NSW HEALTH

Report of the Review of the Podiatrists Act 1989

May 2003

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EXECUTIVE SUMMARY

1. INTRODUCTION

The Department of Health has conducted a review of the *Podiatrists Act 1989* in accordance with the Council of Australian Governments Competition Principles Agreement.

An Issues Paper designed to facilitate comment from the professions and the public was released in April 2000 with a total 21 submissions being received by the Department.

2. THE REGULATION OF PODIATRISTS

The *Podiatrists Act 1989* commenced operation on 1 August 1990. The Act provides that only those people who are registered as podiatrists may practise podiatry for fee or reward and use the title *podiatrist*. The Act makes exceptions for registered medical practitioners and for people who practise "basic foot care" in accordance with the regulations.

A complaint can be made about the professional conduct of a podiatrist to the Podiatrists Registration Board under the Podiatrists Act or to the HCCC in accordance with the provisions of the *Health Care Complaints Act 1993*.

3. THE OBJECTIVES OF THE PODIATRISTS ACT

The primary objective of the legislation at the time it was introduced was to protect the health and safety of members of the public by ensuring that appropriate standards of care are observed within the practice of podiatry. The Act seeks to do this by ensuring that only people who are considered to have the appropriate education and experience may hold themselves out as podiatrists and practise podiatry.

The objective of the current Act to minimise the risks of serious harm or injury to consumers remains valid.

Recommendation 1 – Regulatory objective
That any regulation of the podiatry profession have the objective of protecting the health and safety of members of the public by providing mechanisms to ensure that podiatrists are fit to practise.

4. THE REGULATION OF PODIATRISTS AND COMPETITION

The primary forms of intervention by which the Podiatrists Act seeks to achieve its objective are the registration system, the placement of restrictions on who may use the title "podiatrist" and the limitation on who may practise podiatry. The restriction on title aims to achieve the objective of the legislation by providing consumers with a simple and understandable means of identifying practitioners who have been assessed as capable of providing professional services. The rationale behind the restriction on practising podiatry is to reduce the risk of any serious health consequences that may be associated with podiatry where it is practised incompetently.

The Department is of the view that substantial benefits to the public will arise where the risks of harm are minimised. As a consequence 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 Department of Health endorses the view that there is a need in the interests of public health and safety for continued statutory regulation of podiatrists. Continued statutory regulation with a restriction on title will provide the public with a simple mechanism to assess whether a person has the qualifications that have been adjudged as appropriate to practise podiatry. Consumers will also be assured that a registered podiatrist is subject to a disciplinary system which is designed to maintain professional standards. Therefore the Department of Health recommends that there continue to be registration of podiatrists in NSW with the titles *podiatrist* and *chiropodist* and variants on them restricted to registered podiatrists.

Recommendation 2 – Registration by title
That there continue to be registration of podiatrists in New South Wales. That the titles *podiatrist* and *chiropodist* be restricted to registered podiatrists.

The current Act restricts the entire scope of the practice of podiatry, effectively as defined by the podiatry profession from time to time, and provides for medical practitioners to be exempt from the restriction and for certain other exemptions in the area of basic foot care.

It is clear from the definition of podiatry that it is concerned with ailments or disorders of the foot, ie unhealthy feet, while the definition of basic foot care demonstrates that it relates to normal or healthy feet.

There is no evidence that suggests basic foot care carries with it any real risk of harm or that any member of the public has been injured or in any manner disadvantaged by the provision of basic foot care services by unregistered people.

The arguments that are generally advanced to support continued restriction of podiatry involve issues of infection control, systemic disease detection and appropriate wound management. However, there is a broad range of health practitioners, including nurses, who have training, skills and experience in these areas.

Recommendation 3 - Practice restrictions
The Public Health Act be amended to provide that

1. the undertaking of invasive procedures performed on the feet and toenails under anaesthesia is restricted to medical practitioners and podiatrists; and
2. (a) the undertaking of debridement of hypertrophic and necrotic tissues of the foot, and
   (b) the undertaking of treatment of the feet of immuno-compromised or vascular compromised individuals and individuals suffering from peripheral neuropathy,
   is restricted to medical practitioners, podiatrists and registered nurses who are employed by a public health organisation, a nursing home, a private hospital or a day procedure centre.

