the dangerous core practices of physiotherapy are spinal manipulation and the use of electrotherapeutic treatments.

The NSW Department of Health's Report of the Review of the Chiropractors and Osteopaths Act 1991 concluded that the practice of spinal manipulation is dangerous when performed by unqualified people and recommended that the practice continue to be restricted to chiropractors, medical practitioners, osteopaths and physiotherapists and that the definition and restriction be placed in the Public Health Act.

It is apparent that while there may be risks associated with the use of electrotherapeutic treatments the risks to the public are low and many of the potential injuries are of a lesser degree of seriousness and reasonably readily prevented. However, in the case of shortwave and microwave diathermy and electrical stimulation (interferential treatment) there is evidence that treatment can have significant, possibly life threatening, effects on the heart if it is not administered properly and with due regard to treatment contraindications. Therefore the Department considers that given the potential for the inappropriate use of shortwave and microwave diathermy and electrical stimulation to lead to severe health consequences for patients a restriction on these treatments should be maintained in the interests of public health and safety with the restriction placed in the Public Health Act.

Recommendation 3 – Electrotherapeutic treatments

The use of shortwave and microwave diathermy, electrical stimulation by interferential current and such other electrotherapeutic treatments as are prescribed be restricted to chiropractors, medical practitioners, osteopaths, physiotherapists and podiatrists and that the restriction be placed in the Public Health Act 1991.

5. ENTRY REQUIREMENTS

For a person to be eligible for registration as a physiotherapist he or she must establish his or her competence. The Act provides in section 21(1) that competence is established for initial registration by the applicant:

- having a degree, diploma or other award for the successful completion of a course of training prescribed by the regulations; or
- satisfying the Board that he or she has the requisite knowledge or skill to practise physiotherapy in New South Wales by having undertaken a course of study in physiotherapy and passing such examinations as the Board may require.

Accreditation procedures

The Issues Paper sought comment on whether the mechanism by which courses of training are recognised for registration should be amended and whether an alternative means of assessing an applicant's competence should be developed.

The Department recognises that the physiotherapy profession and physiotherapy regulating authorities have worked hard to establish a transparent and nationally consistent system for accrediting educational courses. However the decision as to whether a course should be accredited or not remains a decision for the Board to make and the Department considers that in addition to existing mechanisms to accredit courses the Board should be able to accredit courses based on criteria established by regulation.

Recommendation 4 – Courses of training

That:

- the Physiotherapists Registration Board have the power to approve courses of training for the purposes of registration;
- the Board be able to accredit a course based on the recommendation of another body;
- the Regulations set out criteria under which educational institutions can apply to the Board to have their courses approved for registration; and
- educational institutions which are aggrieved by a board decision not to approve a course of training have a right of appeal to the Administrative Decisions Tribunal.

The Physiotherapists Registration Board review courses that are currently prescribed for the purposes of registration.

Good Character

Submissions to the review overwhelmingly supported the criteria of good character on the basis it is essential for minimising the risks of harm from inappropriate or unethical conduct. The Department strongly supports the retention of the “good character” requirement as an essential part of satisfying the legislative objective of protecting the public.

Age

When considering the age restriction it must be acknowledged that graduates of Australian physiotherapy courses complete four year courses to be eligible for registration and graduates from overseas who do not have a recognised qualification must satisfactorily complete an examination which is pitched at the level expected of a local graduate. The Department does not believe that there is a problem with unreasonably young people gaining registration and therefore considers that the age restriction is not warranted.

Recommendation 5 – Minimum age

That the requirement that applicants for registration have attained the prescribed age be removed.

Post-graduate Experience

The current Act provides that a person may only be registered as a physiotherapist if he or she has practised physiotherapy for at least 12 months while conditionally registered, although all Australian trained applicants and applicants who have passed the AECOP examination are exempted from this requirement.

The Department is not aware of any evidence that the existing requirements of the Act with respect to post-graduate experience have prevented qualified people from practising physiotherapy in New South Wales. Therefore as the provisions will assist the Board in ensuring that graduates are competent to practise and no submission has argued the provision is unnecessary or unfair, the Department does not propose any changes to the requirement for post-graduate experience.

Grounds for Refusal of Registration

The Issues Paper noted that recent health professional registration Acts include a number of additional criteria for registration which may, if not complied with, provide grounds for refusing registration. These matters include physical and mental capacity; proficiency in English; recency of practice; and criminal convictions.

Physical and mental capacity

The objective of the Act and the role of the Board are the protection of the public. In order that the Board may be proactive rather than reactive in fulfilling its role the Department recommends that the Board be able to hold an inquiry into the competence of an applicant for registration. In this context the Board will be able to consider the physical and mental capacity of the applicant. Where the Board is not satisfied that the applicant is competent to practise it will have the power to register him or her subject to conditions or, in appropriate cases, refuse registration.

Proficiency in English

The Act does not allow the Board to consider an applicant's competence in the English language when dealing with an application for registration. The Department is of the view that demonstrated proficiency in English should only be a requirement for registration where there is evidence of a need for it in the public interest.

On balance the Department has formed the view that an English language requirement for physiotherapists is necessary.

Recency of practice

The Department is of the view that lack of recent practice does not necessarily mean that a person is not competent in all practice contexts. However, the Department considers that the overall objective of the Act, the protection of the public, requires that the Board have available to it the necessary tools to ensure that only competent people may be granted registration or restoration of registration. Therefore the Department recommends that the Board be able to inquire into the competence of an applicant for registration or restoration of registration and if not satisfied as to his or her competence refuse registration or grant it subject to conditions.

Recommendation 6 – Competence for registration

That when a person applies for registration or restoration of their registration the Physiotherapists Registration Board have the power to inquire into that person's competence, including their physical and mental capacity and command of the English language. If following its inquiries the Board is not satisfied as to the person's competence it may refuse to register the person or restore his or her registration or make registration subject to conditions.

Criminal convictions

All health professional Acts enacted in New South Wales since 1989 provide the relevant registration board with the power to refuse to register an applicant based on prior criminal convictions which in the opinion of the board render the person unsuitable for registration.

The Department is of the opinion that it is important for registration boards to be able to consider criminal offences committed by applicants prior to an application for registration.

Recommendation 7 – Consideration of criminal convictions

That when a person applies for registration the Board be able to consider criminal offences committed by the person prior to their application for registration, whether or not a conviction has been recorded. Where the Board is satisfied that the offences render the person unfit to be registered it may refuse registration, or in appropriate circumstances make registration subject to conditions.

Forms of Registration

The Board has the power to grant full registration, provisional registration, conditional registration and approval to practise for a limited period and for specific purposes. It has already been recommended (**recommendation 6**) that the Board have the power to inquire into a person's competence for registration and where not satisfied that they are competent register them subject to conditions or in appropriate cases refuse to register them. On balance the Department considers that this power, in combination with the Board's discretion to waive an application fee in whole or part, will provide suitable flexibility to allow the Board to register applicants in appropriate circumstances and subject to appropriate conditions.

The Department is of the view that it is in the interests of patients and employers that the Board have the power to require physiotherapists to disclose any conditions to which their registration is subject.

Recommendation 8 - Disclosure of conditions on registration

That the Physiotherapists Registration Board have the power to require a physiotherapist to disclose to patients and employers any conditions to which their registration is subject.

That the Physiotherapists Registration Board be required to record on the Register any conditions to which a physiotherapist's registration is subject.

Appeals

Given that this Report recommends (see **recommendation 13**) the establishment of a Physiotherapists Tribunal it is appropriate that appeals relating to the Board's refusal to register or restore the registration an applicant or its decision to grant registration or restoration of registration subject to conditions be made to the Tribunal.

Recommendation 9 – Appeals

That appeals against a decision to refuse to register a person, restore the registration of a person, or impose conditions on a person's registration as a physiotherapist should be made to the Physiotherapists Tribunal.

6. REQUIREMENTS FOR CONTINUING REGISTRATION

It has been suggested that strategies need to be developed in connection with registered health professionals to enable health professional registration boards to play an active role in the ongoing maintenance of professional standards. Possible strategies include:

- regular competency testing and targeted performance assessments;
- mandatory continuing professional education; and
- the development of a more comprehensive annual renewal process for practitioners.

Competency testing and assessment

If a system of regular performance assessments were introduced, there would be additional costs to the profession and the community. No evidence has been put forward to demonstrate that practitioners are failing to maintain their competence to the extent that the introduction of a performance assessment system is justified. Accordingly, the Department does not support this particular option.

Continuing education

The Department does not support mandatory continuing education but proposes that as part of the process for annual renewal of registration practitioners should be required to make a declaration about continuing professional education activities undertaken in the previous 12 months. By requiring practitioners to consider the amount of professional education they have undertaken, the profile of continuing education will be increased.

Annual renewal

The Department supports a more comprehensive process for renewing registration to enable the Board to assess whether any action needs to be taken by it in the interests of protecting the public.

Disciplinary or impairment action by another health registration authority

There are a large number of registered health practitioners who are registered in more than one profession. Clearly there can be instances where the actions of a practitioner may justify disciplinary or impairment action in more than one professional context.

Restoration of registration

The current Act provides that the only requirement that a person who seeks to restore their registration must meet is payment of the prescribed fee. There is no requirement that a person who seeks restoration of their registration must demonstrate their competence to the satisfaction of the Board.

Recommendation 6 provides that where the Board is concerned about a person's competence it will be able to inquire into his or her competence before granting registration or restoration of registration. It is also important that a person who has failed to pay the annual renewal fee by the due date and applies to have their name restored to the Register be required to submit the same declarations as a person who has renewed their registration in time.

Recommendation 10 – Renewal and restoration of registration

That applicants for annual renewal of registration and restoration of registration be required to make declarations on:

- findings of guilt in criminal matters (whether a conviction is recorded or not);
- charges for sex or violence offences where the allegations
 - (a) concern minors or relate to conduct occurring in the course of practice; involve minors; or
 - (b) relate to conduct occurring in the course of practice.
- refusal of registration, suspension or deregistration in other jurisdictions;
- suspension or cancellation of registration or the imposition of conditions on registration by another health registration board in New South Wales whether as a

- result of a disciplinary finding or an impairment process;
- registration with another health registration board in New South Wales;
- significant illness which may adversely affect fitness to practise;
- continuing professional education activities; and
- practice status.

7. DISCIPLINARY SYSTEM

A statutory disciplinary system which is independent, transparent, accountable to the public and fair to all parties can protect the public by facilitating the taking of action against incompetent or unethical practitioners. However, disciplinary arrangements can, in practice, operate against the interests of patients where they impinge on the legitimate commercial and competitive conduct of practitioners. Alternatives to a statutory disciplinary system include professional associations monitoring standards, or legal action at common law or under the Trade Practices and Fair Trading Acts. However neither system would achieve the protective objectives of the Physiotherapists Registration Act.

Two-Tier Definition of Misconduct

The introduction of a two-tier definition would distinguish between serious and less serious matters and limit the potential for the provision to be narrowly interpreted. In addition, the availability of a wide range of graded protective orders under the Physiotherapists Registration Act facilitates this distinction.

All submissions that have addressed this issue have supported the introduction of a two-tier definition of “professional misconduct”.

Power to Compel a Practitioner to Respond to a Complaint

In the interests of assisting the Board to discharge its responsibilities in a timely and efficient manner, the Department supports it having the power to compel the subject of a complaint to respond to a request for information within a reasonable time frame. Failure to respond to a request without reasonable cause would be a breach of the Act and therefore constitute “unsatisfactory professional conduct”.

Recommendation 11 – Definition of misconduct

That a two-tier definition of misconduct be introduced whereby:

- “Unsatisfactory professional conduct” is defined as:
 - (a) any conduct by the physiotherapist that demonstrates a lack of adequate knowledge, skill, judgement, or care in the practice of physiotherapy,
 - (b) contravention of a provision of the Act or the regulations or of a condition of registration,
 - (c) a failure without reasonable excuse by the physiotherapist to comply with a direction of the Board to provide information with respect to a complaint against the physiotherapist,
 - (d) failure to comply with an order made or a direction given by the Board or Tribunal,
 - (e) any other improper or unethical conduct by the physiotherapist in the course of the practice or purported practice of physiotherapy.
- “Professional misconduct” is defined to mean “unsatisfactory professional conduct of a

serious nature which may lead to suspension or de-registration of the physiotherapist”.

Grounds for Making a Complaint

Under the Physiotherapists Registration Act a complaint can be made that a physiotherapist has been convicted of a criminal offence or has been guilty of “misconduct in a professional respect”.

It is essential that the grounds for making a complaint complement the grounds for refusing registration. Therefore the Department recommends that a complaint be able to be made that a physiotherapist has been found guilty in a criminal matter whether or not a conviction is recorded; that the physiotherapist suffers from an impairment; that the physiotherapist does not have the physical or mental capacity to practise; or the physiotherapist is not of good character. A complaint will also be able to be made that a physiotherapist has been guilty of unsatisfactory professional conduct or professional misconduct.

The Department has considered the matter of complaints about professional fees. Registration boards, including the Physiotherapists Registration Board, regularly receive complaints about professional fees and the efficacy of the treatment received for those fees. In the absence of conduct that constitutes “misconduct in a professional respect” the Physiotherapists Board has no power to consider such complaints. The Department is of the view that the Physiotherapists Registration Board should be able to receive and consider complaints about a practitioner’s failure to provide treatment of value.

Recommendation 12 – Grounds for complaint

The grounds for making a complaint about a physiotherapist be that the physiotherapist

- has been convicted of an offence or been the subject of a criminal finding in circumstances that render the physiotherapist unfit, in the public interest, to practise,
- is guilty of unsatisfactory professional conduct or professional misconduct,
- has not provided treatment of value,
- suffers from an impairment,
- does not have the physical or mental capacity to practise,
- is not of good character.

Disciplinary Structures

The Issues Paper raised for consideration changes to the Act’s disciplinary structure. Possible changes include introduction of a Professional Standards Committee and Tribunal system modelled on that in the Nurses Act and the Medical Practice Act or a Professional Care Assessment Committee/Board and Tribunal system based on the system under the Dentists Act. The Dentists Act model is the model that has been recommended for chiropractors, osteopaths, optometrists and psychologists following reviews of the relevant Acts.

The Department considers that the Dental Act model offers the most effective model for handling consumer complaints expeditiously whilst ensuring that serious matters are appropriately dealt with through a formal Tribunal system.

Application of the Two-tier Definition of Misconduct

The Department proposes that the recommended two tier definition of misconduct be applied through a two tier Board inquiry/Tribunal structure that incorporates the

Physiotherapy Standards Advisory Committee (PSAC). Complaints of unsatisfactory professional conduct will be considered by the relevant Board after investigation by the PSAC, the HCCC or the Board's Inspectors, and complaints of professional misconduct will be considered by the Tribunal.

The Board would be able to make the following orders:

- counsel or reprimand the physiotherapist;
- make an order in respect of the fees charged by the physiotherapist for the services the subject of the complaint;
- order the physiotherapist to seek medical or psychiatric treatment or counselling;
- order the physiotherapist to undertake additional training;
- order the physiotherapist to seek advice on the management of their practice;
- order the physiotherapist to report on the status of their practice to the Board, or its nominee; and
- impose conditions on the physiotherapist's practice.

The Tribunal would be able to make the orders available to the Board. The Tribunal will also have the power to suspend or de-register the physiotherapist.

The power to fine a practitioner has been deleted from the list of protective orders available to the Board and Tribunal.

Recommendation 13 – Revised disciplinary structure

That a revised disciplinary structure be introduced whereby:

- The Physiotherapy Standards Advisory Committee will be established to consider and investigate complaints, referred from the Board regarding standards of professional services. The Physiotherapy Standards Advisory Committee will be able to conciliate and investigate consumer complaints, including complaints about fees, and to make recommendations to the Board for the resolution of those complaints or any further action the Committee considers should be taken. When the Committee recommends that there be an inquiry into unsatisfactory professional conduct the Board must conduct an inquiry or refer the matter to the Tribunal for a hearing.
- The Board will hear complaints of unsatisfactory professional conduct following investigation of a complaint by the Physiotherapy Standards Advisory Committee, the Health Care Complaints Commission or the Board's Inspectors.
- A Tribunal will be established to hear complaints of professional misconduct.

Following an inquiry the Board is to be able to exercise any of the following powers either singly or in combination:

- Place conditions on the physiotherapist's registration.
- Make an order in respect of the fees charged by the physiotherapist for the services the subject of the complaint.
- Issue a caution or reprimand.
- Order the physiotherapist to seek medical or psychiatric treatment or counselling.
- Order the physiotherapist to undertake further training.
- Order the physiotherapist to report on the status of their physiotherapy practice to the Board, or its nominee.

- Order the physiotherapist to seek advice on the management of their physiotherapy practice.

The Tribunal will be able to exercise any of the above powers of the Board, as well as:

- Suspending the physiotherapist's registration for such time as it thinks fit.
- Removing the physiotherapist's name from the Register.

Composition of the Tribunal

The Tribunal will comprise:

- a legal practitioner with at least seven years' experience, appointed by the Governor as chair or deputy chair of the Tribunal;
- two registered physiotherapists appointed by the Board; and
- a representative of consumers appointed by the Board from a panel of consumers nominated by the Minister.

In the interests of transparency and natural justice the Department recommends that members of the Board be ineligible for appointment to the Tribunal.

Composition of the PSAC

The PSAC will be constituted by three physiotherapists and a consumer. In order to emphasise the transparency of the process undertaken by the PSAC members of the Board will not be eligible to sit on the PSAC.

Recommendation 14 – Constitution of disciplinary bodies

That the Physiotherapists Tribunal be constituted as follows:

- a legal practitioner with extensive experience, appointed by the Governor;
- two registered physiotherapists having such qualifications as may be prescribed, appointed by the Board; and
- one representative of consumers appointed by the Board from a panel of consumers nominated by the Minister.

That the Physiotherapy Standards Advisory Committee be appointed by the Minister and be constituted as follows:

- one registered physiotherapist, who is to be chair of the Committee, nominated by the Board;
- two registered physiotherapists selected from a panel provided to the Minister by the Board; and
- one representative of consumers appointed from a panel of consumers nominated by the Minister.

That Board members should not be eligible to sit on the Tribunal or the Physiotherapy Standards Advisory Committee.

Conduct of Tribunal proceedings

Tribunals are designed to be adversarial and formal and can conduct proceedings as they see fit. As tribunals have such extensive and far reaching powers to effect a practitioner's livelihood a high standard of natural justice must be observed. Therefore legal

representation is allowed and a decision of a tribunal may be appealed to the Supreme Court on a point of law or the severity of penalty.

Conduct of PSAC/Board proceedings

The PSAC will conduct hearings and its investigations and endeavours to resolve complaints will be conducted in as informal a manner as is appropriate in the circumstances.

Where the PSAC refers a matter to the Board for consideration the Board will consider that matter in an informal manner and will be able to conduct its inquiry in whatever manner it considers appropriate given the nature of the material and recommendations available to it.

Medical Examination

All submissions that addressed this point, including those from the Board and the Australian Physiotherapy Association, agreed that the Board should have the power to order a physiotherapist who is subject to a complaint to undergo a medical examination. In line with the Medical Practice Act the Department recommends that the Act provide that a failure by a practitioner to attend for an examination may be considered as a lack of physical or mental capacity.

Recommendation 15 – Medical examinations

That the Board have the power to order that a physiotherapist who is the subject of a complaint attend for a medical examination.

Notification of Criminal Convictions and Relevant Serious Criminal Charges

The criminal justice system can provide information relevant to whether disciplinary action should be initiated against a practitioner. The Department has identified a number of strategies that would be of assistance in this regard. They are as follows:

- Courts are to be required to notify the relevant registration board of any practitioner who is convicted of an offence or who is found guilty of a sex or violence offence where a conviction is not recorded.
- Practitioners are to be under a positive obligation to notify their registration board if they are found guilty of any offence, except prescribed offences, whether or not a conviction is recorded.
- Practitioners are to be under an obligation to notify their registration board within seven days if charged with a “sex or violence offence” where:
 - (a) the allegations relate to conduct involving minors; or
 - (b) the allegations relate to conduct occurring in the course of practice.

A “sex or violence offence” means an offence involving sexual activity, child pornography, acts of indecency, physical violence or the threat of physical violence.

Recommendation 16 – Criminal convictions

That:

- Courts be required to notify the Board of any practitioner who is convicted of an offence, unless it is an offence of a type that is exempted by regulation;
- Courts be required to notify the Board of any practitioner who is found guilty of a sex or violence offence, irrespective of whether a conviction is recorded;
- Practitioners be required to notify the Board if they are found guilty of an offence, unless it is an offence of a type that is exempted by regulation, irrespective of whether a conviction is recorded or not; and
- Practitioners be required to notify the Board within seven days if charged with a sex or violence offence where:
 - (a) the allegations relate to conduct involving minors; or
 - (b) the allegations relate to conduct occurring in the course of practice.

A sex or violence offence means an offence involving sexual activity, child pornography, acts of indecency, physical violence or the threat of physical violence.

Emergency Powers

Under the Medical Practice Act and certain other health professional registration Acts the respective registration boards have the power to order that a practitioner's registration be suspended or made subject to conditions where that action is required in order to protect the physical or mental health of any person, including the practitioner.

The Department is of the opinion that the nature of physiotherapy practice is such that the inclusion of emergency powers is appropriate.

Recommendation 17 – Emergency powers

That the Physiotherapists Registration Act include emergency suspension powers modelled on section 66 of the Medical Practice Act.