5. ENTRY REQUIREMENTS

For a person to be eligible for registration as a podiatrist he or she must satisfy the Board as to his or her competence.

Recommendation 4 – Courses of training
That:
- The Podiatrists Registration Board have the power to approve courses of training for the purposes of registration;
- The Regulations set out criteria under which educational institutions can apply 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 Podiatrists Registration Board review the courses that are currently prescribed for the purposes of registration.

The Department supports the view that retention of the "good character" requirement is an essential part of satisfying the legislative objective of protecting the public.

The Podiatrists Act currently provides that a person may not be registered as a podiatrist unless he or she has reached the age of 20 years. There is no evidence that this restriction benefits the public.

Recommendation 5 – Minimum age
That the requirement that applicants for registration have attained the age of 20 years be removed.

Section 7 of the Act provides that a person may not be registered unless the Board is satisfied that he or she has a knowledge of the English language that is adequate for the practice of podiatry. There is no evidence or suggestion that the English competency provisions have been used in a discriminatory manner.

The current Act does not allow the Board to consider the physical or mental capacity of a person who applies for registration.

Recommendation 6 – Competence for registration
That when a person applies for registration or restoration of their registration the Podiatrists 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.

The Act allows the Board to refuse to register a person based on criminal convictions that in the opinion of the Board render the person unfit for registration. The Department is of the opinion that it remains important for registration boards to be able to consider criminal offences committed by applicants prior to an application for registration. The Department is also of the view that these provisions should apply to both convictions and to offences that are proven but where a conviction is not recorded.

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.

The Board currently has power to grant full registration and provisional registration. The Department is of the view that the Podiatrists Registration Board should have the power to grant temporary registration and to grant that registration subject to whatever conditions it considers appropriate.

Recommendation 8 – Temporary registration
That the Podiatrists Registration Board be able to grant temporary registration subject to such conditions as the Board considers appropriate.

Given that this report recommends (see **recommendation 13**) the establishment of a Podiatrists 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, to refuse to restore the registration of a person, or to impose conditions on a person's registration as a podiatrist should be made to the Podiatrists 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.

The Department supports a more comprehensive process for renewing registration so as to enable the Board to assess whether any action needs to be taken by it in the interests of protecting the public. This approach is consistent with the Board's recent amendment to its Code of Professional Conduct and with the Chiropractors Act, the Medical Practice Act, the Optometrists Act, the Osteopaths Act, the Physiotherapists Act and the Psychologists Act.

Recommendation 10 – Action by other registration authorities
(a) That the Act be amended to provide that where a practitioner who is also registered with another health registration board in New South Wales has a disciplinary finding made against them by the other registration authority that finding may form the basis of a complaint to the Podiatrists Registration Board.
(b) 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.

Recommendation 11 – 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) involve minors; or
  (b) relate to conduct occurring in the course of practice;
- significant illness which may adversely affect fitness to practise;
- 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;
- continuing professional education activities; and
- practice status.

7. DISCIPLINARY SYSTEM

The current Podiatrists Act utilises what is effectively a single tier disciplinary system in that all complaints are considered by the Board, although in appropriate cases in conjunction with the report of a Professional Standards Committee. 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.

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.

Clearly disciplinary investigations and hearings involve costs for the HCCC, the Board and podiatrists. 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.

Recommendation 12 – Definition of misconduct
That a two-tier definition of misconduct be introduced whereby:

- "Unsatisfactory professional conduct" is defined as:
  (a) any conduct by the podiatrist that demonstrates a lack of adequate knowledge, skill, judgement, or care in the practice of podiatry,
  (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 podiatrist to comply with a direction of the Board to provide information with respect to a complaint against the podiatrist,
  (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 podiatrist in the course of the practice or purported practice of podiatry.
- "Professional misconduct" is defined to mean "unsatisfactory professional conduct of a serious

nature which may lead to suspension or de-registration of the podiatrist".

It is essential that the grounds for making a complaint complement the grounds for complaint under the Health Care Complaints Act and grounds for refusing registration.

Recommendation 13 - Grounds for complaint
A complaint may be made about:

- the professional conduct of a registered podiatrist; or
- the provision of a podiatry service by a registered podiatrist.

In particular a complaint may be made that a podiatrist

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

The Department proposes that the recommended two tier definition of misconduct be applied through a two tier Board inquiry/Tribunal structure that incorporates the Podiatry Care Assessment Committee (PCAC).

The Board would be able to make the following orders:

- impose conditions on the podiatrist's registration;
- caution or reprimand the podiatrist;
- order the podiatrist to seek medical or psychiatric treatment or counselling;
- order the podiatrist to undertake additional training;
- order the podiatrist to report on the status of their practice to the Board, or its nominee; and
- order the podiatrist to seek advice on the management of their 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 podiatrist.

Recommendation 14 – Revised disciplinary structure
That a revised disciplinary structure be introduced whereby:
- The Podiatry Care Assessment Committee will be established to consider and investigate complaints, referred from the Board regarding standards of professional services. The Podiatry Care Assessment 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 Podiatry Care Assessment Committee, the Health Care Complaints Commission

or the Board's Inspector.
- 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 podiatrist's registration.
- Issue a caution or reprimand.
- Order the podiatrist to seek medical or psychiatric treatment or counselling.
- Order the podiatrist to undertake further training.
- Order the podiatrist to report on the status of their podiatry practice to the Board, or its nominee.
- Order the podiatrist to seek advice on the management of their podiatry practice.

The Tribunal is to be able to exercise any of the above powers of the Board. The Tribunal will also have the power to suspend or de-register the podiatrist.

Recommendation 15 - Constitution of disciplinary bodies
That the Podiatrists Tribunal be constituted as follows:
- a legal practitioner with extensive experience, appointed by the Governor;
- two registered podiatrists 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 Podiatry Care Assessment Committee be appointed by the Minister and be constituted as follows:
- one registered podiatrist, who is to be chair of the Committee, nominated by the Board;
- two registered podiatrists selected from a panel provided to the Minister by the Board; and
- one representative of consumers.

That Board members should not be eligible to sit on the Tribunal or the Podiatry Care Assessment Committee.

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. As tribunals have such extensive and far reaching powers to effect a practitioner's livelihood a high standard of natural justice must be observed.

The PCAC 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 PCAC 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.

The Department considers that providing the Board with the power to require a practitioner who is subject to a complaint to attend for an examination is in the public interest.

Recommendation 16 - Medical examinations
That the Board have the power to order that a podiatrist who is the subject of a complaint attend for a medical examination.

Recommendation 17 – Criminal convictions
That:
- Courts be required to notify the Board of any podiatrist 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 podiatrist who is found guilty of a sex or violence offence, irrespective of whether a conviction is recorded;
- Podiatrists 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
- Podiatrists are to be under an obligation to notify the Board within seven days if charged with a sex or violence offences 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.

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.

Recommendation 18 - Emergency powers
That the Podiatrists Act include emergency suspension powers modelled on section 66 of the Medical Practice Act.

Recommendation 19 - 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.

Recommendation 20 – 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.

Recommendation 21 – Statutory declarations
That a complaint to the Podiatrists 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. That prescribed statutory office holders be exempt from the requirement to verify a complaint by statutory declaration.

The Podiatrists Act provides for the Board to establish a code of professional conduct that sets out the rules of conduct to be observed by podiatrists in practice.

On balance, the Department supports the Act continuing to provide a power for the Board to make a code of conduct. The Department supports codes 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 include a full assessment of the respective advantages and disadvantages of its provisions.

Recommendation 22 – Codes of conduct
That the Act provide for the making of a code of conduct by the Board following 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

Unlike the Nurses Act and the Medical Practice Act the Podiatrists 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.

Recommendation 23 - Impaired practitioners
That the Act be amended to include impaired practitioners provisions modelled on Part 13 of the Medical Practice Act.

9. COMMERCIAL ISSUES

Recent amendments to the Public Health Act 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 Department is of the view that the retention of limited advertising restrictions in the Podiatrists Act is in the public interest.

Recommendation 24 – Advertising
That the regulations regarding advertising by podiatrists provide that a podiatrist or a corporation providing podiatry 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 podiatrist.