Disciplinary Action Against Practitioners Who Cease to be Registered

Neither the Physiotherapists Registration Act nor the Health Care Complaints Act allow the continuation of a complaint against a person who ceases to be registered. Submissions were unanimously of the view that the Physiotherapists Registration Act should contain a provision allowing the Board to consider and take action on a complaint that concerns a person who is no longer registered.

Recommendation 18 - Disciplinary action

That the Act be amended to provide that the Board may deal with a complaint against a person who ceases to be registered.

Withdrawal of a Complaint

Recommendation 19 – Withdrawal of a complaint

That a complaint be able to be withdrawn once an investigation or disciplinary action has been commenced, following consultation between the Board and the Health Care Complaints Commission.

Making of complaints

The Department considers that complaints should be verified by statutory declaration when the matter is to be referred for disciplinary action and that the Health Care Complaints Commission should be exempt from this requirement.

Recommendation 20 – Statutory declarations

That a complaint to the Physiotherapists Registration Board be in writing and be verified by a statutory declaration at the point where the complaint is to be referred for disciplinary action. The Health Care Complaints Commission is to be exempt from the requirement to verify a complaint by statutory declaration.

Codes of Conduct

The Physiotherapists Registration Act does not provide the Board with the power to make codes of professional conduct that set out the rules of conduct to be observed by physiotherapists in practice.

Codes of conduct have been given a statutory basis in several health professional registration Acts to assist the relevant board ensure that registered practitioners are competent to practise. These codes cover a range of issues including but not limited to standards of conduct, professionalism, privacy and confidentiality, research and relations with other members of their professions.

On balance, the Department supports the Act containing a power for the Board to make a code of conduct. It is important that any code of conduct made or adopted by the Board does not sanction anti-competitive conduct or contain trivial matters, and that it serves the interests of consumers. Therefore the Department supports a code being made by the Board following a process of public consultation after which the Minister's approval must be obtained. The process of public consultation would require a proper assessment of the respective advantages and disadvantages of a code's provisions.

Recommendation 21 – Codes of conduct

That the Act provide for the making of a code of conduct by the Board following release of a draft code and impact assessment statement for public consultation and the Minister's approval.

That the Minister may direct the Board to make a code of conduct on a particular matter with the content of such a code being developed by the Board.

8. ALTERNATIVES TO THE DISCIPLINARY SYSTEM

Both the Nurses Act and the Medical Practice Act provide the relevant Board with a means other than the disciplinary system for dealing with practitioners who may be impaired in their ability to practise. These mechanisms enable those Boards to take action before the practitioner's condition puts the public at risk or disciplinary proceedings would be warranted.

Both the Medical Board and the Nurses Board as well as the Health Care Complaints Commission report that the impairment systems function well and provide appropriate and efficient means for the management of impaired practitioners. Submissions were uniformly

in agreement that an impairment system modelled on the system in the Medical Practice Act should be included in the Act.

Therefore the Department recommends that the Act provide for the establishment of impaired registrants panels which will be charged with inquiring into and managing physiotherapists who suffer from impairment.

Impaired registrants panels will be constituted by two people at least one of whom is a registered physiotherapist. This structure will ensure that at least one of the members of a panel is a peer of the physiotherapist and will also allow the panel to have other expert membership, such as a medical practitioner or psychologist, as required in particular cases.

Recommendation 22 – Impaired practitioners

That the Act be amended to include impaired practitioners provisions modelled on Part 13 of the Medical Practice Act.

9. COMMERCIAL ISSUES

The Department supports the Physiotherapists Registration Board continuing to have a regulatory role in the area of advertising although the prohibition on advertising by physiotherapists that is vulgar or sensational and advertising that is unprofessional or likely to bring the profession into disrepute will be removed.

As the existing restrictions on advertising extend to corporations that provide physiotherapy services it is important that company directors and those involved in the management of corporations can be held accountable for contraventions of the advertising restrictions. Therefore the Department recommends that the Act be amended to provide that when a body corporate commits an offence every director and person who takes part in the management of the body corporate is taken to have committed the same offence.

Recommendation 23 – Advertising

That the regulations regarding advertising by physiotherapists provide that a physiotherapist or a corporation providing physiotherapy services must not advertise in a manner which

- is false, misleading or deceptive; or
- creates an unjustified expectation of beneficial treatment; or
- promotes the unnecessary or inappropriate use of the services of a physiotherapist.

That when a body corporate commits an offence, every director and person who takes part in its management will be taken to have committed the same offence unless he or she proves that:

- the offence was committed without his or her consent or connivance; and
- he or she exercised all such due diligence to prevent the commission of that offence as he or she ought to have exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.

10. BOARD ISSUES

The Department has recommended the Physiotherapists Registration Board be reformed with eleven members.

Recommendation 24 – Board composition

That the Physiotherapists Registration Board have eleven members and be constituted as follows :

- Three physiotherapists elected by physiotherapists;
- one physiotherapist selected by the Minister from nominations provided by educational institutions providing undergraduate physiotherapy education in NSW;
- one physiotherapist selected by the Minister from nominations provided by one or more professional physiotherapy associations including the Australian Physiotherapy Association;
- one physiotherapist in practice in NSW selected by the Minister;
- one legal practitioner nominated by the Minister;
- one officer of the Department of Health or a public health organisation selected by the Minister; and
- three people, at least two of whom are representative of the public, nominated by the Minister.

Terms of Board Members

Recommendation 25 – Terms of Board members

That:

- a person may not hold office as a member of a board for more than three consecutive terms;
- each term of office as a board member is not to exceed four years.

Delegation

The Department supports the Physiotherapists Registration Board having powers of delegation.

Recommendation 26 – Delegation

That the Physiotherapists Registration Board have the power to delegate any of its functions (other than the power of delegation and the power to approve expenditure from the Education and Research Account) to:

- the President;
- the Deputy President;
- a committee of two or more members of the Board; or
- the Registrar or any other member of staff of the Board.

However, the Board must not delegate any of its functions in relation to complaints or disciplinary proceedings to the Registrar or any other member of staff of the Board.

Committees

It is recommended that the Physiotherapists Registration Board have the power to establish committees to assist it in carrying out its functions.

Recommendation 27

That the Physiotherapists Registration Board have the power to establish committees.

11. OTHER ISSUES

Access to Information on the Register

The Department supports the public having the right to access relevant professional information about health practitioners, including information relating to restrictions on their ability to practise. The Department also believes that it may be in the interests of the public and the profession for information relating to disciplinary hearings to be available. Therefore the Department recommends that the Board be able to provide relevant professional information about physiotherapists to any person who may be interested.

Recommendation 28 - Information on the Register

That information on the Register, with the exception of a physiotherapist's residential address, be available to members of the public.

That the Physiotherapists Registration Board be able to publish Board and Tribunal decisions in any manner it considers appropriate.

1. INTRODUCTION

1.1 Background to the Review

The Council of Australian Governments Competition Principles Agreement provides that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of restricting competition and that the objectives of the legislation can only be achieved by restricting competition. Governments have agreed that legislation reviews will:

- (i) clarify the objectives of the legislation;
- (ii) identify the nature of legislative restrictions;
- (iii) analyse the likely effects of the restriction on competition and the economy generally;
- (iv) assess and balance the costs and benefits of any restrictions identified; and
- (v) consider alternative means for achieving the same result.

The Department of Health has conducted a review of the *Physiotherapists Registration Act 1945* in accordance with the principles outlined above. The review has also involved a wide ranging consideration of the Act as a whole. The terms of reference for the review are set out at **Appendix A**.

1.2 Conduct of the Review

An Issues Paper designed to facilitate comment from the professions and the public was released in September 1999. The paper was largely distributed to interested parties via the Department of Health's Internet site with approximately 30 hard copies of the Paper distributed to key stakeholders and those unable to access the Internet. Stakeholders consulted include consumers, government bodies, physiotherapists, professional associations and other health care professionals. In total 20 submissions were received by the Department.

A list of submissions received is at **Appendix B**.

1.3 The Report

The Department has prepared this Report for consideration by the Minister for Health and the NSW Government in satisfaction of the review requirements under the Competition Principles Agreement.

2. THE REGULATION OF PHYSIOTHERAPISTS

2.1 Introduction

Physiotherapists provide services to consumers in order to *develop, maintain and restore maximum movement and functional ability throughout the lifespan*¹. Practitioners assess and diagnose physical ailments and conditions, plan treatment programs and use a range of treatments including physical interventions, electrotherapeutic/electrophysical and mechanical agents, training and counselling and the provision of aids and appliances including prostheses.

As at 30 June 2000 there were 5,495 physiotherapists registered in NSW. Of the total number of registrants in practice it is estimated that almost half work in private practice including group and multidisciplinary practices. The predominant types of treatment provided in private practice is for sporting and work injuries, ailments associated with ageing and lifestyle, as well as health promotion and injury prevention activities. Approximately 34% of practitioners work in the public and private hospital systems providing a diverse range of services ranging from rehabilitation following surgery or accidents through to prescribing exercise regimes for cardiac patients.

The Department of Health estimates that physiotherapy services valued at over \$400 million are provided in New South Wales each year. This turnover represents payments from health insurance funds, the value of services provided to patients in the public hospital system, out of pocket expenses of insured consumers and payments by uninsured consumers. Physiotherapy services are not included in the Commonwealth Medicare Benefits Schedule although all private health insurance funds in NSW provide rebates for physiotherapy services.

2.2 The Physiotherapists Registration Act 1945

The *Physiotherapists Registration Act 1945* commenced operation on 1 November 1946. The Act is the original legislation for the registration and regulation of physiotherapists in NSW and although it has been extensively amended over the intervening years it is considered to be outdated. An outline of the key features of the Act follows.

2.2.1 Restriction on titles and practice

The Act provides that only those people who meet the registration requirements can be registered as physiotherapists in NSW. Those who gain registration are entitled to practise physiotherapy as defined by the Act and use the titles *physiotherapist, physical therapist, physiotherapist, physical therapist* and *electrotherapist*.

Unregistered people may not practise physiotherapy, hold themselves out as being registered, as qualified to be registered, or as competent or willing to practise physiotherapy as defined. The Act provides exemptions from the practice restriction for people carrying on their practices as registered chiropractors, dentists, medical practitioners, osteopaths and podiatrists. In addition, registered nurses may practise physiotherapy under the instruction of a registered physiotherapist or one of the exempted professional groups. The Physiotherapists Registration Act is therefore a “title and whole of practice” Act.

¹ Description of physical therapy adopted by the 14th annual general meeting of the World Congress of Physical Therapy, May 1999, paragraph 1.1

2.2.2 Registration requirements

For a person to be registered as a physiotherapist under the Physiotherapists Registration Act he or she must be of good character, have reached the prescribed age (although no age is prescribed), pay the prescribed fee and:

- have received a diploma, certificate or other award prescribed by the regulations; or
- satisfy the Board that s/he has the knowledge and skill to practise physiotherapy in New South Wales by reason of having taken a course of study in physiotherapy and having passed such examinations as the Board may require.

Section 21(1A) of the Act provides that a person may only be registered if they have gained 12 months post-graduate work experience while conditionally registered. Section 21(1B) provides that the Board may exempt people from this requirement and all Australian graduates and overseas graduates who have passed the registration examination conducted by the Australian Examining Council for Overseas Physiotherapists (AECOP) are exempted.

Physiotherapists registered interstate and in New Zealand are, irrespective of their qualifications, eligible for registration under the Mutual Recognition Acts based on that interstate or New Zealand registration.

Fees levied by the Board for registration purposes are:

- Application for registration \$60;
- Renewal of registration \$50; and
- Restoration of registration \$100.

Physiotherapists are required to renew their registration on an annual basis.

2.2.3 Regulation of the conduct of physiotherapists

The Act seeks to ensure that physiotherapists maintain appropriate standards of professional conduct. The primary means through which this is done is the complaints system. A complaint may be made to the Board or the Health Care Complaints Commission (the “HCCC”) that a physiotherapist:

- has been convicted of a criminal offence; or
- has been guilty of misconduct in a professional respect.

The current Act provides that there is only one category of professional misconduct and all complaints are considered by the Board, where appropriate in conjunction with the report of a Professional Standards Committee. The current statutory definition of “misconduct in a professional respect” is attached at **Appendix C**.

Breaches of specific offence provisions of the Act such as the making of false entries in the Register, advertising in contravention of the regulations or practising while unregistered can be pursued through criminal action in the Local Court. However, the definition of “misconduct in a professional respect” is such that breaches of the Physiotherapists Registration Act and regulation by physiotherapists may also be pursued through the Act’s disciplinary system.

A complaint can be made to the Physiotherapists Registration Board under the Physiotherapists Registration Act or to the HCCC in accordance with the provisions of the *Health Care Complaints Act 1993*. Under the two Acts processes are in place to ensure that complaints are handled in a coordinated manner. In the first instance, complaints made to one body are notified to the other. Action on a complaint is then determined through consultation between the Board and the HCCC. Matters can be handled in a number of ways including referral to the Health Conciliation Registry for conciliation, referral to the HCCC for investigation, or dismissal.

Following an investigation, the HCCC can make a recommendation that disciplinary action be taken. Serious complaints are referred to the Board for an inquiry conducted by the Board or a Professional Standards Committee (PSC). In conducting an inquiry both the Board and a PSC can inform themselves of any matter as they see fit, summons witnesses, take evidence and obtain documents. Neither body is bound by the rules of evidence. Legal representation is only permitted before a Board inquiry.

A wide range of protective orders can be made by the Board if it is satisfied a complaint is proved after a hearing. These orders include a reprimand; an order that the practitioner receive medical or psychiatric treatment or counselling; an order the practitioner undertake further training; an order that the person report on the status of his or her practice to the Board or its nominee; an order that the person take advice in relation to the management of his or her practice; a fine of up to \$4,400; imposition of conditions on the practitioner's registration; and suspension or cancellation of the practitioner's registration.

2.3 Other Legislation

It is important to note the existence of the broader regulatory environment in which physiotherapy services are provided.

- Consumer protection laws (ie the Commonwealth *Trade Practices Act 1974* which is administered by the Australian Competition and Consumer Commission and the NSW *Fair Trading Act 1987* which is administered by the NSW Department of Fair Trading) prohibit physiotherapists (and others) from making false and misleading representations in the course of providing a service, for example, falsely claiming to hold qualifications or membership of professional associations.
- The HCCC has the power to investigate complaints about any person or organisation that provides a health service, whether registered or not.
- In the case of a dispute between a health professional and a consumer, either party could seek to resolve their differences through the civil legal system, although it is recognised that this is generally an expensive process and is unsuitable for minor complaints. As an alternative such matters and complaints about fees can also be argued before a Consumer Claims Tribunal which has the objective of providing a simple low cost mechanism for dispute resolution.
- Recent amendments to the Public Health Act will, on commencement, make it an offence for a person to advertise health services in a manner that is false, misleading or deceptive.

2.4 The Role of Professional Associations

In addition to the Board, professional associations play a role in monitoring standards among physiotherapists. The Australian Physiotherapy Association has a code of conduct which deals with a number of performance related issues such as continuing professional education. However, not all physiotherapists are members of the Association.

2.5 Other Service Providers

There are a number of health practitioners that provide some of the services that are ordinarily provided by physiotherapists. These practitioners include chiropractors, masseurs, medical practitioners, osteopaths and podiatrists. All persons providing health services, whether registered or not, are subject to the Health Care Complaints Act and the other consumer protection legislation outlined above, and chiropractors, medical practitioners, osteopaths and podiatrists are regulated by the relevant professional registration board which may deal with complaints about those practitioners.

2.6 The Regulation of Physiotherapy in Other Jurisdictions

While all Australian jurisdictions provide for the establishment of a registration board and academic requirements for registration, different arrangements apply for the disciplining of members and the handling of complaints. For example, whilst NSW restricts the use of the titles *physiotherapist*, *physical therapist*, *physiotherapeutist*, *physical therapeutist* and *electrotherapeutist* and restricts the practice of physiotherapy, some jurisdictions only prohibit the use of certain titles. A summary of the main features of legislation regulating physiotherapy in other jurisdictions is provided at **Appendix D**.

2.7 Impact of the Legislation on Competition

Legislative controls imposed by Government often have positive outcomes for the community where they effectively address problems that arise from the provision of services in an unregulated environment. These problems are sometimes known as ‘market failures’. An example of such a problem is where there is an imbalance of information between service providers and consumers, limiting the ability of the latter to make informed choices when seeking services. However, regulation may also restrict competition among service providers. This may result in new problems or costs for business, consumers and government which are not justified having regard to the nature of the problem which the intervention was designed to address. Alternatively, regulation may not be effective in addressing the identified problems at all.

The principal requirements of the Act that may have an impact on competition can be summarised as follows:

- The Act imposes restrictions on who may practise physiotherapy.
- The restriction on the use of certain titles by unregistered persons may confer a competitive advantage on physiotherapists over other service providers.
- The requirements for registration may restrict competition where the number of persons that may gain registration (and hence the right to use the restricted titles and practise

physiotherapy) is limited beyond that which is necessary to ensure that the objectives of the Act can be achieved. Limitations on the number of physiotherapists, whether those limitations are effected by requirements for academic qualifications or the imposition of specific requirements such as character, may result in a lessening of competition.

- The complaints and disciplinary system, although generally directed at ensuring high standards are adopted by physiotherapists, may inappropriately focus on commercial conduct thus limiting information to consumers on the range of services available.
- The power to impose conditions on registration could, in certain cases, be used to limit competition or punish a physiotherapist who engages in aggressive competitive conduct.

The guiding principles of the Competition Principles agreement are that legislation is not to restrict competition unless the benefits to the community outweigh the costs and the objective of the legislation can only be met by restricting competition. In assessing the restrictions outlined above the review has applied these guiding principles.

3. THE OBJECTIVES OF LEGISLATION REGULATING PHYSIOTHERAPISTS

3.1 Objectives of the Current Act

To comply with the Competition Principles Agreement the NSW Government is required to identify the objectives of the Physiotherapists Registration Act and to consider whether achieving these objectives through legislation remains appropriate. If it is established that there is a need for legislative intervention, the precise form of that intervention must be considered. (see **chapter 4**)

The Physiotherapists Registration Act does not contain a statement of its objectives. The preamble to the Act states:

“An Act to make provision for the registration of physiotherapists; to regulate the qualifications for and the effect of such registration; to provide for the constitution of a Physiotherapists Registration Board and to define the powers and functions of that Board; and for purposes connected therewith.”

The powers and duties of the Physiotherapists Registration Board are as follows:

Subject to this Act the powers and duties of the Board shall be:

- (a) to register physiotherapists,*
- (b) to approve of, or arrange the conduct of, examinations required to be undertaken by persons applying for registration pursuant to section 21(1)(b),*
- (c) to issue and cancel certificates of registration,*
- (d) to suspend the registration of any person under this Act and to annul such suspension,*
- (e) to cancel the registration of any person under this Act and to annul such cancellation, and*
- (f) generally, to do any other act or exercise any other power or perform any other duty necessary for carrying the provisions of this Act into effect.*

In his second reading speech when introducing the Act to Parliament in 1944 the then Minister for Health the Hon C A Kelly said

“The main object of this Bill is to ensure that the public may be aware that people who style themselves physiotherapists are registered as such under the law of the State, which registration will be sufficient guarantee of the requisite knowledge and skill for the efficient practice of physiotherapy.”²

The primary objective of the legislation at the time it was introduced was therefore to protect the health and safety of members of the public. The Act seeks to do this by ensuring that only people who are considered to have adequate education and experience may hold themselves out as physiotherapists and practise physiotherapy. The Act also protects the public by the complaints mechanism which is designed to exclude unscrupulous or sub-standard operators from the market for physiotherapy services.

² NSW Legislative Assembly Hansard, 9 November 1944, page 912.

3.2 Submissions

Most submissions commented on the objectives of the legislation, however, very few submissions directly addressed the question of whether the objectives stated in the Issues Paper are appropriate objectives for Government intervention in relation to the provision of physiotherapy services. Clearly, the appropriateness of the objectives of legislative intervention can only be determined by reference to the problems that exist in an unregulated environment. Most submissions highlighted the potential risks of harm to the “health and safety of consumers” in an unregulated environment, although no submissions have provided evidence to demonstrate this point.

The HCCC in its submission stated that:

“the no regulation model with untrained persons providing services would leave consumers of physiotherapist (sic) services:

- (a) at greater risks of serious injury and harm;*
- (b) at greater risks of exploitation including financially and sexually;*
- (c) in a position of making choices about their care without adequate and reliable information and without the ability to assess the quality and adequacy of the services so provided;*
- (d) with no adequate means to make and to have health complaints appropriately resolved.”³*

One submission suggested that:

“The objects clause .. could also include protect the community from unregistered health care workers who claim to practise physiotherapy.”⁴

3.3 Conclusions

Several submissions expressed the view that the objective of the Act is the minimisation of the risks of harm to those using or seeking physiotherapy services. The rationale underpinning this objective is that in the absence of government intervention, consumers will have difficulty identifying competent and ethical service providers. In short, there is an information imbalance that has the potential to expose consumers to harm.

A number of potential risks of harm to consumers have been identified. The “harm” that is sought to be addressed is not limited to the acts of registered or unregistered persons that injure a patient, but includes the injury that may result if a patient is unable to obtain the services they need, or is discouraged from seeking those services. These can be summarised as follows:

³ Submission – Health Care Complaints Commission

⁴ Submission – David Cross, Physiotherapy Adviser Macquarie Area Health Service, Far West Area Health Service, on behalf of rural physiotherapists

- Consumers (most of whom lack specialised knowledge) may have a limited ability to assess their need for physiotherapy services or the type of service required. There are a number of different service providers not all of whom have the same training and skills or can offer the same service.
- The inability of consumers to identify competent service providers may result in a failure to seek treatment and a failure to detect chronic or severe illness. Furthermore if an incompetent practitioner is consulted in the first instance, appropriate treatment may be delayed or inappropriate treatment provided and consumers may be discouraged from seeking further treatment. Unmanaged or untreated illness can result in reduced health, well being with associated financial impacts on individuals and the economy in general.

It is also noted that there are risks of harm associated with those who are qualified and registered to practise as physiotherapists.⁵ Each year a proportion of the complaints received by the Physiotherapists Registration Board concern the clinical competence of registered physiotherapists.

The misuse of physiotherapy practices can result in serious harm to consumers. The objective of the current Act to minimise the risks of serious harm or injury to consumers therefore remains valid. The most appropriate means of achieving this objective is considered in the next chapter. If it is proposed to achieve that objective through legislative intervention then that legislation should include a specific statement of this objective as a means of informing consumers and the professions of the purpose of regulation.

Recommendation 1 – Regulatory objective

That any regulation of the physiotherapy profession have the objective of protecting the health and safety of members of the public by providing mechanisms to ensure that physiotherapists are fit to practise.

⁵ Appendix 2, Department of Health, Review of the Physiotherapists Registration Act 1945, Issues Paper, September 1999

4. THE REGULATION OF PHYSIOTHERAPISTS AND COMPETITION

4.1 Introduction

The primary forms of intervention by which the Physiotherapists Registration Act seeks to achieve the objective outlined in the previous chapter are the registration system, the placement of restrictions on who may use the title *physiotherapist* and the other regulated titles, and the limitation on who may practise physiotherapy. The restriction on title aims to achieve the objective of the legislation by providing consumers with a simple and understandable means of identifying practitioners capable of providing professional services. By enabling consumers to identify such practitioners, risks of injury and the costs to consumers of seeking qualified practitioners will be reduced. The rationale behind the practice restriction is a reduction in the risk of any serious health consequences that may be associated with physiotherapy.

Although the Issues Paper noted that the registration of physiotherapists, along with the registration of related practitioners such as chiropractors and osteopaths, could have benefits for consumers, it was also noted that this might also have disadvantages or costs, primarily through the impact of registration on competition. Registration with restrictions on certain professional titles and on the practice of physiotherapy may confer a competitive advantage on registered physiotherapists by indicating that they are able to provide a superior service. In addition the registration criteria may restrict the number of practitioners who become registered and therefore impact on competition among physiotherapists. This may result in unnecessary costs for consumers. A restriction on the practice of physiotherapy confers on physiotherapists a further competitive advantage as the profession may have a near monopoly on the performance of particular procedures.⁶

This chapter will focus on the impact of the restrictions on the use of the regulated titles and on who may practise physiotherapy and whether these regulatory interventions are necessary to achieve the objective of the Act. Alternatives to these restrictions are considered to determine whether they can achieve the objective of the legislation, at a lower cost and with less impact on competition. Before turning to these alternatives it is important to reiterate that the Physiotherapists Registration Act is not the only legislation which has an impact on the delivery of physiotherapy services. The Trade Practices Act, the Fair Trading Act and the Health Care Complaints Act are also relevant in this regard.⁷

4.2 Submissions

Submissions were sought on the effectiveness of the current Act, the costs and benefits of the current system and whether the objectives of the legislation could be achieved by other means. The overwhelming majority of submissions supported the continuation of registration and argued that not only could deregulation potentially reduce the quality and effectiveness of treatments provided as physiotherapy but also lead to serious injury to consumers.

“The APA advocates the need for regulation of practitioners providing physiotherapy services. The provision of services or advice by untrained persons has the potential to

⁶ Chiropractors, dentists, medical practitioners, osteopaths and podiatrists are exempt from the practice restriction and registered nurses may practise physiotherapy under instruction.

⁷ See 2.3

cause harm to consumers. A person who does not have an adequate background knowledge of pathology, mechanisms of injury or appropriate technique selection may well cause harm both in an active manner due to injury from techniques performed incorrectly, or indirectly through a less than ideal outcome occurring due to inappropriate techniques being performed or inadequate advice being provided.”⁸

“Removal of registration for physiotherapy would reduce the effective range of options to the public, as there would be very little to distinguish the type of services at the point of selection.”⁹

4.3 Options to Achieve the Objective

In view of the submissions received concerning the current Act and the impact on competition, the Department has further considered the issue of whether the current arrangements produce the greatest overall net benefit for the community, and are the most effective means for achieving the objective of the Act. In order to undertake this consideration, a number of options have been identified.

4.3.1 Option 1 – No regulation

This option would involve the Physiotherapists Registration Act being repealed. Consumer protection legislation would prevent physiotherapists from engaging in false, misleading or deceptive conduct or anti-competitive practices (eg price fixing and exclusionary dealing). Action against an unethical or incompetent practitioner could proceed through a civil claim in negligence or for breach of contract. Complaints could be made to a professional association that would play a role in monitoring the professional standards of its members. If this approach were adopted professional associations may choose to develop descriptors which assist the public in choosing suitably qualified practitioners, such as certified practising physiotherapist, although it must be noted that the use of such a descriptor would not be restricted.

4.3.2 Option 2 – Co-regulation

Under this model, to gain the right to use a particular title, a person would be required to have membership of a professional association accredited by the Government. This would provide a forum for the continued monitoring of professional standards. Once the person ceases to be a member of the association, he or she could no longer use the title. Under this system the professional association would administer a disciplinary system.

4.3.3 Option 3 – Registration with title protection only

Under this model only those people meeting certain registration requirements would be able to gain registration. Only registered physiotherapists would be entitled to use a particular title or titles and there would be no practice restrictions. Title regulation would also involve a statutory complaints and disciplinary system. The legal framework that applies under option 1 involving consumer protection legislation, the

⁸ Submission – Australian Physiotherapy Association

⁹ Submission – New South Wales Physiotherapists Registration Board

avenue of pursuing court action and the role of voluntary professional associations would also apply.

4.3.4 Option 4 – Registration with title and core practice restrictions

This system involves title regulation as outlined above and a restriction on those core practices of physiotherapy that are considered to pose a serious risk to the public if performed improperly. It is important to note that not all techniques and treatments used by physiotherapists would be restricted. This system would provide a competitive advantage to physiotherapists and other exempted professions in the restricted practices but may also protect the public from the risk of harm posed by those practices.

4.3.5 Option 5 – Registration with title and complete practice restrictions (the current system)

This is the most restrictive form of professional regulation. In addition to restrictions on title, the entire scope of the profession's practice would be limited to the registered professional group, and any other approved groups. This is the current regulatory system described in 2.2.

4.4 Assessment of Options

The Department is of the view that substantial benefits to the public will arise where the risks of harm are minimised. As a consequence, in carrying out a comparative assessment of the options, it is likely that the option which has the highest overall benefits or advantages for the community will be the one which most effectively and simply provides information to consumers about the quality of practitioners and addresses any potential for serious adverse health consequences. The effectiveness of the system can then be balanced with the costs of the system, in particular the anticipated impact on competition. However, identifying a price premium for any profession is complicated and even where a premium is observed and regulation has served to elevate the public perception of the standard of services on offer, it is not clear that this can be directly attributed to regulation.

In assessing the five options, option 1 – no regulation is used as the benchmark against which the other options will be assessed as it imposes no regulatory costs on practitioners and no restrictions on competition. It is important at this stage to note that the costs and benefits of each system have been described in qualitative terms as, due to a lack of comparative data, it is not possible to quantify costs and benefits.

4.4.1 Option 1 – No regulation

This option would involve the Physiotherapists Registration Act being repealed. Removal of registration would have the benefit of removing any adverse impacts on competition. However, there would be a reduction in the amount of information readily available to consumers and an increase in the potential for physical harm and associated increased costs to consumers and the economy.

This system would have the following **advantages**:

- There will be no restrictions on competition and any person will be able to undertake the practices of physiotherapy and hold themselves out as capable of so doing. Consumer protection legislation will continue to apply and prevent practitioners making false claims about their qualifications or the services they provide.
- There will be no regulatory costs and only those practitioners who make the choice to join a professional association will incur costs associated with that membership.

Such a system would have **disadvantages** or costs, as outlined below:

- Although consumer protection legislation would assist consumers in the choices they make by precluding practitioners from engaging in false, misleading and deceptive conduct, it may not be effective in situations where qualifications are held but are not of a sufficient standard for the services the consumer is seeking. This is significant because it is unlikely that consumers will be in a position to identify which qualifications are necessary and appropriate for the purpose of practising physiotherapy safely. To a certain extent this disadvantage could be countered by a professional association promoting the benefits of the public in dealing with its members, however in the absence of extensive, and possibly expensive, promotional activities by the professions consumers are likely to incur significant transaction costs in obtaining this information.
- Most consumers in the market for professional health care services lack specialised knowledge and as a result have a limited ability to distinguish competent from incompetent practitioners, assess the quality of any services offered and whether those services are excessive or inadequate in relation to their needs. These distortions may result in unnecessary expense to patients and insurers and in an increase in injuries and costs associated with receiving care that is inappropriate or delayed. Again promotional activity by professional associations could, to a certain extent, overcome this problem.
- While the Health Care Complaints Act enables consumers to make a complaint about any health service provider, registered or not, specific disciplinary action can only be taken where the person is registered. Although complaints could be referred to a professional association for action, this may be inadequate as not all physiotherapists are members of a professional association and in any event the sanctions available to professional associations are limited.
- Consumers may place unwarranted weight on the fact that a practitioner is a member of a professional association and may require assistance in identifying those associations which play an active role in relation to monitoring and promoting professional standards among their members.
- A disciplinary system administered by professional associations may lack transparency.
- While there would be no costs associated with a registration board, there would be costs connected with professional bodies assessing qualifications for the purpose of

determining entry criteria and the promotion to consumers of the benefits of membership of the professional body.

- Civil legal action against an unethical or incompetent practitioner could be expensive and slow and have little real impact on professional standards.

On balance, the Department considers that in view of the disadvantages identified above this option is unlikely to meet the objective of the current legislation which is to minimise the risk of serious harm to members of the public.

4.4.2 Option 2 – Co-regulation

Co-regulation would involve the Government and professional associations cooperating to jointly regulate the profession. The use of the title *physiotherapist* would remain restricted and any dangerous core practises could also be restricted.

The **advantages** of this model are:

- Most consumers who wish to access physiotherapy services are not easily able to judge the skill and competence of a practitioner before receiving treatment. A regulatory system is a means of providing a signal that a registered person possesses qualifications that have been assessed as appropriate.
- The imposition of qualification and training requirements for registration and professional association membership results in more competent practitioners, or at the very least an assurance of a certain level of competence. The more competent practitioners are the lower the risk of harm (both physical and financial) to patients, their families and the community.
- Improved use of appropriate health service providers by patients operates to reduce the social costs of illness to both the community and the health system.
- Membership of a professional association may provide some guarantee for consumers that practitioners are subject to a disciplinary structure.

There are a number of **disadvantages** associated with this model.

- There are costs both to the individual and the community associated with obtaining the qualifications an individual must have for membership.
- Membership requirements may be more restrictive and more expensive than under the existing Physiotherapists Registration Act.
- There are costs associated with administering a system of regulation. The practice of the current Physiotherapists Registration Board is for all costs to be recovered through registration fees. Under a co-regulation system there would be costs to Government of establishing the regulatory system and possibly in accrediting professional associations. It is likely these costs would be recovered, at least in part, from accreditation fees which would be passed on to practitioners and thence to consumers.

- Regulation and association membership may allow practitioners to attach a price premium to their services above that which would be expected to occur in a fully competitive market.
- This model may not provide an effective sanction to prevent a practitioner from offering substandard or unethical services to the public as a “physiotherapist”. A disciplinary system operated by a professional association may lack the transparency necessary for consumers to be confident of the ongoing competency of practitioners.

A number of these additional disadvantages could be addressed in whole or in part by Government accreditation of professional associations, although such accreditation would, as noted above, impose additional costs on the profession and the Government. In addition sanctioning or removing the accreditation of non-complying associations may be problematic.

Overall, the Department does not consider that this model achieves the objective of the legislation, as it does not provide consumers with sufficient information about the ongoing competence of practitioners. Further this approach may not involve a sufficiently rigorous complaints system to protect consumers from incompetent or unethical practitioners.

4.4.3 Option 3 – Registration with title protection only

Under this model only registered practitioners would be entitled to use the title *physiotherapist* and there would be no restrictions on any of the practices of physiotherapy. There would also be a statutory complaints and disciplinary system administered by the registration authority.

This option includes the advantages and disadvantages outlined for option 2 as well as certain additional advantages and disadvantages. The added **advantages** of this option are:

- A statutory disciplinary system that is transparent and fair to all parties can provide consumers with additional information on the competency of practitioners.
- The regulatory and disciplinary machinery may help to partially overcome supplier induced demand because consumers will be better able to gather information as to what an appropriate level of service should be or to report incidents they feel constitute over-servicing.
- A statutory disciplinary system can provide consumers with assurances that incompetent or unethical practitioners will be removed from the market.
- There are reduced transaction costs for patients in identifying appropriate practitioners and settling disputes with professionals.

The added **disadvantages** of this option are:

- There are costs associated with administering a system of registration which also contains a disciplinary structure. In addition to the costs of administration¹⁰ there are additional costs associated with disciplinary investigations and hearings and potentially costs associated with appeals from those hearings

Whilst it is considered that of Options 1 to 3 this model provides the best protection to members of the public, the Department is concerned that none of these options adequately addresses the issue of those harmful practices which, if carried out by untrained people, are dangerous to consumers. This issue is considered in the following option.

4.4.4 Option 4 –Registration with title and core practice restrictions

This model places restrictions on who may use or adopt certain titles and provides restrictions on who may undertake certain practices that are considered to be dangerous if undertaken by the unskilled.

The disadvantages and advantages that were canvassed in relation to option 3 are also applicable to this model of registration and will not be repeated. In addition, this review has identified a number of separate advantages and disadvantages that may be associated with the existence of a core practice restriction.

The **advantages** associated with core practice restrictions are as follows.

- The fact that a practice is restricted will, where consumers are aware of that restriction, provide consumers with information that there is a significant risk of injury associated with it. This information may assist consumers in making informed decisions about their treatment needs.
- Non-registered practitioners would be able to compete with registered practitioners by providing services that do not carry significant risks but which nevertheless fall within the scope of practice of the regulated profession.

The **disadvantages** of core practice restrictions are as follows.

- Core practice restrictions provide a competitive advantage, if not a virtual monopoly, for the registered group in the performance of certain procedures. This may result in a restriction on the number of service providers, the availability of services and inflation in cost.
- Practice restrictions can have an adverse impact on competition and result in increased costs. This may occur because:
 - (i) innovation and improved techniques both within the registered group and by other professional groups with closely related areas of practice have been hindered, either through complacency in the registered group or excessively vigorous enforcement activity by that group; and

¹⁰ The Annual Report for the Year Ended 30.6.99 for the Physiotherapists Registration Board indicated that it received approximately \$314,000 in income and spent approximately \$252,000.

(ii) there is a public perception that the restriction is an indication of overall superior quality on the part of practitioners permitted to perform the procedure over the other practitioners not permitted to perform the procedure.

- Practice restrictions are of limited effect in that they do not apply to instances of members of the registered group practising beyond their level of competence.
- The task of drafting workable definitions of practices which only registered practitioners may provide that do not unnecessarily overlap with the legitimate scope of practice of other service providers is difficult.
- The enforcement of practice restrictions can be difficult as a court must be satisfied that a particular procedure that is proscribed has been performed.

4.4.5 Option 5 – Registration with title and complete practice restrictions

This is the most restrictive form of regulation and the regulatory system which currently applies to physiotherapy. The immediate impact of such a system is to confer on the registered profession a monopoly over an entire professional area and substantially reduce competition. This option fails to recognise that there is some overlap between the legitimate scope of practice of most professions. The Department considers that this model offers no advantages over **option 4 title and core practice restrictions** while amplifying the restrictions on competition within that model.

4.5 Regulatory System

Submissions have unanimously supported the retention of a statutory registration scheme for physiotherapists based on the risk of harm to consumers from improper techniques. Submissions were divided on the form that a registration scheme should take, however the majority of submissions favour a title and core practices system in line with those recommended for chiropractors, optometrists and osteopaths.

Submissions in favour of a title and core practice system of regulation include the following:

“The Association is aware of the risks associated with the use of some techniques currently performed only by physiotherapists and other appropriately qualified people, which are of themselves potentially dangerous if not performed competently. As the risk... is potentially catastrophic there is a need that only appropriately trained and competent practitioners perform certain procedures undertaken by physiotherapists ...”¹¹

“The School believes that it is essential that physiotherapists are registered ... to protect the public from harm.

...

Title and core regulation would be the model favoured by the School of Physiotherapy...”¹²

¹¹ Submission – Australian Physiotherapy Association (NSW Branch)

¹² Submission – School of Physiotherapy, University of Sydney

“The NSW Physiotherapists Act 1945 does not provide physiotherapists with a monopoly over the provision of physical care services. Indeed there are many groups in the health care market who can and do provide related services at a range of market costs. Removal of registration for physiotherapy would reduce the effective range of options to the public, as there would be very little to distinguish the type of services at the point of selection.

...

The Board only wishes to restrict high risk procedures to those who are adequately trained (and not just physiotherapists). In addition the Board is not trying to restrict any specific low risk techniques... ”¹³

Other submissions have advocated retention of the existing title and general practice restriction or a system of title only registration.

“The Commission supports the present situation involving title and general practice restriction. There is clearly a need for this because of the nature of practice as defined in Section 2 of the Act and the harm that can be caused to patients from physiotherapy treatment.”¹⁴

“A title regulation model, which has been adopted for registered medical practitioners and nurses, correctly reflects today’s healthcare and regulatory scene and would easily achieve the objects of the current Physiotherapists Registration Act 1945.”¹⁵

The Physiotherapists Registration Board has also submitted that:

“As physiotherapy has been a registered practice for over 50 years, the Act has served to educate the public that, those people calling themselves physiotherapists, have adequate education and skill to trust with certain care and procedures.”¹⁶

The Department of Health endorses the view that there is a need in the interests of public health and safety for continued statutory regulation. This view is supported by the fact that there is a form of statutory registration for physiotherapists in all Australian jurisdictions (see **Appendix D**), and most of these regimes have already been subject to review under the Competition Principles Agreement, as well as in a great many overseas jurisdictions. Furthermore the Department accepts that there are certain core practices within physiotherapy that are particularly dangerous if performed by untrained people. In order to protect the public from the risk of injury arising from untrained people employing those practices the Department recommends that those practices be restricted to physiotherapists and other registered health professionals who are trained to safely employ them.

Therefore on balance the Department considers that the most appropriate form of statutory registration for physiotherapists is a system of title and core practice registration. Title restrictions are considered in detail in section 4.5.1 and practice restrictions are considered in section 4.5.2.

¹³ Submission – New South Wales Physiotherapists Registration Board

¹⁴ Submission – Health Care Complaints Commission

¹⁵ Submission – Australian Traditional Medicine Society

¹⁶ Submission – New South Wales Physiotherapists Registration Board

4.5.1 Restricted titles

As the Department has recommended a system of title and core practice registration consideration must be given to the titles that are to be restricted. The current Act restricts the titles *physiotherapist*, *physical therapist*, *physiotherapeutist*, *physical therapeutist* and *electrotherapeutist*. As can be seen from the comparison of interstate legislation in **Appendix D** there are a number of different approaches to title restrictions within Australian jurisdictions.

Only three submissions to the review chose to make suggestions as to the titles that should be restricted. The suggestions were from:

- the Australian Council of Physiotherapy Regulating Authorities and the Australian Physiotherapy Association (NSW Branch) which argued that the existing restrictions on title should remain; and
- the NSW Physiotherapists Registration Board which argued that the titles *physiotherapist* and *physical therapist* and related terms should be restricted.

The Department is not aware of any evidence that unregistered people have sought to use the titles *physiotherapeutist*, *physical therapeutist* or *electrotherapeutist*, either in New South Wales or in any jurisdiction where those titles are not restricted, and thereby mislead the public. In fact the Department considers that those titles have little, if any, meaning for the public and that their use is unlikely to result in confusion.

Therefore the Department considers that the title *physiotherapist* should be restricted to registered physiotherapists. As the title *physical therapist* is a term widely used by physiotherapists overseas, particularly in North America, it is recommended that the title *physical therapist* be similarly restricted.

Recommendation 2 – Registration by title

That physiotherapists continue to be registered by title. That the titles *physiotherapist* and *physical therapist* be restricted to registered physiotherapists. That only registered physiotherapists be able to hold themselves out as qualified and capable of practising physiotherapy.

4.5.3 The core practices of physiotherapy

Few submissions gave any substantial consideration to what the core practices of physiotherapy are and fewer still provided information on the health risks of treatment modalities in support of their views. Of the submissions that argued there are core practices within physiotherapy that are dangerous if performed by untrained and unregulated people there was a loose consensus that the dangerous core practices are spinal manipulation and the use of electrotherapeutic (or electrophysical) treatments.

(a) Spinal Manipulation

Spinal manipulation is currently restricted by the Chiropractors and Osteopaths Act 1991 to chiropractors, medical practitioners, osteopaths and physiotherapists. Although spinal manipulation is restricted it is not defined.

The NSW Department of Health's Report of the Review of the Chiropractors and Osteopaths Act 1991¹⁷ concluded that the practice of spinal manipulation is dangerous when performed by unqualified people and recommended that the practice continue to be restricted to chiropractors, medical practitioners, osteopaths and physiotherapists. That Report also recommended that spinal manipulation be defined so as to target and restrict the genuinely dangerous aspects of the practice and that the definition and restriction be placed in the Public Health Act. Placement of the restriction on spinal manipulation in the Public Health Act is consistent with the protection of public health and safety and recognises that a number of registered professional groups may legitimately undertake the practice.

It is not proposed to reconsider the material covered in the Report of the Chiropractors and Osteopaths Act Review except to say that spinal manipulation is clearly a core practice of physiotherapy and all submissions to this review that addressed the point concurred. Accordingly, the recommendations of the Report concerning spinal manipulation are confirmed by this review.

(b) Electrotherapeutics

A number of submissions have put a case to the Department for the inclusion of electrotherapeutic (or electrophysical) treatment as a core practice of physiotherapy. The current Act does not include electrotherapeutic treatment as such within the definition of physiotherapy but the definition does include the use of electricity, heat, light, sound and ultrasonic therapy apparatus for the purpose of alleviating or preventing any abnormal condition of the human body. However, the treatment areas included within the existing definition are very broad and defining electrotherapeutic treatment in these terms would undoubtedly restrict access to a number of treatment options that are not dangerous. Such an approach would unreasonably impact on the practices of a large number of unregistered practitioners.

Physiotherapists, including the Physiotherapists Registration Board and the Australian Council of Physiotherapy Regulating Authorities (ACOPRA), have suggested that the following electrotherapeutic treatment modalities be restricted:

- lasers;
- ultraviolet light;
- microwave and shortwave diathermy;
- electrical stimulation; and
- therapeutic ultrasound.

The Physiotherapists Registration Board has made the point that:

“The Board only wishes to restrict high risk procedures to those who are adequately trained (and not just to physiotherapists).”¹⁸

A number of organisations involved in the training and regulation of chiropractors and osteopaths have argued that both those professions are educated in the use of

¹⁷ New South Wales Department of Health, January 2000, <http://www.health.nsw.gov.au/csd/llsb/chiros>

¹⁸ Submission – Physiotherapists Registration Board of NSW

electrotherapeutic treatments and should not be excluded from their use.¹⁹ It is worthwhile noting that chiropractors and osteopaths are currently entitled to practise physiotherapy as defined, and the Department is aware of no evidence that their use of electrotherapeutics has resulted in harm or loss to the public. Medical practitioners and podiatrists are in the same position and the Department is similarly not aware of any evidence that they have inappropriately used electrotherapeutic treatments.

The Association of Massage Therapists (AMT) has argued that there should be no restrictions on the use of class 1 – 3 lasers or on the use of magnetic field therapy.²⁰

The Australian Physiotherapy Association (APA) has produced Clinical Standards for the use of Electrophysical Agents. These standards deal with:

- ultrasound (standard 6);
- electro-mechanical devices (standard 7);
- electrical stimulation currents (standard 8);
- ultraviolet radiation (standard 9);
- lasers (standard 10); and
- low frequency magnetic fields (standard 11).

The Department has also been provided with a breakdown of insurance claims made on professional indemnity policies issued through the APA's insurer. These figures show that in the six years 1991/2 to 1996/7 39 separate claims were made relating to injuries or complications caused through the use of electrotherapeutic treatments. Of these claims 19 relate to interferential or electromagnetic burns and a further 12 relate to burns caused by heat and ultrasound treatments.

The School of Physiotherapy at the University of Sydney has provided the Department with a number of articles, from peer reviewed journals, dealing with the health risks relating to the use of electrotherapeutic treatments. The risks identified are set out in the following table.

¹⁹ Submissions – Chiropractors and Osteopaths Registration Board; Department of Chiropractic, Macquarie University; Sydney College of Chiropractic.

²⁰ Submission – Association of Massage Therapists

TREATMENT	INJURY	DEGREE OF RISK	SOURCE
Shortwave and microwave diathermy	Radiofrequency burns at the point of contact between the patient and the earth.	Small. Injuries incurred are minor.	1
	Electromagnetic field leakage may have ocular effects including cataract formation.	Small. The studies show effects only after prolonged exposure to high levels.	2
	Thermal effects of electromagnetic radiation can result in the creation of lesions in bodily organs.	Small. Adverse effects require high levels of exposure over a lengthy period of time.	2
	Interference with heart pacemakers.	Small, however the consequences are serious.	2
	Teratogenic effects following excessive (2.5 degree) elevation in body core due to exposure to shortwave radiation.	Unknown. Effects have been demonstrated in animal experiments only, although a Swedish study has discovered a higher than normal incidence of stillborn or malformed children born to operators of shortwave diathermy units.	2
Lasers	Ocular damage (to both practitioner and patient).	Small and readily avoided by use of appropriate safety goggles.	3
Electrical stimulation	Ventricular fibrillation (particularly where output currents exceed 50mA).	Small, however the consequences are serious.	4
Ultraviolet light	Melanoma.	Small. Some risk to people regularly exposed to UV-B radiation, such as operators of UV equipment.	5
Therapeutic ultrasound	Malignant tumour metastasis.	Theoretical possibility. No evidence is available to support the hypothesis.	6
	Increased growth of subcutaneous tumours.	Demonstrated in animal studies. The authors caution against extrapolating their findings to humans.	7
	Burns caused by the creation of standing waves within body tissues.	Unknown. The article contains no assessment of the risks.	8
Sources:			
<p>1. Martin, McCallum, Strelley and Heaton, "Electromagnetic Fields from Therapeutic Diathermy Equipment", <i>Physiotherapy</i> vol 77 no 1, January 1991.</p> <p>Lerman, Jacobovich, Caner and Ribak, "Electromagnetic Fields from Shortwave Diathermy Equipment in Physiotherapy Departments", <i>Physiotherapy</i> vol 82 no 8, August 1996.</p>			

2. Delpizzo and Joyner, "On the Safe Use of Microwave and Shortwave Diathermy Units" *The Australian Journal of Physiotherapy* vol 33 no 3, 1987.
Kallen, Malmquist and Moritz, "Delivery Outcome among Physiotherapists in Sweden: Is Non-ionising Radiation a Fetal Hazard", *Physiotherapy* vol 78 no 1, January 1992.
Smith, Clarren and Sedgwick-Harvey, "Hyperthermia as a possible teratogenic effect", *Journal of Paediatrics*, Vol 92, no 6, 1978.
3. Baxter, *Therapeutic Lasers: Theory and Practice*, Churchill Livingstone, Edinburgh, pp56-59.
The Chartered Society of Physiotherapy, "Guidelines for the Safe Use of Lasers in Physiotherapy", *Physiotherapy* vol 77 no 3, March 1991.
4. Canadian Department of Health and Welfare, Medical Alert no 88, February 24 1988.
5. Diffey, "Ultraviolet Radiation and Skin Cancer, Are Physiotherapists at Risk", *Physiotherapy* vol 75 no 10, October 1989.
6. Maxwell, "Therapeutic Ultrasound and Tumour Metastasis", *Physiotherapy* vol 81 no 5, May 1995.
7. Sicard-Rosenbaum, Lord, Danoff, Thom and Eckhaus, "Effects of continuous therapeutic ultrasound on growth and metastasis of subcutaneous murine tumours", *Physical Therapy*, vol 75 no 1, January 1995.
8. Dyson, "Mechanisms Involved in Therapeutic Ultrasound", *Physiotherapy* vol 73 no 3, March 1987.

It is therefore apparent that although there may be risks associated with the use of electrotherapeutic treatments it appears that the risks to the public are low and that many of the potential injuries are of a lesser degree of seriousness and reasonably readily prevented. However, in the case of shortwave and microwave diathermy and electrical stimulation (interferential treatment) there is evidence that treatment can have significant, possibly life threatening, effects on the heart if it is not administered properly and with due regard to treatment contraindications. This is particularly so for patients with older style cardiac pacemakers.

Therefore the Department does not consider that the public interest would be served by a wholesale restriction on the use of electrotherapeutic agents. However, given that there is a potential for the inappropriate use of shortwave and microwave diathermy and electrical stimulation to lead to severe health consequences for patients the Department considers that the restriction of these treatments should be maintained in the interests of public health and safety. Furthermore future research in the area of electrotherapeutic treatments may result in the development of new treatment modalities that are dangerous if improperly applied. Therefore the Department recommends that a restriction on electrotherapeutic treatments also include such other treatments as may be prescribed by regulation.

As noted above the Report of the Review of the Chiropractors and Osteopaths Act recommends that the restriction on the practice of spinal manipulation be placed in the Public Health Act. The Department has proposed that the Public Health Act be used

for all health professional practice restrictions and that a new Part be created within the Public Health Act for this purpose. As noted above chiropractors, medical practitioners, osteopaths and podiatrists use electrotherapeutic treatments and there is no evidence that they have done so in an inappropriate manner or that patients have been harmed as a result.

The current Physiotherapists Act also exempts dentists from the restriction on physiotherapy where they undertake those practices in the course of their normal practice. Registered nurses are also exempted from the restriction on physiotherapy where they undertake those practices under the instruction of a physiotherapist, medical practitioner, dentist, podiatrist, chiropractor or osteopath. However information provided to the Department indicates that neither of those professions is trained in diathermy or the use of interferential electrical stimulation.

Therefore it is recommended that the use of shortwave and microwave diathermy, electrical stimulation by interferential current and such other electrotherapeutic treatments as are prescribed be restricted to chiropractors, medical practitioners, osteopaths, physiotherapists and podiatrists. It is also recommended that the restriction be placed in the Public Health Act 1991.

Recommendation 3 – Electrotherapeutic treatments

The use of shortwave and microwave diathermy, electrical stimulation by interferential current and such other electrotherapeutic treatments as are prescribed be restricted to chiropractors, medical practitioners, osteopaths, physiotherapists and podiatrists and that the restriction be placed in the Public Health Act 1991.

5. ENTRY REQUIREMENTS

5.1 Introduction

The Physiotherapists Registration Act contains a number of criteria for registration. The Board may also refuse registration on a number of specific grounds. Failure to gain registration prevents a person from holding him or herself out to be a physiotherapist and from practising physiotherapy.²¹ If entry level requirements are set artificially high, this may restrict the number of people able to seek registration, with a resultant impact on competition. Alternatively, although the barriers may not be high or onerous, there may be limited access to appropriate educational courses and supervision opportunities creating a barrier to entry for intending practitioners.

5.2 Registration Procedures

For a person to be eligible for registration as a physiotherapist he or she must establish his or her competence. The Act provides in section 21(1) that competence is established for initial registration by the applicant:

- (a) having a degree, diploma or other award for the successful completion of a course of training prescribed by the regulations; or
- (b) satisfying the Board that he or she has the requisite knowledge or skill to practise physiotherapy in New South Wales by having undertaken a course of study in physiotherapy and passing such examinations as the Board may require.

The regulations prescribe a number of New South Wales qualifications for registration. The Board also recognises all equivalent Australian courses based on their course content as well as qualifications from New Zealand and from selected educational institutions in Canada, Hong Kong and South Africa, based on the recommendations of the Australian Examining Council for Overseas Physiotherapist (AECOP). At the time the Issues Paper was released the Board also recognised all physiotherapy courses from the United Kingdom. Since that time the Australian Council Of Physiotherapy Regulating Authorities (ACOPRA) has completed a review of accredited overseas courses and has recommended that courses from the United Kingdom no longer be recognised due to the significant changes to physiotherapy education in the United Kingdom in the last decade.

The Board expects that ACOPRA and AECOP will be used in the future to make recommendations regarding accreditation of overseas courses.

The Issues Paper sought comment on whether the mechanism by which courses of training are recognised for registration should be amended and whether an alternative means of assessing an applicant's competence should be developed.

The Physiotherapists Registration Board has argued that

“(a) the current listing of approved courses is adequate,

²¹ Chiropractors, dentists, medical practitioners, osteopaths and podiatrists are exempt from this latter prohibition as are registered nurses when they provide services under the instruction of a physiotherapist or a member of the exempt professions.

- (b) the recognition of overseas qualifications be made on the recommendations from a national body such as the Australian Examination Council for Overseas Physiotherapists (AECOP),*
- (c) the current wording of the Act should make provisions for the recommendations for accreditation of new courses, from a national body such as the Australian Council of Physiotherapy Regulating Authorities (ACOPRA).’’²²*

Both the Australian Physiotherapy Association and the School of Physiotherapy at the University of Sydney argued that competency should be assessed against the curricula of Australian university programs recognised by ACOPRA.²³

The Department recognises that the physiotherapy profession and physiotherapy regulating authorities have worked hard to establish a transparent and nationally consistent system for accrediting educational courses. However the decision as to whether a course should be accredited or not remains a decision for the Board to make and the Department considers that the Board should be able to accredit courses based on criteria established by regulation. If the Board works in cooperation with other registration boards to develop consistent accreditation guidelines ACOPRA could then undertake assessment of courses on behalf of all registration boards and the Board could adopt ACOPRA’s recommendations. Where an institution is aggrieved by a decision of the Board to refuse its application for accreditation there will be a right to appeal that refusal to the Administrative Decisions Tribunal. Under this proposal the Board is to develop accreditation criteria which will ensure that graduates of approved courses are competent to practise in New South Wales.

As part of this process of establishing accreditation criteria the Department recommends that the Board review the courses which are currently prescribed to ensure that they are all of a sufficient standard. In the event that the Board forms the view that one or more courses of training should no longer be prescribed, the Department will recommend to the Minister that they be removed from the Regulation on the basis that any action taken was of a prospective nature only. Practitioners who are currently registered on the basis of qualifications that are removed would continue to be eligible to be registered.

Recommendation 4 – Courses of training

That:

- the Physiotherapists Registration Board have the power to approve courses of training for the purposes of registration;
- the Board be able to accredit a course based on the recommendation of another body;
- the Regulations set out criteria under which educational institutions can apply to the Board to have their courses approved for registration; and
- educational institutions which are aggrieved by a board decision not to approve a course of training have a right of appeal to the Administrative Decisions Tribunal.

The Physiotherapists Registration Board review courses that are currently prescribed for the purposes of registration.

²² Submission – New South Wales Physiotherapists Registration Board

²³ Submissions – Australian Physiotherapy Association (NSW Branch); School of Physiotherapy, the University of Sydney.

5.3 Good Character

The Act currently provides that “good character” is a prerequisite to registration as a physiotherapist. The Issues Paper raised for consideration whether the requirement should be retained and, if so, whether more “objective” criteria should be developed.

The proposition that character requirements can unnecessarily restrict entry to the profession must be balanced against the important role which good character plays in minimising the risk of harm posed by inappropriate or unethical conduct through ensuring that disreputable people are precluded from registering as physiotherapists.

Submissions to the review overwhelmingly supported the criteria of good character on the basis it is essential for minimising the risks of harm from inappropriate or unethical conduct.

“The Commission is strongly of the view that the requirement of ‘good character’ for registration as a physiotherapist should remain... It is in the public interest that only persons of good character be afforded the privileges and opportunities which membership of the physiotherapy profession affords.

...

There would not appear to be any reason to consider that the Physiotherapists Registration Board is not as capable as other registration boards to determine whether applicants for registration possess the good character necessary for registration as a physiotherapist or that the Board would approach its task in this regard subjectively rather than in the objective manner required by law.”²⁴

“The School acknowledges that a requirement that applicants for registration should be of ‘good character’ is subjective and may be difficult to police. Nevertheless, we believe that this requirement should be retained as it sends a strong message about the reputability of all registered physiotherapists. Such a message is likely to reassure the public.”²⁵

The Department strongly supports the retention of the “good character” requirement as an essential part of satisfying the legislative objective of protecting the public. Consumers of physiotherapy services build relationships with their physiotherapist based on trust and in the context of those relationships allow the practitioner to have access to their bodies and to information that may be considered private. It is therefore important that consumers are able to have confidence that only fit and proper people are able to register as physiotherapists. The Department does not support the narrowing of the “good character” requirement on the ground that courts may be inclined to interpret it narrowly and that such an outcome would not be in the public interest. Furthermore there is no evidence that the Physiotherapists Registration Board has applied the test of good character in an inappropriate way or that competent practitioners have been denied registration based on the requirement.

²⁴ Submission – Health Care Complaints Commission

²⁵ Submission – School of Physiotherapy, University of Sydney

5.4 Age

The Physiotherapists Registration Act currently provides that a person may not be registered as a physiotherapist unless he or she has reached the prescribed age, although no age is prescribed.

Only a few submissions addressed this point with the majority expressing the view that the age requirement should be removed on the ground that it is unnecessary.

“No need to set an age restriction as they would not have graduated if they were not competent.”²⁶

Two submissions suggested that there may be a problem with the registration of very young physiotherapists especially if they are required to practise alone.²⁷ However, it is the Department’s view that if a very young person is able to qualify and register as a physiotherapist they would be highly unlikely to have the financial resources to establish an independent practice. Therefore those practitioners would practise, at least initially, in an employed capacity, and that employment relationship would provide appropriate supervision opportunities.

When considering the age restriction it must be acknowledged that graduates of Australian physiotherapy courses complete four year courses to be eligible for registration and graduates from overseas who do not have a recognised qualification must satisfactorily complete an examination which is pitched at the level expected of a local graduate. The Department does not believe that there is a problem with unreasonably young people gaining registration and therefore considers that the age restriction is not warranted.

Recommendation 5 – Minimum age

That the requirement that applicants for registration have attained the prescribed age be removed.

5.5 Post-graduate Experience

As noted in the Issues Paper, section 21(1A) of the Act provides that a person may only be registered as a physiotherapist if he or she has practised physiotherapy for at least 12 months while conditionally registered. Section 21(1B) of the Act then goes on to provide that the Board may exempt a person or a class of persons from the requirements of section 21(1A) and the Board has exempted all Australian trained applicants and applicants who have passed the AECOP examination.

A limited number of submissions commented on this requirement although all that did comment argued that the provision will be of use when the Board registers the graduates of new physiotherapy schools that do not have full ACOPRA accreditation.

²⁶ Submission – Broken Hill Health Service

²⁷ David Cross, Physiotherapy Adviser Macquarie Area Health Service, Far West Area Health Service, on behalf of rural physiotherapists; David Cross, Physiotherapy Adviser Macquarie Area Health Service, Far West Area Health Service following a survey of consumers of physiotherapy services.

The Department is not aware of any evidence that the existing requirements of the Act with respect to post-graduate experience have prevented qualified people from practising physiotherapy in New South Wales. Therefore as the provisions will assist the Board in ensuring that graduates are competent to practise and no submission has argued the provision is unnecessary or unfair, the Department does not propose any changes to the requirement for post-graduate experience.

5.6 Other Registration Requirements / Grounds for Refusal of Registration

The Issues Paper noted that recent health professional registration Acts include a number of additional criteria for registration which may, if not complied with, provide grounds for refusing registration. These matters include physical and mental capacity; proficiency in English; recency of practise; and criminal convictions.

5.6.1 Physical and mental capacity

The current Act does not allow the Board to consider the physical or mental capacity of a person who applies for registration. The only mechanism by which these matters can be taken into account is by the Board registering the person and then making a complaint of misconduct in a professional respect and referring the matter to a Professional Standards Committee or a Board inquiry.

A small number of submissions addressed this issue with most agreeing that the physical and mental capacity of an applicant should be considered by the Board where it may affect the applicant's ability to practise. The exception is the submission from the School of Physiotherapy at the University of Sydney, which argued:

“Contemporary professional practice is extremely diverse and offers many opportunities for employment in areas where such impairments need not be a handicap to the physiotherapist. The School believes that physiotherapists with a physical or mental handicap will self-regulate and should be aware of their responsibilities to work within the limitations set by their particular problem.”

The Department considers that the view put by the School of Physiotherapy with respect to the diversity of practice is valid. However, the objective of the Act and the role of the Board are the protection of the public. In order that the Board may be proactive rather than reactive in fulfilling its role the Department recommends that the Board be able to hold an inquiry into the competence of an applicant for registration. In this context the Board will be able to consider the physical and mental capacity of the applicant. Where the Board is not satisfied that the applicant is competent to practise it will have the power to register him or her subject to conditions or, in appropriate cases, refuse registration.

5.6.2 Proficiency in English

The Act does not allow the Board to consider an applicant's competence in the English language when dealing with an application for registration. The Issues Paper noted that there is concern that imposing English competence as a requirement for registration may be used to arbitrarily discriminate against practitioners trained overseas.

Although there is no evidence or suggestion that this has in fact occurred the Department is of the view that demonstrated proficiency in English should only be a requirement for registration where there is evidence of a need for it in the public interest. Of those submissions to the review that addressed the point there was strong support for the introduction of an English language requirement.

The School of Physiotherapy at the University of Sydney submitted that:

“Excellent oral and written communication skills are a pre-requisite for health care workers in general and in physiotherapy the need to gather and interpret information and to instruct and advise patients can be critical... Further, most literature related to the science of physiotherapy is published in English and regular updating of knowledge should be an expectation of any registered physiotherapist.”²⁸

The Physiotherapists Registration Board has submitted that many physiotherapists, both in the public and private sectors, work as part of a team and that good English language skills are essential in these contexts, this view has been supported by the Australian Physiotherapy Association. In the context of the review of the Optometrists Act 1930 the Council on the Aging (NSW) argued that:

“Proficiency in English should be a requirement, as reports from consumers substantiate that communication problems are at the root of many complaints and misadventures between practitioners and patients.”²⁹

On balance the Department has formed the view that an English language requirement for physiotherapists is necessary for the following reasons:

- Consumers could be put to unnecessary expense when they seek out a registered physiotherapist and discover that the physiotherapist is unable to communicate effectively.
- The requirement for physiotherapists to interact with other health care practitioners in a team setting, or to refer patients to other practitioners, requires that they be able to communicate clearly in both written and verbal English.
- A physiotherapist without a command of English would have difficulty in participating in continuing education and remaining abreast of professional developments.

As with mental or physical capacity, this should simply provide grounds for refusal of registration or for imposing conditions on an applicant’s registration rather than requiring applicants to demonstrate proficiency through an examination. To ensure that this provision is not used inappropriately to restrict access to practice by people from non-English speaking backgrounds the Board must adopt the least restrictive strategy possible for dealing with an application by a person without an adequate command of English.

²⁸ Submission – School of Physiotherapy, the University of Sydney

²⁹ Submission to the Review of the Optometrists Act 1930 – The Council on the Aging (NSW)

5.6.3 Recency of practise

The current Act does not require a physiotherapist to demonstrate recency of practise when applying for registration or the restoration of their registration. It is possible that a person who has not practised for a number of years, or who has never practised, may apply for registration or the restoration of a lapsed registration. In such a situation the Board has no power to refuse the application.

Submissions that addressed this issue were unanimously in support of a recency of practise requirement being introduced for physiotherapists. However, no evidence was supplied which suggested that physiotherapists who had not practised for a period of time were unsafe or a risk to their patients. The School of Physiotherapy at the University of Sydney argued that

“the rate of increase in the physiotherapy knowledge base is so great that applicants for registration should be expected to demonstrate the currency of their professional knowledge and practice.”

The Department is however of the view that lack of recent practise does not necessarily mean that a person is not competent in all practice contexts. The Department also believes that defining practice will be very difficult if not impossible, particularly where many registered physiotherapists are engaged in administration or teaching. However the Department considers that the overall objective of the Act, the protection of the public, requires that the Board have available to it the necessary tools to ensure that only competent people may be granted registration or restoration of registration. Therefore the Department recommends that the Board be able to inquire into the competence of an applicant for registration or restoration of registration and if not satisfied as to his or her competence refuse registration or grant it subject to conditions.

Concerns have also been expressed that some physiotherapists continue to maintain their registration by paying the annual renewal fee although they have ceased to practise. These concerns are based on a belief that these peoples' skills are deteriorating and there is no mechanism available to ensure that they are in fact competent to be registered.

The Department is not aware of any instances where consumers have been disadvantaged by these practitioners returning to the workforce, although the Physiotherapists Registration Board has expressed concern over its lack of power to manage their safe return to the workforce. The Department is proposing (see section 6.4) that registrants be required to submit an annual declaration when renewing their registration, and this matter can be handled in that context. If following an annual declaration the board is concerned that a person has not maintained their skills at an appropriate level and that the public may be adversely effected the Board may make a complaint and conduct an inquiry. This matter will be dealt with in more detail in section 6.4.

Recommendation 6 – Competence for registration

That when a person applies for registration or restoration of their registration the Physiotherapists Registration Board have the power to inquire into that person's competence, including their physical and mental capacity and command of the English language. If following its inquiries the Board is not satisfied as to the person's competence it may refuse to register the person or restore his or her registration or make registration subject to conditions.

5.6.4 Criminal convictions

As noted in the Issues Paper the current Act does not provide the Board with the power to refuse to register a person based on criminal convictions and the Board must rely on the broader power to refuse registration to a person who is not of "good character".

All health professional Acts enacted in New South Wales since 1989 provide the relevant registration board with the power to refuse to register an applicant based on prior criminal convictions which in the opinion of the board render the person unsuitable for registration. Submissions did not address this point other than to say, in a few cases, that the Physiotherapists Registration Board's guidelines for criminal records checks should be incorporated in the Act.

Patients develop relationships of trust with their health professionals and as a result of that trust practitioners have access their patients' bodies and intimate details of their lives. In some cases practitioners can also gain access to their patients' financial resources. In order that patients can continue to have confidence in the registration process and the integrity of health practitioners the Department is of the opinion that it is important for registration boards to be able to consider criminal offences committed by applicants prior to an application for registration. Therefore it is recommended that the Physiotherapists Registration Board be able to consider criminal offences committed by a person prior to their application for registration and where appropriate refuse to register the person or register him or her subject to conditions.

In making this recommendation the Department also recommends that this provision apply to offences that are proven but no conviction is recorded in accordance with s.10 of the Crimes (Sentencing Procedure) Act 1999 and equivalent interstate and Commonwealth provisions. This recommendation is made because the focus of the criminal justice system is punitive rather than protective and a judicial officer in determining whether or not to record a conviction does not consider the need to protect the public from unethical practitioners. This recommendation will not apply to convictions that are spent due to the operation of the Criminal Records Act except so that matters dealt with under s.10 of the Crimes (Sentencing Procedure) Act and matters where a good behaviour bond is imposed do not become spent for a period of ten years. Minor traffic matters and other matters prescribed by regulation will also be exempted.

Recommendation 7 – Consideration of criminal convictions

That when a person applies for registration the Board be able to consider criminal offences committed by the person prior to their application for registration, whether or not a conviction has been recorded. Where the Board is satisfied that the offences render the person unfit to be registered it may refuse registration, or in appropriate circumstances make registration subject to conditions.

5.7 Forms of Registration

The Issues Paper explained that the Act gives the Board power to grant full registration, provisional registration, conditional registration and approval to practise for a limited period and for specific purposes. The Issues Paper also explained the practical effect of each of these forms of registration. It is worth noting that the Board can only grant conditional registration to applicants who do not have 12 months post-graduate work experience, to enable them to gain that experience, and may only place conditions on a person's existing registration following a disciplinary procedure.

It has already been recommended (**recommendation 6**) that the Board have the power to inquire into a person's competence for registration and where not satisfied that they are competent register them subject to conditions or in appropriate cases refuse to register them. On balance the Department considers that this power, in combination with the Board's power to waive an application fee in whole or part, will provide suitable flexibility to allow the Board to register applicants in appropriate circumstances and subject to appropriate conditions.

The Issues Paper also asked whether people registered subject to conditions should be required to disclose those conditions to patients and employers. The only submission to actively address this issue was that from the Physiotherapists Registration Board which sounded a note of caution:

“With regard to the obligation to disclose conditions to the patients, the Board recognises that while it is a very sound principle, the practical implementation may be more difficult.”

The Department considers that the submission from the Board is correct and that disclosure of conditions may not be either necessary or appropriate in all cases and the Board can, as a condition on registration, require that a registrant disclose the conditions to which his or her registration is subject. Therefore the Department considers it unnecessary for the Act to require that registrants disclose any conditions to which their registration is subject and that this is a matter best left to the discretion of the Board. Nonetheless it is important that consumers are able to access this information if they choose and therefore the Department recommends that any conditions that a physiotherapist's registration is subject to should be recorded on the Register. The issue of consumers having access to information on the Register is considered in **section 11.5** and **recommendation 28**.

Recommendation 8 - Disclosure of conditions on registration

That the Physiotherapists Registration Board have the power to require a physiotherapist to disclose to patients and employers any conditions to which their registration is subject.

That the Physiotherapists Registration Board be required to record on the Register any conditions to which a physiotherapist's registration is subject.

5.8 Mutual Recognition

Submissions were almost uniformly supportive of the concept of mutual recognition of registration from other Australian and New Zealand jurisdictions and supportive of the inclusion in the Act of the mutual recognition principle. However, the Department is of the opinion that incorporation of mutual recognition into the Physiotherapists Registration Act is unnecessary. The Department's view has been arrived at based on the following considerations:

- the belief that the type of administrative oversight that resulted in the lapse of the Victorian Mutual Recognition Act is unlikely to recur; and
- Australia wide mutual recognition is now such an accepted feature of professional regulation that it is extremely unlikely that a State or Territory will withdraw from the scheme.

Therefore it is recommended that the mutual recognition principle not be incorporated in the Physiotherapists Registration Act.

5.9 Appeals

Currently there is a right of appeal to the District Court against a decision to refuse to register an applicant as a physiotherapist. Modern registration Acts that establish professional tribunals provide for appeals in registration matters to those tribunals. Registration appeals are made to tribunals as they include practitioners from the relevant profession who are well placed to consider matters of competence and the appropriateness of any conditions that have been placed on a person's practise. Referral of appeals to a tribunal also helps to ensure consistent decision making in matters relating to professional practise and competence.

Given that this Report recommends (see **recommendation 13**) the establishment of a Physiotherapists Tribunal it is appropriate that appeals relating to the Board's refusal to register or restore the registration an applicant or its decision to grant registration or restoration of registration subject to conditions be made to the Tribunal.

Recommendation 9 – Appeals

That appeals against a decision to refuse to register a person, restore the registration of a person, or impose conditions on a person's registration as a physiotherapist should be made to the Physiotherapists Tribunal.

6. REQUIREMENTS FOR CONTINUING REGISTRATION

6.1 Introduction

One of the main aims of the Physiotherapists Registration Act is to provide patients with information about the competence of practitioners using the title *physiotherapist*. In the case of ongoing registration there is heavy reliance on establishment of competence through initial registration criteria, the use of the complaints/disciplinary system to detect incompetent practitioners and each individual practitioner's professional obligation to maintain his/her skills.

It has been suggested that strategies need to be developed in connection with registered health professionals to enable health professional registration boards to play an active role in the ongoing maintenance of professional standards. Possible strategies include:

- regular competency testing and targeted performance assessments;
- mandatory continuing professional education; and
- the development of a more comprehensive annual renewal process for practitioners.

6.2 Regular Competency Testing

One way of ensuring that practitioners maintain their skills and remain up to date with developments in their profession is through routine performance assessments. In cases where assessment shows a practitioner's performance to be sub-standard, the Board could direct him or her to undertake a specified training program. The Issues Paper invited submissions seeking the introduction of annual competency assessments to provide evidence demonstrating there is a problem with the ongoing competency of practitioners and to consider the costs and benefits associated with any such system.

The Health Care Complaints Commission in its submission put forward the following view.

“The Commission strongly supports the introduction of annual or other regular competency assessment of physiotherapists for renewal of registration. Consideration should also be given to the introduction of mandatory continuing education. These measures would ensure that standards are maintained, provision of quality health care to consumers is facilitated and substandard practitioners are identified.”³⁰

Most submissions have not supported the introduction of annual competency assessments.

“There are significant problems with determining who should be competent at doing what... However if a serious complaint is made about a practitioner, then maybe they could be reassessed in their own work environment.”³¹

“The Board does not agree that regular competency assessment can be justified on a cost-benefit basis.”³²

³⁰ Submission – Health Care Complaints Commission

³¹ Submission – David Cross, Physiotherapy Adviser Macquarie Area Health Service, Far West Area Health Service, on behalf of rural physiotherapists

³² Submission – New South Wales Physiotherapists Registration Board

If a system of regular performance assessments was introduced, there would be additional costs to the profession and the community. The Physiotherapists Registration Board is self funding so that the cost of an assessment system and its administration would be recouped through registration fees which will in turn be passed on to patients. Such a scheme might also involve delays in the processing of registration renewals, which in itself is an intangible cost. No evidence has been put forward to demonstrate that practitioners are failing to maintain their competence to the extent that the introduction of a performance assessment system is justified. Accordingly, the Department does not support this particular option.

6.3 Continuing Professional Education

Practitioner participation in continuing professional education is desirable and can be seen as an essential component of professionalism. It is often argued that mandatory professional education helps to ensure that practitioners keep their knowledge up to date and remain competent. A number of submissions have addressed the issue of whether a mandatory or voluntary system of continuing education should be introduced.

Several submissions argued continuing education should be a mandatory requirement for registration to ensure that practitioners maintain their standards.

“Practitioners have a professional responsibility to maintain their knowledge and skills but many practitioners without some sort of coercion may not voluntarily undertake ongoing education.

...

Introduction of competency assessment and mandatory continuing education does involve additional costs for practitioners and the Board but the benefits to the community and the profession in maintaining standards outweighs any cost considerations.”³³

The Physiotherapists Registration Board has argued quite strongly in favour of mandatory continuing professional education. The Board argued it would involve limited cost to the Board, of less than \$3,000 per annum, and limited cost to the profession as its research indicates that over 90% of physiotherapists already engage in continuing education and would simply be required to document their current activities.³⁴

Many more submissions have noted that the Australian Physiotherapy Association has recently introduced a scheme of mandatory continuing education for its members. The Association claims that 80% of registered physiotherapists in Australia are members with 3000 members in NSW.³⁵ This represents less than 60% of registered physiotherapists in NSW but according to the Department’s workforce survey it is approximately 80% of practising physiotherapists. Two submissions suggested that the Association’s mandatory continuing education scheme combined with a voluntary scheme established by the Board would help to ensure high standards of practise.³⁶

If continuing professional education were made a requirement for continuing registration, a barrier to continuing registration would be created as the cost of training programs, including

³³ Submission – Health Care Complaints Commission

³⁴ Submission – Physiotherapists Registration Board

³⁵ Submission – Australian Physiotherapy Association

³⁶ Submissions – Health and Research Employees Association; Illawarra Area Health Service

time costs, would have to be borne by individual physiotherapists and their employers. Clearly programs will be of varying quality and usefulness for practitioners and in some instances may be taken merely to satisfy registration requirements without having a practical benefit to the physiotherapist or his/her patients. In addition to these concerns there may be impediments to practitioners in rural or remote areas accessing a suitably broad range of courses that meet their practical requirements, and part-time workers or those taking a break from practice for family reasons may also be disadvantaged.

The Department therefore does not support mandatory continuing education but proposes that as part of the process for annual renewal of registration practitioners should be required to make a declaration about continuing professional education activities undertaken in the previous 12 months. By requiring practitioners to consider the amount of professional education they have undertaken, the profile of continuing education will be increased. The existence of the Association's continuing education scheme should ensure that a substantial majority of practising physiotherapists will undertake continuing education. Declarations will also give the Board data on the types of practitioners who are receiving professional education, its standard, relevance to practice and the types of organisations delivering education. This information will provide an improved basis for evaluating whether the current system is adequate or if it can be improved and for formulating effective strategies to address any areas of concern that are identified.

6.4 Annual Renewal

6.4.1 Current position

Currently the Act only requires an applicant for renewal of registration to pay a fee. There is no requirement that practitioners provide information that would assist the Board in assessing their ongoing character and competence. Clearly, a board can only take action to protect the public on the information it receives and relevant information may come from a range of sources and is not limited to complaints.

The Issues Paper discussed the option of requiring practitioners who are renewing their registration to provide a range of information to the Board including:

- charges laid against the practitioner for offences of a serious nature that relate to conduct occurring in the course of practice;
- criminal convictions and cases where the offence has been proved but no conviction recorded pursuant to section 556A of the Crimes Act (now s.10 of the Crimes (Sentencing Procedure Act) 1999) or equivalent provision;
- verdicts and settlements in a civil action taken by a patient;
- maintenance of professional indemnity insurance;
- significant illness (including psychiatric illness); and
- continuing education activities.

Submissions, notably those from Australian Physiotherapy Association and the Physiotherapists Registration Board were supportive of a more comprehensive annual renewal process which includes practitioners providing declarations on the above matters.

6.4.2 Disciplinary action by another health registration authority

There are a large number of registered health practitioners who are registered in more than one profession. Within this group there may be a number of physiotherapists who are registered with two or more registration boards, for example those who are registered as both nurses and physiotherapists, or psychologists and physiotherapists. The Physiotherapists Registration Act, along with other health registration Acts, makes no provision for the sharing of information between boards nor does it allow for a complaint to be made or action to be taken against a practitioner based on a disciplinary finding by another board.

Clearly there can be instances where the actions of a practitioner, such as sexual misconduct, in a particular professional context demonstrate that the practitioner is unfit for registration as a health professional in any context. Equally certain professional shortcomings which fall short of justifying deregistration, such as a failure to adequately document treatment or comply with infection control standards, may justify the imposition of conditions on the practitioner's registration in a number of professional contexts.

However, due to differences between health professions, the conduct of a practitioner in one professional context may be of a nature that justifies deregistration while the same conduct in another professional context may require only that the practitioner undertake additional education or that conditions be placed on registration. The effect of particular conduct in each professional context is a matter for individual registration boards and disciplinary bodies to determine when deciding if a practitioner is guilty of unsatisfactory professional conduct or professional misconduct under each relevant health registration Act.

The Department is therefore of the view that where the Physiotherapists Registration Board takes disciplinary action against a practitioner and the Board is aware that he or she is, or has been, registered with another health registration board in NSW (the secondary board) the Physiotherapists Registration Board should be under a duty to notify secondary boards about those disciplinary findings and the orders made as a result. The secondary board could then, where appropriate, make a complaint about the practitioner and institute disciplinary proceedings. In extreme cases the secondary board could take emergency action (see **section 7.12** and **recommendation 18**) to protect the public by suspending the practitioner and then make a complaint and initiate disciplinary proceedings. Similarly where a secondary registration board takes disciplinary action against a person who is also registered as a physiotherapist that board would notify the Physiotherapists Registration Board of any findings and orders and the Physiotherapists Registration Board could initiate disciplinary proceedings where appropriate.

6.4.3 Impairment action by another health registration authority

The above discussion relating to disciplinary action taken by health registration authorities can equally apply to action taken on the basis of a practitioner's impairment. Impairment action is taken by a registration board in order to protect the public from a practitioner whose ability to practice is impaired whether that be due to drug or alcohol addiction or to physical or mental incapacity (see **chapter 8**). The

Department therefore recommends that it be a condition of the impairment process that where the primary board is aware that a practitioner is registered with a secondary board it notify the secondary board of any suspension of a practitioner's registration or the placing of conditions on that registration.

6.4.4 Conclusion

The Department supports a more comprehensive process for renewing registration to enable the Board to assess whether any action needs to be taken by it in the interests of protecting the public. The Department has therefore reached the conclusion that practitioners, on renewing their registration, should be required to make declarations to the Board on the following matters:

- findings of guilt in criminal matters (whether a conviction is recorded or not);
- charges for sex or violence offences where the allegations:
 - (a) involve minors; or
 - (b) relate to conduct occurring in the course of practice (this matter is discussed in more detail in section 7.11);
- refusal of registration, suspension of registration or deregistration in other jurisdictions;
- suspension or cancellation of registration or the imposition of conditions on registration by another health registration board in New South Wales whether as a result of a disciplinary finding or an impairment process;
- registration with another health registration board in New South Wales;
- significant illness, for the purpose of identifying whether the applicant has sufficient physical and mental capacity to practise;
- continuing professional education activities; and
- practice status.

6.5 Restoration of Registration

The current Act provides that the only requirement that a person who seeks to restore their registration must meet is payment of the prescribed fee. There is no requirement that a person who seeks restoration of their registration must demonstrate their competence to the satisfaction of the Board.

This matter has already been considered in section 5.6.3, **Recency of practice**, where it was recommended (**recommendation 6**) that where the Board is concerned about a person's competence it will be able to inquire into his or her competence before granting registration or restoration of registration. Following the Board's inquiries it will be able to register or restore the registration of the person, register or restore registration subject to conditions, or refuse registration or restoration of registration. It is also important that a person who has failed to pay the annual renewal fee by the due date and applies to have their name restored to the Register be required to submit the same declarations as a person who has renewed their registration in time. The furnishing of those declarations can also form an important part of the Board's inquiries into the competence of an applicant for restoration of registration. Therefore the Board will be empowered to require the applicant to provide the same declarations as to their professional activities as will be required on annual renewal of registration.

Recommendation 10 – Renewal and restoration of registration

That applicants for annual renewal of registration and restoration of registration be required to make declarations on:

- findings of guilt in criminal matters (whether a conviction is recorded or not);
- charges for sex or violence offences where the allegations
 - (a) concern minors or relate to conduct occurring in the course of practice; involve minors; or
 - (b) relate to conduct occurring in the course of practice.
- refusal of registration, suspension or deregistration in other jurisdictions;
- suspension or cancellation of registration or the imposition of conditions on registration by another health registration board in New South Wales whether as a result of a disciplinary finding or an impairment process;
- registration with another health registration board in New South Wales;
- significant illness which may adversely affect fitness to practise;
- continuing professional education activities; and
- practice status.

7. DISCIPLINARY SYSTEM

7.1 Introduction

An effective disciplinary system plays a central role in securing the underlying objective of the Act, which is to protect the public from incompetent and unethical practitioners. The current Physiotherapists Registration Act utilises what is effectively a single tier disciplinary system. All complaints are considered by the Board, although in appropriate cases in conjunction with the report of a Professional Standards Committee. As noted in **section 2.2** complaints about physiotherapists may be made to the Physiotherapists Registration Board or the Health Care Complaints Commission (HCCC).

A statutory disciplinary system which is independent, transparent, accountable to the public and fair to all parties can protect the public by facilitating the taking of action against incompetent or unethical practitioners. However, disciplinary arrangements can, in practice, operate against the interests of patients where they impinge on the legitimate commercial and competitive conduct of practitioners. No evidence of such activities has been suggested or identified in the case of physiotherapists.

Clearly disciplinary investigations and hearings involve costs for the HCCC, the Board and physiotherapists. However, these costs are far outweighed by the benefits produced from removing incompetent or unethical practitioners from the market or imposing conditions on their practices.

Alternatives to a statutory disciplinary system include professional associations monitoring standards, or legal action at common law or under the Trade Practices and Fair Trading Acts. However neither system would achieve the protective objectives of the Physiotherapists Registration Act because there is no ability to prevent practitioners who have been found to have practised unethically or incompetently from using the title *physiotherapist*. Furthermore, legal action depends upon the individual effected being prepared to invest time and/or money in pursuing his or her cause of action.

7.2 Two-Tier Definition of Misconduct

The Physiotherapists Registration Act contains a single definition of “misconduct in a professional respect” (See **Appendix C**). The Issues Paper canvassed the introduction of a two-tier definition of misconduct in similar terms to those in the Medical Practice and Nurses Acts.

The introduction of a two-tier definition would distinguish between serious and less serious matters and limit the potential for the provision to be narrowly interpreted. In addition, the availability of a wide range of graded protective orders under the Physiotherapists Registration Act facilitates this distinction.

All submissions that have addressed this issue have supported the introduction of a two-tier definition of “professional misconduct” modelled on the Nurses and Medical Practice Acts.

“The Commission supports the introduction of a two tier definition of misconduct in accordance with the structure under the Medical Practice Act 1992 and the Nurses Act 1991.”³⁷

“The APA supports the introduction of a two-tier definition of misconduct as set down in 8.2.2(a) [of the Issues Paper] and we agree with the definitions of unsatisfactory professional conduct and professional misconduct as set down therein.”³⁸

The Department supports the introduction of a two-tier definition of misconduct.

7.3 Power to Compel a Practitioner to Respond to a Complaint

The Physiotherapists Registration Act does not confer on the Board the power to compel a physiotherapist subject to a complaint to respond to its request for information about a complaint. In the course of the review of the Medical Practice Act this was identified by the Medical Board and the Health Care Complaints Commission as an important issue. The Medical Board advised that a significant number of complaints had been unnecessarily delayed and taken further than their gravity warranted because of the failure of the practitioner to respond.

In the interests of assisting the Board to discharge its responsibilities in a timely and efficient manner, the Department supports it having the power to compel the subject of a complaint to respond to a request for information within a reasonable time frame. This recommendation is consistent with recent amendments to the Medical Practice Act.

Recommendation 11 – Definition of misconduct

That a two-tier definition of misconduct be introduced whereby:

- “Unsatisfactory professional conduct” is defined as:
 - (a) any conduct by the physiotherapist that demonstrates a lack of adequate knowledge, skill, judgement, or care in the practice of physiotherapy,
 - (b) contravention of a provision of the Act or the regulations or of a condition of registration,
 - (c) a failure without reasonable excuse by the physiotherapist to comply with a direction of the Board to provide information with respect to a complaint against the physiotherapist,
 - (d) failure to comply with an order made or a direction given by the Board or Tribunal,
 - (e) any other improper or unethical conduct by the physiotherapist in the course of the practice or purported practice of physiotherapy.
- “Professional misconduct” is defined to mean “unsatisfactory professional conduct of a serious nature which may lead to suspension or de-registration of the physiotherapist”.

³⁷ Submission – Health Care Complaints Commission

³⁸ Submission – Australian Physiotherapy Association

7.4 Grounds for Making a Complaint

Under the Physiotherapists Registration Act a complaint can be made that a physiotherapist has been convicted of a criminal offence or has been guilty of “misconduct in a professional respect”. The Issues Paper noted that the Nurses Act provides that a complaint can be made that a nurse

- has been convicted of an offence in circumstances that render the nurse unfit, in the public interest, to practise,
- suffers from an impairment,
- is guilty of unsatisfactory professional conduct or professional misconduct,
- does not have the physical or mental capacity to practise,
- is not of good character.

The only submission to address this point was that from the Australian Physiotherapy Association which agreed that

“provision should be made whereby a complaint may be made that a physiotherapist is not of good character or where a physiotherapist has been convicted of an offence in circumstances that render the physiotherapist unfit, in the public interest, to practise.”

As noted previously, it is essential that the grounds for making a complaint complement the grounds for refusing registration, which were discussed in **Chapter 6**. If they do not there will be anomalies because conduct will be treated differently depending upon whether it is being considered in the course of an application for registration or for the purposes of determining if disciplinary action should be taken against a person who is already registered. Therefore the Department recommends that a complaint be able to be made that a physiotherapist has been found guilty in a criminal matter whether or not a conviction is recorded; that the physiotherapist suffers from an impairment; that the physiotherapist does not have the physical or mental capacity to practise; or the physiotherapist is not of good character.

As the Department has also recommended, **recommendation 11**, that a two tier definition of misconduct be introduced it is necessary that a complaint can be made that a physiotherapist has been guilty of unsatisfactory professional conduct or professional misconduct.

In addition to the matters discussed in this section the Department has considered the matter of complaints about professional fees. Registration boards, including the Physiotherapists Registration Board, receive complaints about professional fees and the efficacy of the treatment received for those fees. In the absence of conduct that constitutes “misconduct in a professional respect” the Physiotherapists Registration Board has no power to consider such complaints. This matter is given detailed consideration in the discussion of disciplinary structures in sections **7.6** and **7.7**, and the Department is of the view that the Physiotherapists Registration Board should be able to receive and consider complaints about the fees charged for physiotherapy treatment. It is important to emphasise that this will not provide the Board with a mechanism to set or regulate fees charged but rather to assess whether treatment of value has been provided to the patient and make appropriate orders with regard to the fees charged for that treatment.

7.5 Disciplinary Action by Other Registration Authorities

As noted above in section 6.4 there are a number of health professionals in NSW who are registered with more than one registration board and quite clearly there can be professional conduct by a practitioner in one professional context that requires that disciplinary action be taken in all the professional contexts in which the practitioner is entitled to practice. Therefore it is important that where a physiotherapist holds dual registration in NSW the Physiotherapists Registration Board be able to consider any disciplinary finding against the physiotherapist by another health registration board and make a complaint about the physiotherapist based on the finding by the other registration board.

Recommendation 12 – Grounds for complaint

The grounds for making a complaint about a physiotherapist be that the physiotherapist

- has been convicted of an offence or been the subject of a criminal finding in circumstances that render the physiotherapist unfit, in the public interest, to practise,
- is guilty of unsatisfactory professional conduct or professional misconduct,
- has not provided treatment of value,
- suffers from an impairment,
- does not have the physical or mental capacity to practise,
- is not of good character.

That the Act be amended to provide that where a practitioner is subject to a disciplinary finding by another health registration board in NSW that finding may form the basis of a complaint to the Physiotherapists Registration Board.

Where the Board is aware that a practitioner is registered with another health registration board it be required to notify that board of any disciplinary action taken against a practitioner and any suspension of registration or the imposition of conditions on registration as a result of the impairment process.

7.5 Disciplinary Structures

The existing disciplinary structure in the Physiotherapists Registration Act provides that the Board is required to consider all complaints and decide on an appropriate protective order where a complaint is proved. In less serious professional matters a Professional Standards Committee (PSC) can be constituted to inquire into a complaint and make recommendations to the Board. Where a complaint is serious a full Board inquiry is constituted to hear the complaint.

The Issues Paper raised for consideration changes to the Act's disciplinary structure. Possible changes include introduction of a Professional Standards Committee and Tribunal system modelled on that in the Nurses Act and the Medical Practice Act or a Professional Care Assessment Committee/Board and Tribunal system based on the system under the Dentists Act. The Dentists Act model is the model that has been recommended for chiropractors, osteopaths, optometrists and psychologists following reviews of the relevant Acts.

7.5.1 The Professional Standards Committee and Tribunal model

This is the model applied by the Nurses Act and the Medical Practice Act. Complaints of unsatisfactory professional conduct are considered by a Professional Standards Committee and complaints of professional misconduct are heard by the Tribunal. Both PSC and Tribunal proceedings are independent of the Board and each body makes its own findings and administers any protective order considered appropriate.

Professional Standards Committees are intended to inquire into complaints in an informal manner. Inquiries are held in the absence of the public, unless the Committee directs otherwise, and neither the complainant nor the practitioner is entitled to legal representation. Professional Standards Committees are generally constituted by two members of the relevant profession and one public member who is not a health professional. If no member of a Committee is legally qualified a legal practitioner may be appointed to assist the Committee.

Tribunals hold formal hearings into serious complaints that, if substantiated, could effect the practitioner's right to continue to practise. Tribunal hearings are conducted in public, unless the Tribunal orders otherwise, and both the complainant and the practitioner are entitled to legal representation. Tribunals comprise two members of the relevant profession, a public member and are chaired by a legal practitioner with extensive experience.

7.5.2 The Physiotherapy Standards Advisory Committee/Board and Tribunal model

This is a modification of the model currently applied by the Dentists Act and the model recommended for adoption by a number of other health professional reviews. Under this system serious complaints would be referred to the Tribunal for a hearing and less serious complaints including those relating to whether or not the consumer has received service of value or the services they have paid for could be referred to the Physiotherapy Standards Advisory Committee (PSAC). The PSAC would have a role in conciliating and investigating complaints about physiotherapists and would make recommendations to the Board for their resolution.

The PSAC would provide a forum for independent expert assessment of concerns raised by patients as to the standards of physiotherapy services provided to them, and could also provide a means for consumers to make complaints about the lack of value in the treatment provided to them. The PSAC would also provide a means for the Board to receive a more detailed assessment of a complaint before determining how to proceed. In this regard, the PSAC could refer a patient for an independent examination and obtain such other evidence, professional reports and advice, as it considers desirable. It is important to emphasise that this model will not provide a mechanism for the Board to regulate fees and the Board will have no power to make complaints that a practitioner's fees are too high but rather a mechanism for consumers to complain that they have not received the services or treatment that they paid for. The PSAC would be constituted by three physiotherapists and a consumer representative.

The experience of the Dental Board with the Dental Care Assessment Committee (DCAC) is that it performs a useful function for consumers. It is considered to be efficient, responds to complaints in a prompt manner, and is a less costly alternative for consumers than pursuing legal action through courts or tribunals. In respect of dental services it represents an effective way of dealing with consumer complaints, the vast majority of which relate to the less serious end of the misconduct scale or to disputes as to whether consumers have received treatment of value. Where a matter cannot be resolved by the DCAC with the consent of the parties involved or there are issues the DCAC considers should be brought to the attention of the Board, the Committee refers the matter back to the Board with a recommendation for action. The DCAC can recommend that a practitioner be cautioned or reprimanded, or may make any other recommendation it considers necessary. The Board does not have to accept the DCAC's findings or recommendations and may in appropriate cases refer a matter for a disciplinary hearing notwithstanding the DCAC's successful conciliation of a complaint.

It is useful to contrast the utilisation of the DCAC with PSCs under the Chiropractors and Osteopaths Act. The Dental Board receives around 80 complaints each year and about 80% are referred to the DCAC for consideration.³⁹ By way of comparison in the seven reporting years 1991/2 to 1997/8 the Chiropractors and Osteopaths Registration Board received over 220 complaints and the Board's complaints screening committee considered 59 complaints regarding treatment provided by registrants or the conduct of registrants. Of these complaints only one proceeded to a PSC hearing, with 10 matters being heard by the Chiropractors and Osteopaths Tribunal.⁴⁰

7.5.3 Submissions

Few submissions addressed the issue of disciplinary structures. The submission from the Physiotherapists Registration Board endorsed changes to the disciplinary system and was broadly supportive of both suggested models. Other submissions endorsed the Dentists Act model as appropriate for the physiotherapy profession and in the interests of consumers.⁴¹

The Department has recommended in other health professional Act reviews, specifically reviews of the Chiropractors and Osteopaths Act, the Optometrists Act and the Psychologists Act, that the Dental Act model be adopted. It is considered that this model offers the most effective model for handling consumer complaints expeditiously whilst ensuring that serious matters are appropriately dealt with through a formal Tribunal system. The Department considers that the arguments in support of this system are equally valid for the physiotherapy profession and that it should be incorporated in the Physiotherapists Registration Act. The Department is however cognisant of the differences between professions and the model adopted in the Physiotherapists Act will be modified to ensure that it functions in a manner appropriate for the physiotherapy profession.

³⁹ Dental Board of NSW *Information Bulletin* (October 1997) p.5

⁴⁰ Chiropractors and Osteopaths Registration Board Annual Reports 1991/2 to 1997/8.

⁴¹ Submissions - Health and Research Employees Association; Illawarra Area Health Service

7.6 Application of the Two-tier Definition of Misconduct

The Department proposes that the recommended two tier definition of misconduct be applied through a two tier Board inquiry/Tribunal structure that incorporates the PSAC. If such a structure were adopted then complaints of unsatisfactory professional conduct would be considered by the relevant Board after investigation by the PSAC, the HCCC or the Board's Inspectors, and complaints of professional misconduct would be considered by the Tribunal.

The Board would be able to make the following orders:

- counsel or reprimand the physiotherapist;
- order the physiotherapist to seek medical or psychiatric treatment or counselling;
- order the physiotherapist to undertake additional training;
- order the physiotherapist to seek advice on the management of their practice;
- order the physiotherapist to report on the status of their practice to the Board, or its nominee;
- order the refund in whole or part, or the withholding in whole or part, of the payment for the physiotherapy services the subject of the complaint; and
- impose conditions on the physiotherapist's practice.

The Department envisages Board inquiries being conducted in an informal manner. Where a practitioner is unhappy with the outcome of an inquiry he or she may appeal to the Tribunal where a much higher level of formality is involved and legal representation is allowed.

The Tribunal would be able to make the orders available to the Board. The Tribunal will also have the power to:

- suspend or de-register the physiotherapist.

Notwithstanding the fact that the Tribunal would hear complaints of professional misconduct it will be able to make a finding of unsatisfactory professional conduct.

There may be instances where during consideration of a complaint of unsatisfactory professional conduct the Board forms the opinion that the complaint is of a more serious nature than originally determined and may provide grounds for suspension of the practitioner's registration or their deregistration. That is the complaint may constitute professional misconduct. In such a case the hearing must be adjourned and the complaint referred to the Tribunal for consideration. The exception to the general rule that only the Tribunal can suspend or cancel a person's registration is where the Board considers such action is warranted due to a lack of physical or mental capacity. In those cases the Board may recommend suspension or deregistration to the Chair or Deputy-Chair of the Tribunal who may make an order in the terms recommended, any other order with respect to suspension or deregistration or any other order available to the Board.

The power to fine a practitioner has been deleted from the list of protective orders available following a disciplinary hearing/inquiry as it is a punitive penalty that is inconsistent with the protective nature of the jurisdiction exercised by registration boards and health professional disciplinary bodies. All submissions that addressed this issue agreed with the deletion of the power to fine.

7.7 Role of the Health Care Complaints Commission

In considering changes to the disciplinary structure it must be remembered that the Health Care Complaints Commission (HCCC) is the independent body created by the *Health Care Complaints Act 1993* to receive and investigate complaints about health care providers and institutions. The HCCC should therefore have a role in whatever disciplinary structure is adopted. Under the PSAC/Board and Tribunal model recommended for inclusion in the Act the HCCC will have a role not dissimilar to the role it has under the current disciplinary system. The Board and the HCCC will continue to consult each other on the action to be taken regarding each complaint and if either body considers that a complaint requires investigation by the HCCC it must be so investigated. Following an investigation the HCCC may decide whether to prosecute the complaint before the Board, in the case of a complaint of unsatisfactory professional conduct, or the Tribunal, in the case of a complaint of professional misconduct.

Where a complaint is referred to the PSAC the Board would provide the HCCC with a copy of the Committee's recommendations.

As the Board is the relevant adjudicative body on complaints involving conduct that may constitute unsatisfactory professional conduct, there may be a perceived lack of transparency and a conflict in roles if the Board is able to dismiss a complaint that the PSAC has recommended be the subject of an inquiry. It is therefore proposed that where the PSAC recommends that the Board inquire into unsatisfactory professional conduct the Board must inquire into the matter or refer it to the Tribunal for hearing. The Board will also be required to give the HCCC the opportunity to attend and make a submission to the hearing or in Tribunal matters actually conduct the prosecution.

Recommendation 13 – Revised disciplinary structure

That a revised disciplinary structure be introduced whereby:

- The Physiotherapy Standards Advisory Committee will be established to consider and investigate complaints, referred from the Board regarding standards of professional services. The Physiotherapy Standards Advisory Committee will be able to conciliate and investigate consumer complaints, including complaints about fees, and to make recommendations to the Board for the resolution of those complaints or any further action the Committee considers should be taken. When the Committee recommends that there be an inquiry into unsatisfactory professional conduct the Board must conduct an inquiry or refer the matter to the Tribunal for a hearing.
- The Board will hear complaints of unsatisfactory professional conduct following investigation of a complaint by the Physiotherapy Standards Advisory Committee, the Health Care Complaints Commission or the Board's Inspectors.
- A Tribunal will be established to hear complaints of professional misconduct.

Following an inquiry the Board is to be able to exercise any of the following powers either singly or in combination:

- Place conditions on the physiotherapist's registration.

- Issue a caution or reprimand.
- Order the physiotherapist to seek medical or psychiatric treatment or counselling.
- Order the physiotherapist to undertake further training.
- Order the physiotherapist to report on the status of their physiotherapy practice to the Board, or its nominee.
- Order the physiotherapist to seek advice on the management of their physiotherapy practice.
- Order the refund in whole or part, or the withholding in whole or part, of the payment for the physiotherapy services the subject of the complaint.

The Tribunal will be able to exercise any of the above powers of the Board, as well as:

- Suspending the physiotherapist's registration for such time as it thinks fit.
- Removing the physiotherapist's name from the Register.

7.8 Composition of Disciplinary Bodies

7.8.1 Composition of the Tribunal

As noted in **7.5.1** professional tribunals have four members who are:

- a legal practitioner with extensive experience, appointed by the Governor;
- two registered practitioners having such qualifications as may be prescribed, appointed by the relevant Board; and
- one representative of consumers appointed by the Board from a panel of consumers nominated by the Minister.

The Acts which currently adopt this structure have shown that it is effective and allows for appropriate legal and professional expertise while ensuring that consumers are involved in helping to maintain professional standards. It is proposed that the Physiotherapists Tribunal will adopt this structure.

Due to the extensive powers that Tribunals wield and the nature of the protective orders they may make it is essential that the process be transparent and that a high level of natural justice is observed. Therefore the Department recommends that members of the Board be ineligible for appointment to the Tribunal.

For all boards for which the Health Administration Corporation provides administrative support the Department recommends the creation of a single panel from which can be drawn lay persons for disciplinary bodies. A similar approach could be taken in relation to the legal members of Tribunals who are appointed by the Governor. Neither of these initiatives requires legislative amendment. These measures will facilitate the achievement of consistency of approach in disciplinary proceedings across a number of health professions and reduce administrative costs associated with the establishment of separate panels.

7.8.2 Composition of the PSAC

The DCAC comprises four members, three dentists and a consumer. The PSAC will be constituted in a similar manner with three physiotherapists and a consumer. It is

recommended that, in order to emphasise the transparency of the process undertaken by the PSAC, and as the Committee can refer matters back to the Board for consideration or inquiry, members of the Board will not be eligible to sit on the PSAC. The consumer member of the Committee could be appointed from the same general panel as would be established to provide consumer members for all health professional disciplinary bodies.

Recommendation 14 - Constitution of disciplinary bodies

That the Physiotherapists Tribunal be constituted as follows:

- a legal practitioner with extensive experience, appointed by the Governor;
- two registered physiotherapists having such qualifications as may be prescribed, appointed by the Board; and
- one representative of consumers appointed by the Board from a panel of consumers nominated by the Minister.

That the Physiotherapy Standards Advisory Committee be appointed by the Minister and be constituted as follows:

- one registered physiotherapist, who is to be chair of the Committee, nominated by the Board;
- two registered physiotherapists selected from a panel provided to the Minister by the Board; and
- one representative of consumers appointed from a panel of consumers nominated by the Minister.

That Board members should not be eligible to sit on the Tribunal or the Physiotherapy Standards Advisory Committee.

7.9 Conduct of Proceedings

7.9.1 Conduct of Tribunal proceedings

Tribunals, which can suspend or cancel a practitioner's registration, are designed to be adversarial and formal and can conduct proceedings as they see fit. A tribunal may summons a witness to produce documents or give evidence, is not bound by the rules of evidence and may award costs. As tribunals have such extensive and far reaching powers to effect a practitioner's livelihood a high standard of natural justice must be observed. Therefore legal representation is allowed and a decision of a tribunal may be appealed to the Supreme Court on a point of law or the severity of penalty. It is not appropriate that an appeal be available on findings of fact as tribunals are expert bodies and are best placed to reach a decision on the facts of a particular case.

7.9.2 Conduct of PSAC/Board proceedings

The PSAC will be designed to operate as an investigative body and it will be able to obtain reports, interview individuals and generally inform itself on a matter in any way it considers appropriate. The PSAC will therefore not conduct hearings and its investigations and endeavours to resolve complaints will be conducted in as informal a manner as is appropriate in the circumstances.

Where the PSAC refers a matter to the Board for consideration the Board will consider that matter in an informal manner and will be able to conduct its inquiry in whatever manner it considers appropriate given the nature of the material and recommendations available to it. Where a matter is considered serious enough to warrant a formal hearing that matter should generally be referred to the Physiotherapists Tribunal.

7.10 Medical Examination

The Act provides that the Board may order a physiotherapist to undergo medical treatment or counselling following a disciplinary hearing. The Issues Paper noted that the Medical Practice Act adopts a different approach and allows the Board to order a practitioner, who is the subject of a complaint, to undergo a medical examination. All submissions that addressed this point, including those from the Board and the Australian Physiotherapy Association, agreed that the Board should have the power to order a practitioner who is subject to a complaint to undergo a medical examination.

The Department considers such a power to be in the public interest as it will facilitate the Board's management of complaints, particularly those relating to a practitioner's physical or mental capacity to practise. In line with the Medical Practice Act the Department recommends that the Act provide that a failure by a practitioner to attend for an examination may be considered as a lack of physical or mental capacity.

Recommendation 15 - Medical examinations

That the Board have the power to order that a physiotherapist who is the subject of a complaint attend for a medical examination.

7.11 Notification of Criminal Convictions and Relevant Serious Criminal Charges

The criminal justice system can provide information relevant to whether disciplinary action should be initiated against a practitioner. The Department has been considering all health professional registration Acts to ensure that they continue to reflect the high standards expected by the community by adequately addressing questions of character and criminal convictions. The Department has identified a number of strategies that would be of assistance in this regard. They are as follows:

- Courts are to be required to notify the relevant registration board of any practitioner who is convicted of an offence or who is found guilty of a sex or violence offence where a conviction is not recorded. Currently the Physiotherapists Registration Act is one of only two Acts to contain similar provisions. Under the current Act courts are required to notify the Board if a practitioner is convicted of an offence unless it is one prescribed by regulation. The Regulation prescribes all traffic offences except the most serious such as

negligent and reckless driving, driving under the influence of alcohol or other drugs, and failing to stop and give assistance or particulars after an accident.

- Practitioners are to be under a positive obligation to notify their registration board if they are convicted of an offence, except certain minor offences to be prescribed by regulation, or found guilty of a sex or violence offence whether or not a conviction is recorded. This will provide an additional means for obtaining relevant information in a timely manner and will emphasise to practitioners the potential seriousness with which criminal matters should be regarded.
- Practitioners are to be under an obligation to notify their registration board within seven days if charged with a “sex or violence offence” where the allegations:
 - (a) involve minors; or
 - (b) relate to conduct occurring in the course of practice.

A “sex or violence offence” means an offence involving sexual activity, child pornography, acts of indecency, physical violence or the threat of physical violence.

Requiring practitioners to notify the Board about sex or violence charges involving minors is in recognition of the particularly vulnerable position of minors with respect to this type of offence. Requiring practitioners to notify sex or violence charges that relate to conduct in the course of practice balances the presumption of innocence (a criminal law concept) with the Act's objective of protecting the public. In each of these instances the criminal charge per se would not constitute the basis for disciplinary action. Rather, the charge and the circumstances surrounding it can be relevant to a practitioner's overall ability to practise and to questions of character.

Self-reporting of sex or violence charges is not unprecedented in the health system. For example the *Health Services Act 1997* requires health system employees and visiting practitioners who have been charged with a serious sex or violence offence to report that fact to the chief executive officer of the relevant public health organisation.

Recommendation 16 – Criminal convictions

That:

- Courts be required to notify the Board of any practitioner who is convicted of an offence, unless it is an offence of a type that is exempted by regulation.
- Courts be required to notify the Board of any practitioner who is found guilty of a sex or violence offence, irrespective of whether a conviction is recorded.
- Practitioners be required to notify the Board if they are found guilty of an offence, unless it is an offence of a type that is exempted by regulation, irrespective of whether a conviction is recorded or not.
- Practitioners be required to notify the Board within seven days if charged with a sex or violence offence where the allegations:
 - (a) involve minors; or
 - (b) relate to conduct occurring in the course of practice.

A sex or violence offence means an offence involving sexual activity, child pornography, acts of indecency, physical violence or the threat of physical violence.

7.12 Emergency Powers

Under the Medical Practice Act and certain other health professional registration Acts the respective registration boards have the power to order that a practitioner's registration be suspended or made subject to conditions where that action is required in order to protect the physical or mental health of any person, including the practitioner. Recent amendments to the Medical Practice Act provide that such an order can be made for a period of up to eight weeks and may be renewed with the approval of the Chair or Deputy Chair of the Medical Tribunal. Where the Medical Board's emergency powers are exercised the Board must refer a complaint to the Medical Tribunal or a Professional Standards Committee at the same time.

This matter was not discussed in the Issues Paper, however the Department is of the opinion that the nature of physiotherapy practice is such that the inclusion of emergency powers is appropriate. In the reviews of the Medical Practice Act and the Nurses Act there has been overwhelming support for the retention of the Boards' emergency powers and the Department considers that they are an essential aspect of the protective jurisdiction exercised by health professional registration boards.

Recommendation 17 – Emergency powers

That the Physiotherapists Registration Act include emergency suspension powers modelled on section 66 of the Medical Practice Act.

7.13 Disciplinary Action Against Practitioners Who Cease to be Registered

As noted in the Issues Paper neither the Physiotherapists Registration Act nor the Health Care Complaints Act allow the continuation of a complaint against a person who ceases to be registered. Therefore a practitioner who is subject to a complaint may ask the Board to remove his or her name from the Register or fail to pay the annual renewal fee and thereby prevent the Board from taking or continuing with disciplinary action.

All submissions that addressed this point agreed that the Physiotherapists Registration Act should contain a provision allowing the Board to consider and take action on a complaint that concerns a person who is no longer registered. This approach is consistent with the approach currently taken in the Medical Practice Act and the Nurses Act.

Recommendation 18 – Disciplinary action

That the Act be amended to provide that the Board may deal with a complaint against a person who ceases to be registered.

7.14 Withdrawal of a Complaint

The Physiotherapists Registration Act makes no provision for the withdrawal of a complaint once disciplinary action commences. The inclusion of such a power has been recommended in reviews of other health professional Acts and the Department supports its inclusion in the Physiotherapists Registration Act. A complaint would be able to be withdrawn in circumstances where the complaint should not be proceeded with (eg complaints that cannot

be substantiated) and following consultation between the Board and the Health Care Complaints Commission.

Recommendation 19 – Withdrawal of a complaint

That a complaint be able to be withdrawn once an investigation or disciplinary action has been commenced, following consultation between the Board and the Health Care Complaints Commission.

7.15 Making of complaints

Section 24(4) of the Physiotherapists Registration Act requires that any complaint by a member of the public alleging misconduct in a professional respect is to be accompanied by a deposit of \$10 which is to be forfeited if the Board considers the complaint to be frivolous or vexatious.

Other health professional registration Acts require complaints to be verified by a statutory declaration, although it has been recommended in recent reviews that this requirement be deferred until such time as it is decided to refer a complaint for a disciplinary hearing. It has also been suggested that the Health Care Complaints Commission be exempted from the requirement to verify a complaint by statutory declaration. The rationale for this is that the Commission is a statutory body subject to oversight by the Ombudsman's Office, the Minister for Health and the Parliament and there is no evidence that the Commission has made inappropriate complaints.

Therefore the Department considers that complaints should be verified by statutory declaration when the matter is to be referred for disciplinary action and that the Health Care Complaints Commission should be exempt from this requirement. These changes will help to ensure that the Board or the Commission is able to promptly investigate or assess matters while ensuring that the details of the complaint are verified to protect the interest of the practitioner should the complaint proceed to disciplinary action.

Recommendation 20 – Statutory declarations

That a complaint to the Physiotherapists Registration Board be in writing and be verified by a statutory declaration at the point where the complaint is to be referred for disciplinary action. The Health Care Complaints Commission is to be exempt from the requirement to verify a complaint by statutory declaration.

7.16 Codes of Conduct

The Physiotherapists Registration Act does not provide the Board with the power to make codes of professional conduct that set out the rules of conduct to be observed by physiotherapists in practice. Nonetheless the Board has issued a number of policy statements setting out the expected standards to be observed by physiotherapists in certain areas of practice. The Issues Paper sought comments on whether the Board should be able to make a code of conduct or whether the issuing of policy statements is more appropriate. Submissions advocating a code of conduct were invited to address the content of a code and to discuss whether breach of the code should form the basis for a complaint.

Codes of conduct have been given a statutory basis in several health professional registration Acts to assist the relevant board ensure that registered practitioners are competent to practise. These codes cover a range of issues including but not limited to standards of conduct, professionalism, privacy and confidentiality, research and relations with other members of their professions.

Codes of professional conduct can play an important role in protecting the public from harm by establishing standards to be observed by practitioners in the course of their professional practice and can also be used by disciplinary bodies to assist in defining standards of acceptable practice. Most importantly a code of conduct serves as a guide for practitioners as to the expected standard of conduct or practice. However, codes can be used to restrict competition by altering the behaviour of individual practitioners and may also impose compliance costs on the profession. To this extent, the review has considered whether codes with a statutory basis are consistent with the requirements of the Competition Principles Agreement. Obviously, whether a code has such an impact will depend on the content of the code itself.

In the absence of codes, the standards that are expected of physiotherapists are derived from the definition of “unsatisfactory professional conduct” and the common law. Codes represent a pro-active method of establishing clear standards to be observed by practitioners.

While the need for standards can be addressed by the profession itself through professional associations it can be difficult for the practitioner to determine exactly what is the appropriate standard to be observed. This is particularly evident where there are a range of conflicting guidelines on particular issues. A statutory code can provide a single reference point for both patients and practitioners.

Of greater concern is the fact that codes developed by professional associations may give undue emphasis to protecting certain forms of commercial conduct by the profession and may not be consistent with the public interest. In particular, the deeming of matters as “unprofessional conduct” by an association may have an adverse impact on legitimate commercial conduct (eg restrictions on advertising). Practitioners may feel obliged to observe such standards even though they are not legally binding, and their use by courts in determining what constitutes accepted professional practice may de facto give them legal recognition.

The benefits and costs of a code can only be determined where the precise content of the code is known. While concerns that codes can restrict competition or can impose unnecessary compliance costs on practitioners are noted, in the absence of a statutory code, standards could be set by other bodies which may result in greater restrictions on competition and compliance costs for practitioners.

Submissions on this issue were divided on the question of whether a code of conduct with statutory backing should be made by the Board. Submissions from the Board, the Australian Physiotherapy Association and the School of Physiotherapy at the University of Sydney all argued against a statutory code of conduct.

“The Board does not agree that a Code of Professional Conduct is needed to administer the Act. The physiotherapy profession already has a detailed code of conduct (APA 1999) that reflects the standards of practice expected.”⁴²

“The School supports the practice whereby the Board develops and issues policy statements, believing this to be the most appropriate model. Professional Codes of Conduct already exist and are under the purview of the professional association (APA)”⁴³

On the other hand a number of submissions, including that from the Health Care Complaints Commission, supported the Board having the power to make or adopt a code of conduct.

“The Commission supports the desirability of professions publishing Codes of Professional Conduct particularly for the educative value they have for consumers and for the members of the profession.

...

The Commission does see merit in Codes of Professional Conduct being approved by an appropriate independent body. However, it should be appreciated that such a process may undermine the evidentiary value of Codes of Professional Conduct in that it would then be open to suggest that such a Code does not represent the standards accepted within the profession but rather are standards imposed from outside the profession which may or may not have general acceptance.”⁴⁴

On balance, the Department supports the Act containing a power for the Board to make a code of conduct. Such a code:

- would be a valuable tool for directing practitioners on the standards to be adopted;
- could be used by disciplinary bodies to assist in defining standards of acceptable practice;
- would be readily accessible and provide information to consumers as to the standards of practice expected of practitioners; and
- could provide information to assist consumers in selecting a practitioner whose practice complies with acceptable standards.

A range of options were canvassed in the paper including requiring a code to be approved by the Minister for Health, the Department or another appropriate body; subjecting a code to the potential for disallowance by Parliament under the *Interpretation Act 1987*; and establishing a formal system for developing a code involving a process similar to the RIS process under the *Subordinate Legislation Act 1989*.

It is important that any code of conduct made or adopted by the Board does not sanction anti-competitive conduct or contain trivial matters, and that it serves the interests of consumers. Therefore the Department supports a code being made by the Board following a process of public consultation after which the Minister’s approval must be obtained. The process of public consultation would require a proper assessment of the respective advantages and disadvantages of a code’s provisions. The Department does not consider that such a process of approval will reduce the evidentiary value of a code as the code would be prepared by the Board and approved by the Minister.

⁴² Submission – New South Wales Physiotherapists Registration Board

⁴³ Submission – School of Physiotherapy, the University of Sydney

⁴⁴ Submission – Health Care Complaints Commission

The recent review of the Medical Practice Act identified a need for the Minister to have the power, in the public interest, to require the Board to develop a code on particular issues. The Medical Practice Act has recently been amended to incorporate this power and it is proposed that all health professional registration Acts will be amended to include it. It is emphasised that the actual content of a code is a matter for the Board although the content of the code will require the Minister's approval.

Recommendation 21 – Codes of conduct

That the Act provide for the making of a code of conduct by the Board following release of a draft code and impact assessment statement for public consultation and the Minister's approval.

That the Minister may direct the Board to make a code of conduct on a particular matter with the content of such a code being developed by the Board.

8. ALTERNATIVES TO THE DISCIPLINARY SYSTEM

8.1 Impaired Registrants Panels

Unlike the Nurses Act and the Medical Practice Act the Physiotherapists Registration Act does not provide the Board with a mechanism other than the disciplinary system for dealing with practitioners who may be impaired in their ability to practise.

The Medical Practice Act provides the following definition of impairment:

A person is considered to suffer from an impairment if the person suffers from any physical or mental impairment, disability, condition or disorder which detrimentally affects or is likely to detrimentally affect the person's physical or mental capacity to practise medicine. Habitual drunkenness or addiction to a deleterious drug is considered to be a physical or mental disorder.

This mechanism enables the Medical Board to take action before the practitioner's condition puts the public at risk or disciplinary proceedings would be warranted. Part of the management of impaired practitioners involves assessment of the type and level of their impairment and devising strategies to manage that impairment. As such it is appropriate that the Board have the power to require a physiotherapist who is subject to the impairment system to undergo a medical or psychiatric examination at the Board's expense.

Impaired registrants panels have no power to impose conditions on a practitioner's registration but where the Board is satisfied that the practitioner has voluntarily agreed to having conditions placed on his or her registration, or having that registration suspended, the Board may impose the conditions or suspension. Where the practitioner does not agree with the panel's recommendation the Board may deal with the matter as a complaint and this is also the case where the Panel recommends the matter be dealt with as a complaint.

Where a practitioner has voluntarily consented to conditions being placed on his or her registration or to suspension he or she may apply to the Board for a variation or lifting of the conditions or suspension. Following such a request the Board will obtain a report from an impaired registrants panel and may lift or vary the conditions or suspension as appropriate.

Both the Medical Board and the Nurses Board as well as the Health Care Complaints Commission report that the impairment systems function well and provide appropriate and efficient means for the management of impaired practitioners. The Issues Paper sought submissions on whether a similar system should be established under the Physiotherapists Registration Act. Submissions that addressed this point were uniformly in agreement that an impairment system modelled on the system in the Medical Practice Act should be included in the Act.

*"We believe that inclusion of an impaired registrants panel similar to that included in the Medical Practice Act would be in the public interest and therefore support such inclusion."*⁴⁵

⁴⁵ Submission – Australian Physiotherapy Association

“An Impaired Registrants Panel, as present in the Medical Practice Act should be established, enabling the Board to act in a preventative way concerning potential risk to the public.”⁴⁶

Therefore the Department recommends that the Act provide for the establishment of impaired registrants panels which will be charged with inquiring into and managing physiotherapists who suffer from impairment.

8.2 Composition of Impaired Registrants Panels

Impaired registrants panels under the Medical Practice Act are constituted by two people appointed by the Board, at least one of whom is a registered medical practitioner. Impaired registrants panels under the Physiotherapists Registration Act should be constituted in a similar fashion, that is by two people at least one of whom is a registered physiotherapist. This structure will ensure that at least one of the members of a panel is a peer of the physiotherapist and will also allow the panel to have other expert membership, such as a medical practitioner or psychologist, as required in particular cases.

Recommendation 22 - Impaired practitioners

That the Act be amended to include impaired practitioners provisions modelled on Part 13 of the Medical Practice Act.

⁴⁶ Submission – Health and Research Employees Association

9. COMMERCIAL ISSUES

9.1 Advertising

The current Act provides that regulations may be made about “*the manner in which and the extent to which a physiotherapist or a corporation engaged or associated in the practice of physiotherapy is authorised to advertise*”.⁴⁷ The Physiotherapists Registration Regulation 1995 provides that advertising by a physiotherapist or a corporation in relation to physiotherapy must not:

- (a) *be false, misleading or deceptive; or*
- (b) *be vulgar or sensational; or*
- (c) *create an unjustified expectation of beneficial treatment; or*
- (d) *promote the unnecessary or inappropriate use of the services of a physiotherapist; or*
- (e) *claim superiority for a physiotherapist in the practice of physiotherapy; or*
- (f) *compare the physiotherapist’s practice with that of any other physiotherapist; or*
- (g) *be unprofessional or likely to bring the profession into disrepute.*⁴⁸

The maximum penalty for contravening the provision is 5 penalty units (ie \$550). In addition advertising in contravention of the regulation constitutes “misconduct in a professional respect” as currently defined.

In addition to the Physiotherapists Registration Act’s regulation of advertising there have been recent amendments to the Public Health Act which provide that it is an offence for a person to advertise a health service in a manner that is false misleading or deceptive, or creates an unjustified expectation of beneficial treatment. This prohibition will apply to any person who advertises or promotes a health service, which has been defined in the same broad terms as are used in the Health Care Complaints Act. The penalties for this offence are up to \$11,000 for a first offence and up to \$22,000 for second and subsequent offences.

The Issues Paper sought submissions on whether there should continue to be specific restrictions on advertising by physiotherapists and physiotherapy corporations. If the power to regulate advertising was deleted from the Act, advertising would be controlled by the Trade Practices and Fair Trading Acts which prohibit misleading and deceptive conduct, and also by the amendments to the Public Health Act.

Restrictions on advertising can exacerbate fundamental disparities in market information by denying consumers access to information about the availability, quality and price of services provided by competing practitioners. Restrictions can eliminate or constrain normal forms of competitive behaviour. Obviously the extent to which restrictions impact on competition will depend on the precise terms of the regulation.

Nearly all submissions to the Issues Paper supported the retention of the power to regulate advertising under the Act. The Health Care Complaints Commission expressed the view that the regulation of professional standards in relation to advertising is necessary for the following reasons:

⁴⁷ section 33(1)(h)

⁴⁸ clause 44

- “(a) For the protection of health care consumers and for the professions;
(b) Demonstrably false, misleading or deceptive advertising is by no means the only conduct in this area from which members of the public and the professions require protection;
(c) For the reasons advanced above, Fair Trading and other similar legislation is inaccessible to most health care consumers and accordingly, is not an appropriate mechanism for the maintenance of professional standards.”⁴⁹*

The Australian Physiotherapy Association argued in its submission that the current restrictions are in the public interest and that

*“They do not restrict the dissemination of **factual** information about service and price and serve to augment the consumer protections provided by the Trade Practices/Fair Trading Acts”⁵⁰ (original emphasis)*

There were no submissions that advocated dropping the power to regulate advertising from the Act.

On balance, the Department supports the Physiotherapists Registration Board continuing to have a regulatory role in the area of advertising for the following reasons:

- If Trade Practices and Fair Trading legislation provided the only regulation of advertising the Australian Competition and Consumer Commission and the Department of Fair Trading are unlikely to be able to devote significant resources, if any, to prosecuting cases where physiotherapists have engaged in false, misleading or deceptive advertising. In such a case consumers, or the Board, may be placed in the position of having to take private legal action to seek redress for loss caused by unlawful advertising, and possibly an injunction to prevent its recurrence. However, it is important to note that recent amendments to the Public Health Act (outlined above) have strengthened State regulation in this area.
- Removal of the power to regulate advertising would mean that in circumstances where evidence was available of advertising that was false, misleading or deceptive and there was direct evidence of an adverse patient outcome that warranted disciplinary action, the matter would have to be dealt with in unrelated proceedings in separate fora.
- Retention of a power to regulate advertising in the Physiotherapists Registration Act will assist in reminding physiotherapists of the importance of advertising in an appropriate manner.
- Prosecution of advertising breaches involves an assessment of the veracity of any claims made. The Physiotherapists Registration Board is well placed to undertake this task.
- The Physiotherapists Registration Act contains a broad range of sanctions which range from counselling to de-registration. The penalties provided for under the Fair Trading and Trade Practices Acts are numerous but do not include the power to order de-registration of a practitioner.

⁴⁹ Submission – Health Care Complaints Commission

⁵⁰ Submission – Australian Physiotherapy Association (NSW Branch)

- The Physiotherapists Registration Regulation prohibits advertising that promotes the *unnecessary or inappropriate* use of the services of a physiotherapist. Without this restriction in place there would be greater scope for resources to be used unnecessarily, potentially at the expense of more beneficial uses.

As noted above, the extent to which restrictions will impact on competition will depend on the precise terms of the regulation. The advertising restrictions in the Physiotherapists Registration Regulation are generally modelled on consumer protection legislation.

However, the restrictions in the Regulation on advertising that is

- (a) vulgar or sensational;
- (b) claims superiority for a physiotherapist in the practice of physiotherapy;
- (c) compares the physiotherapist's practice with that of any other physiotherapist;
- (d) is unprofessional or likely to bring the profession into disrepute

do not conform to this model.

In the Issues Paper the view was expressed that if advertising restrictions were to continue the Department supports their being modelled on consumer protection legislation. The prohibition on claims of superiority and practice comparisons results in less informed consumers and constrains normal forms of competitive behaviour and must be considered in the context of the prohibition on advertising which is "*false, misleading or deceptive*" which facilitates consumers making informed choices. It should also be noted that the prohibition on advertising claims of superiority has been progressively removed from regulations governing other registered health professionals.⁵¹ The Department of Health supports the removal of the prohibition on claims of superiority and the restriction on practice comparisons in advertising by physiotherapists.

The prohibitions on advertising that is "vulgar or sensational" or "unprofessional or likely to bring the profession into disrepute" requires the Board or a judicial officer to make a subjective judgment as to whether or not an advertisement is in good taste or likely to bring disrepute on the profession. Furthermore such a restriction does not serve the interests of consumers, other than those who may be offended by a "vulgar" advertisement, and is not in keeping with the overall objectives of the Act. The Department of Health supports the removal of the prohibition on advertising by physiotherapists that is vulgar or sensational and advertising that is unprofessional or likely to bring the profession into disrepute.

The existing restrictions on advertising extend to corporations that provide physiotherapy services. It is important that company directors and those involved in the management of corporations can be held accountable for contraventions of the advertising restrictions. Therefore the Department recommends that the Act be amended to provide that when a body corporate commits an offence every director and person who takes part in the management of the body corporate is taken to have committed the same offence unless he or she proves that:

- the offence was committed without his or her knowledge or consent; and
- he or she exercised appropriate care to prevent the commission of that offence, having regard to the nature of his or her functions in that capacity and to all the circumstances.

⁵¹ Eg Medical Practice Regulation 1998; Dental Technicians Registration Regulation 1998.

Recommendation 23 – Advertising

That the regulations regarding advertising by physiotherapists provide that a physiotherapist or a corporation providing physiotherapy services must not advertise in a manner which

- is false, misleading or deceptive; or
- creates an unjustified expectation of beneficial treatment; or
- promotes the unnecessary or inappropriate use of the services of a physiotherapist.

That when a body corporate commits an offence, every director and person who takes part in its management will be taken to have committed the same offence unless he or she proves that:

- the offence was committed without his or her knowledge or consent; and
- he or she exercised appropriate care to prevent the commission of that offence, having regard to the nature of his or her functions in that capacity and to all the circumstances.

9.2 Ownership of Corporations Providing Physiotherapy Services

The Physiotherapists Registration Act is silent on the related issues of the ownership and incorporation of physiotherapy practices. Therefore there are no restrictions on physiotherapists incorporating their practices or on who may be a shareholder or director of such a corporation. The Issues Paper did not raise this matter for discussion although the Australian Physiotherapy Association in its submission noted that both the relevant Tasmanian and South Australian Acts have restrictions on the provision of physiotherapy services by corporations.

The Department of Health is not aware of any evidence that corporations providing physiotherapy services have provided those services in an inappropriate way or acted in any other way that is detrimental to the public. It is important to remember that the restriction on who may use the restricted titles and hold themselves out as capable of providing physiotherapy services ensures that the public is not misled and that corporations must employ physiotherapists to provide physiotherapy services. Therefore the Department does not recommend amending the Act to regulate the provision of physiotherapy services by corporations.

10. BOARD ISSUES

10.1 Composition

The Physiotherapists Registration Act provides that the Physiotherapists Registration Board is to have twelve members appointed by the Governor. Section 5 of the Act provides that the Board is to consist of the following members:

- 3 are to be physiotherapists elected by physiotherapists;
- 2 are to be physiotherapists nominated by the Australian Physiotherapy Association, New South Wales Branch;
- 1 is to be a physiotherapist engaged in physiotherapy nominated by the Faculty of Health Sciences, University of Sydney;
- 1 is to be a barrister or solicitor nominated by the Minister for Health;
- 1 is to be a person nominated by the Minister for Health, being an officer of the Department of Health or an employee of a public health organisation;
- 4 are to be persons nominated by the Minister.

The Issues Paper canvassed whether any changes were needed to the current composition of the Board and most submissions agreed with some or all of the suggestions raised in the Issues Paper. The exceptions to this general consensus were the Physiotherapists Registration Board which submitted that the current size and composition of the Board is appropriate and the Association of Massage Therapists which argued that competition would be enhanced by having at least one representative of a competing profession on the Board. Other submissions have made the following points:

- There should be specific provision for community representation.
- The educational representative should no longer be reserved for a nominee of the University of Sydney but should be a physiotherapist engaged in physiotherapy education in New South Wales.
- Ministerial appointments from nominees of professional associations should be made having regard to the size and representative nature of the nominating organisation.
- The reservation of a position on the Board for a rural representative (either professional or community).

The Department has given consideration to the following matters when considering the composition of the Board.

- The current Board includes three physiotherapists elected by physiotherapists. Only the Nurses Registration Board and the Dental Board contain similar provisions. The election of Board members provides an extra opportunity for individual practitioners to serve on the Board and for registrants to be actively involved in professional regulation through voting. Therefore the Department recommends that the three elected positions be retained.
- The inclusion on the Board of a person involved in the education of physiotherapists is important due to the Board's role in accrediting educational courses for registration

purposes. The current requirement that the educational representative be a nominee of the University of Sydney reflects the fact that until recently the University of Sydney, and its predecessor Cumberland College of Health Sciences, provided the only physiotherapy course in NSW. However the Wagga Wagga Campus of Charles Sturt University has recently established a physiotherapy degree and the Department understands that the University of Newcastle is also considering a degree in physiotherapy. Therefore the Department recommends that the educator on the Board be selected by the Minister following the receipt of nominations from institutions providing undergraduate physiotherapy education in NSW.

- It is important that there be a suitable balance between academics and practitioners on the Board. In past times the elected members of the Board have often come from an academic background. In order to ensure that there is a suitable representation of practitioners on the Board the Department considers that it is important for a member of the Board to be a physiotherapist nominated by the Minister for Health.
- While the current Act provides for two members of the Board to be nominees of the Australian Physiotherapy Association the Department considers that there should be a more flexible means of obtaining input from professional associations. Furthermore the prescribing of the Australian Physiotherapy Association over all other professional associations may have the effect of impeding the establishment and development of alternative associations. Notwithstanding this view it is a fact that the Australian Physiotherapy Association is the largest and most representative professional body representing physiotherapists and should therefore be specifically mentioned in the legislation. Therefore the Department recommends that the Minister appoint one physiotherapist taken from lists of nominees provided by professional associations representing physiotherapists, including the Australian Physiotherapy Association.
- The Board's role in administering the Act and in disciplinary matters requires that a member of the Board have legal training. Therefore it is recommended that there be a legal practitioner on the Board.
- All health professional registration boards in NSW include a member who is an employee of the Department of Health or a public health organisation, this position facilitates communication with the Department and consideration of issues that affect the public health system.
- The primary role of the registration system and the Board is protection of the public. It is important therefore that the Board include lay persons who can represent the community's views. In addition the Physiotherapists Registration Board has requested that there be provision for the appointment of a medical practitioner or other relevant health professional to the Board. While the Department does not consider it appropriate that there be a dedicated position on the Board for a competing health professional the Board's view that such expertise is valuable is noted. Therefore the Department recommends that the minister for health appoint three people, at least two of whom must be representative of the public, to the Board.

Therefore the Department recommends the Physiotherapists Registration Board being reformed with eleven members.

Recommendation 24 – Board composition

That the Physiotherapists Registration Board have eleven members and be constituted as follows :

- Three physiotherapists elected by physiotherapists;
- one physiotherapist selected by the Minister from nominations provided by educational institutions providing undergraduate physiotherapy education in NSW;
- one physiotherapist selected by the Minister from nominations provided by one or more professional physiotherapy associations including the Australian Physiotherapy Association;
- one physiotherapist in practice in NSW selected by the Minister;
- one legal practitioner nominated by the Minister;
- one officer of the Department of Health or a public health organisation selected by the Minister; and
- three people, at least two of whom are representative of the public, nominated by the Minister.

10.2 Terms of Board Members

The Physiotherapists Registration Act provides that members of the Board are to hold office for terms not in excess of three years. The Issues Paper canvassed whether a limit should be introduced on the number of consecutive terms a person may serve as a member of the Board. It was noted that under the Medical Practice Act a person may not be appointed to the Medical Board for consecutive terms totalling more than 12 years. Each term is not to exceed four years.

All submissions that addressed this issue, including that from the Board, supported the introduction of a limit on the number of terms that Board members may serve. The only submissions that suggested a length of time were those from the Australian Physiotherapy Association and the School of Physiotherapy which argued for two terms of four years each, and the Board which argued for three terms of four years. The Department has recommended in reviews of other health professional registration Acts administered by the Health Professionals Registration Boards that Board members should be limited to three terms of up to three years each. However following consultation with the relevant professions those recommendations have been modified to provide that Board members may serve not more than three consecutive terms of office with each term not exceeding four years.

Recommendation 25 – Terms of Board members

That:

- a person may not hold office as a member of a board for more than three consecutive terms;
- each term of office as a board member is not to exceed four years.

10.3 Delegation

The Physiotherapists Registration Act does not provide the Board with a general power of delegation. It is noted that both the Medical Board and the Nurses Registration Board have

such a power and that it has been recommended that other health professional registration boards have the power to delegate many of their functions.

In light of recommendations made in reviews of other health professional registration Acts the Department supports the Physiotherapists Registration Board having powers of delegation.

Recommendation 26 – Delegation

That the Physiotherapists Registration Board have the power to delegate any of its functions (other than the power of delegation and the power to approve expenditure from the Education and Research Account) to:

- the President;
- the Deputy President;
- a committee of two or more members of the Board; or
- the Registrar or any other member of staff of the Board.

However, the Board must not delegate any of its functions in relation to complaints or disciplinary proceedings to the Registrar or any other member of staff of the Board.

10.4 Committees

The Physiotherapists Registration Act does not give the Physiotherapists Registration Board an express power to establish committees. The lack of this power limits the Board's ability to access specialist expertise from outside the Board for specific issues. Other registration Acts such as the Chiropractors and Osteopaths Act and the Nurses Act provide for the establishment of committees to assist the Board in carrying out its functions. The members of a committees need not be members of the Board and committee members are entitled to be paid whilst serving on the committee.

Those registration boards that have the power to establish committees make good use of that power and have extensive committee structures. It is recommended that the Physiotherapists Registration Board have the power to establish committees to assist it in carrying out its functions.

Recommendation 27

That the Physiotherapists Registration Board have the power to establish committees.

11. OTHER ISSUES

11.1 Professional Indemnity Insurance

The Physiotherapists Registration Act is silent on the issue of professional indemnity insurance.

Submissions from the Australian Physiotherapy Association and the Health Care Complaints Commission have noted that there would be public benefits associated with mandatory professional indemnity insurance as consumers would be able to obtain compensation for injury caused by a practitioner.

It is proposed to leave detailed consideration of professional indemnity insurance until such time as the Board chooses to make a code of professional conduct. In addition the Department of Health is currently considering, in conjunction with the Attorney-General's Department, a range of issues concerning health professional indemnity.

11.2 Mandatory Disclosure of Fees

The issue of whether the Act should be amended to compel practitioners to disclose their scale of fees to patients prior to commencing treatment was canvassed in the Issues Paper.

Very few submissions addressed this issue. Submissions in favour of mandatory fee disclosure have put forward the following arguments.

“Disclosure of fees is an essential part of the quality of information provided to patients, enables them to make a choice and places them in a position of knowing how much services will cost.”⁵²

“The APA can see merit in the disclosure of fees being a normal part of the practice of providing a prognosis.”⁵³

The Department supports the concept of practitioners providing information to patients on the cost of any proposed care. However, it is appreciated that there may be practical difficulties with enforcing a duty to provide full fee disclosure to patients prior to the commencement of treatment and that this is not the only strategy for achieving the desired outcome. For example, this is an issue which could be addressed in a code of conduct, either the Board's or the Association's, that encourages practitioners to disclose their fees or through a publicity campaign directed at consumers which encourages them to be more proactive about such matters.

11.3 Record Keeping Practices

The Issues Paper sought submissions on whether the Act should be amended to include a specific regulation making power regarding the keeping of records. The Medical Practice Act has such a regulation making power and a regulation has been made that requires medical practitioners and corporations providing medical services to make and keep specified medical records.

⁵² Submission – Health Care Complaints Commission

⁵³ Submission – Australian Physiotherapy Association

The only submission to address this issue was that from the Australian Physiotherapy Association, which supported the introduction of a regulation making power, in line with that provided for in the Medical Practice Act, that imposes minimum standards for the form and content of clinical records. However, other health professional legislation reviews have examined this issue and the focus of submissions to those reviews has been the Medical Practice Regulation rather than the adequacy of the existing codes of professional conduct. No evidence was provided to the Department to suggest that physiotherapists are failing to maintain adequate records. The Department is therefore of the view that if there is a real problem with the record keeping practices of physiotherapists the problem can be adequately dealt with under a code of professional conduct.

11.4 Access to Clinical Records

Another matter identified for consideration in the Issues Paper was whether the Act should be amended to give patients a right to access their clinical records.

The right a patient may or may not have to see his or her medical records has been an issue of considerable topicality since the case of *Breen v Williams*. In that case, the High Court of Australia concluded that there is no right recognised by the common law requiring a health practitioner to grant a patient access to his or her health record.

While there has been considerable activity in enacting legislation in this regard in some jurisdictions (most notably the ACT, with the introduction of the Health Records (Privacy and Access) Act), and recommendations for a more comprehensive review in NSW (see the recommendations of the Final Report of the Review of the Health Care Complaints Act), most submissions to this review did not support access to records provisions in the Physiotherapists Registration Act. The only submission to make specific recommendations in this area was that from the Australian Physiotherapy Association, which advocated a retention of the existing common law position.

The Department is also of the view that the access issue is of equal importance to persons using the services of unregistered practitioners. As such, the question should be considered as a separate issue relevant to all professional groups, both registered and unregistered. Further, with increasing reliance on storage and transmission of records via electronic means, it is arguable that the issue would be best approached from a federal level. In this regard, it should be noted that in April 2000, the Federal Government introduced the Privacy Amendment (Private Sector) Bill 2000 into the Commonwealth Parliament. This legislation applies to private organisations and individuals including health professionals. If passed, it will provide patients with a right to access health records held by private practitioners, except in circumstances where access would pose a serious threat to the life or health of any individual. The Review therefore considers that any further development in this area should occur in the context of considering the provisions of this legislation.

11.5 Access to Information on the Register

The final issue raised in the Issues Paper was whether the public should have access to information on the Register, including conditions placed on a physiotherapist's registration. Again the only submission to address this issue was that from the Australian Physiotherapy Association, which argued that consumers should have access to information on the Register.

*"We believe information concerning conditions imposed as part of disciplinary processes should be appropriately available on request to the public. Also names, restrictions to practice and details of the offence should be in the Physiotherapists Registration Board newsletter."*⁵⁴

The Department supports the public having the right to access relevant professional information about health practitioners, including information relating to restrictions on their ability to practise. The Department also believes that it may be in the interests of the public and the profession for information relating to disciplinary hearings to be available. Therefore the Department recommends that the Board be able to provide relevant professional information about physiotherapists to any person who may be interested. This would include any conditions on a physiotherapist's registration except for those relating to impairment matters where the nature of the impairment is such that the Board considers disclosure inappropriate.

Where extraction of the information involves the expenditure of the time of Board staff it may be appropriate to charge a fee for the information. The Department also recommends that the Physiotherapists Registration Board have the ability to publish and disseminate the decisions of the Tribunal in any manner it considers appropriate.

Recommendation 28 - Information on the Register

That information on the Register, with the exception of a physiotherapist's residential address, be available to members of the public.

That the Physiotherapists Registration Board be able to publish Board and Tribunal decisions in any manner it considers appropriate.

⁵⁴ Submission – Australian Physiotherapy Association

APPENDIX A

TERMS OF REFERENCE FOR THE REVIEW OF THE PHYSIOTHERAPISTS REGISTRATION ACT 1945

1. The New South Wales Department of Health will review the Physiotherapists Registration Act in accordance with the terms for legislative review set out in the Competition Principles Agreement. The guiding principles of the review are that legislation should not restrict competition unless it can be demonstrated that:
 - i) the benefits of the restriction to the community as a whole outweigh the costs; and
 - ii) the objectives of the legislation can only be achieved by restricting competition.
2. Without limiting the scope of the review, the Department shall:
 - i) clarify the objectives of the legislation and their continuing appropriateness;
 - ii) identify the nature of the restrictions on competition;
 - iii) analyse the effect of the identified restrictions on the economy generally;
 - iv) assess and balance the costs and benefits of the restrictions; and
 - v) consider alternative means for achieving the same results including non-legislative approaches.
3. When considering the matters in (2) the review should also identify potential problems, for consumers seeking to use physiotherapy services, which need to be addressed by the legislation.
4. In addition to considering the matters identified above the Department will consider:
 - i) the effectiveness of the current Act, in particular registration requirements and disciplinary arrangements; and
 - ii) the interrelationship of the Act with the Health Care Complaints Act 1993.
5. The review will consider and take account of the relevant regulatory schemes in other Australian jurisdictions and any recent reforms or proposals for reform, including those relating to competition policy.
6. The Department will consult with and take submissions from health professions, relevant industry groups, Government and consumers.

APPENDIX B

Submissions were received from the following individuals and organisations

Association of Massage Therapists
Australian Association for Exercise and Sports Science
Australian Council of Physiotherapy Regulating Authorities
Australian Physiotherapy Association (New South Wales Branch)
Australian Traditional Medicine Society
Central Sydney Area Health Service
Chiropractors and Osteopaths Registration Board
David Cross
Far West Area Health Service
Health and Research Employees Association
Health Care Complaints Commission
Illawarra Area Health Service
Macquarie University – Department of Chiropractic
Nurses Registration Board of New South Wales
Ms C O'Connor, Department of Behavioural and Community Health Sciences, University of Sydney
Physiotherapists Registration Board of New South Wales
School of Physiotherapy, University of Sydney
South Eastern Sydney Area Health Service
Sydney College of Chiropractic
Royal North Shore Hospital – Physiotherapy Department

APPENDIX C

“Misconduct in a Professional Respect”

Section 24(1A)

Without limiting the meaning of the expression “misconduct in a professional respect” in subsection (1), a physiotherapist shall be guilty of such misconduct who:

- (a) carries on the practice of physiotherapy under a name other than the physiotherapist’s own name except whilst the physiotherapist is acting as the duly appointed locum tenens of another physiotherapist, or
- (b) allows the use of the physiotherapist’s name in connection with the practice of physiotherapy at premises at which the physiotherapist or the physiotherapist’s duly appointed locum tenens is not in regular attendance for the purpose of practice and supervision during the hours in which such premises are open for the practice of physiotherapy, or
- (c) allows any person, not being a physiotherapist, to practise physiotherapy in contravention of the provisions of section 26 at premises used by the physiotherapist or the physiotherapist’s duly appointed locum tenens for the purpose of carrying on the practice of physiotherapy, or
- (d) advertises otherwise than in accordance with the regulations or advertises in contravention of the regulations, or
- (e) by any act or omission, demonstrates a lack of adequate knowledge, experience, skill, judgement or care in the practice of physiotherapy, or
- (f) has been guilty of habitual drunkenness or of addiction to any deleterious drug,

or engages in any other improper or unethical conduct relating to the practice of physiotherapy.

APPENDIX D

Features of Legislation Regulating Physiotherapists in Other States and Territories

	Register	Title restrictions	Practice restrictions	Mandatory continuing education	Recency of practise	Discipline carried out by
NSW	Yes	Yes ¹	Full	No	No	Board
ACT	Yes	Yes ¹	Full	No	No	Board
NT	Yes	Yes ²	Full (undefined)	No	No	Board
QLD	Yes	Yes ¹	Full ⁶	No	No	Professional Conduct Review Panel / Health Practitioners Tribunal
SA	Yes	Yes ³	Full (fee or reward)	No	Yes ⁸	Board
TAS	Yes	Yes ⁴	Core ⁷	No	Yes ⁹	Board
VIC	Yes	Yes ⁵	None	No	Yes ⁹	Hearing Panel
WA	Yes	Yes ³	Full	No	No	Board

KEY

1. Physiotherapist, physical therapist, physiotherapeutist, physical therapist, electrotherapist.
2. Section 65(1) of the Health Practitioners and Allied Professionals Registration Act provides:

A person shall not use in a document, sign or notice a title or combination of words likely to suggest or imply that he is qualified to practise in a category of health practice unless he is registered in that category.

3. Physiotherapist, physical therapist, manipulative therapist, electrotherapist (although a registered chiropractor can take the title manipulative therapist).
4. Physiotherapist, registered physiotherapist, certified physiotherapist, licensed physiotherapist, qualified physiotherapist, physical therapist, manipulative therapist.
5. Registered physiotherapist, registered physical therapist.
6. Practice restrictions are currently being reviewed, in the meantime a full practice restriction applies.
7. Manipulate joints and use prescribed electrical and physical modalities.
8. A physiotherapist who has not practised for 5 years must obtain the Board's approval before practising.
9. The Board can refuse to renew a physiotherapist's registration if not satisfied that the physiotherapist has sufficient experience in the last 5 years to be able to practise physiotherapy. (The Tasmanian and Victorian provisions are essentially the same.)