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

Recommendation 25 – Board composition
That the Podiatrists Registration Board have seven members and be constituted as follows :
- One podiatrist selected by the Minister;
- One podiatrist with experience in the tertiary education of podiatrists selected by the Minister from nominations provided by tertiary education institutions providing undergraduate podiatry education in New South Wales;
- Two podiatrists selected by the Minister from nominations provided by one or more professional podiatry associations including the Australian Podiatry Association (NSW);
- One legal practitioner selected by the Minister;
- One officer of the Department of Health or a public health organisation selected by the Minister; and
- One person, who is not a podiatrist, selected by the Minister to represent consumer and community views.

Recommendation 26 – 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.

The Podiatrists Registration Act does not provide a general power of delegation to the Board. It is noted that both the Medical Board and the Nurses Registration Board have such a power as do many other health professional registration boards.

Recommendation 27 – Delegation
That the Podiatrists 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 may the Board delegate any of its functions in respect of complaints or disciplinary proceedings to the Registrar or any other member of staff of the Board.

11. OTHER ISSUES

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 is in the interests of the public and the profession for information relating to disciplinary hearings to be available.

Recommendation 28 – Information on the register
That information on the register, with the exception of a podiatrist's residential address, be available to members of the public.

That the Podiatrists Registration Board be able to publish the disciplinary decisions of the Board and Tribunal 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 *Podiatrists Act 1989* in accordance with the principles outlined above. 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 April 2000. 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, podiatrists, professional associations and other health care professionals. In total 21 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 PODIATRISTS

2.1 Introduction

The Australian Podiatry Association has provided the following description of podiatry and the role of the podiatrist:

> *"Podiatrists are highly trained in the diagnosis and treatment of both common and more rare skin and nail pathologies of the feet. Podiatrists play an important role in maintaining the mobility of many elderly and disabled people, and others. This is achieved through the monitoring of foot health, in particular of those with vascular problems such as diabetes. Podiatrists are recognised as important members of the health care team in preventing and managing lower limb complications for those living with diabetes."*[1]

As at 30 June 2002 there were 720 podiatrists registered in NSW. Of the total number of registrants in practice it is estimated that 82% work in private practice and the remaining 18% are employed in the public health system[2]. The types of treatments provided by podiatrists include, but are not limited to:

- treating foot problems caused by systemic illness, such as diabetes, and occupational environments;
- sports medicine;
- the production of orthoses to alleviate or prevent ongoing foot and limb problems; and
- foot care education.

The Department of Health estimates that podiatry services valued at over $50 million are provided in New South Wales each year. This turnover represents payments from health insurance funds, the value of services provided to public patients in the public health system, out of pocket expenses of insured consumers and payments by uninsured consumers. Podiatry services are not included in the Commonwealth Medicare Benefits Schedule, although some podiatric treatments provided to eligible veterans are paid for by the Commonwealth Department of Veterans' Affairs.

2.2 The Podiatrists Act 1989

The Podiatrists Act 1989 commenced operation on 1 August 1990 and repealed the Chiropodists Registration Act 1962. Although the Act is relatively modern and has been amended since its enactment it does not reflect the most recent approach taken to complaints handling and discipline, and is considered to be outdated in a number of other respects. 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 specified registration requirements can be registered as podiatrists in NSW. Those who gain registration are entitled to practise podiatry for fee or reward and use the title *podiatrist*. Unregistered people may not hold themselves out as being registered, as qualified to be registered, or as competent or willing to practise podiatry, nor may they practise podiatry for fee or reward. The Act makes exceptions for registered medical practitioners. The

[1] Podiatry Today, the Australian Podiatry Association (Vic) 1994, quoted in the submission from the Australian Podiatry Association (NSW)
[2] NSW Podiatrists Registration Board Annual Report 2001/2002.

Act also makes an exception for people who practise "basic foot care" in accordance with the regulations, and for this purpose it is assumed that basic foot care is an aspect of "podiatry", although the definitions of podiatry in section 3(1) of the Act and of basic foot care in clause 21(2) of the Regulation may be inconsistent. This matter is discussed in more detail in **section 4.6.1**. The Podiatrists Act is therefore a "title and whole of practice" Act.

2.2.2 Registration requirements

For a person to be registered as a podiatrist under the Podiatrists Act he or she must be of good character, have reached the prescribed age of 20 years, have an adequate command of the English language and hold one of the recognised qualifications (see **Appendix C**). The Board does not recognise any educational courses conducted overseas nor does it conduct examinations to assess the competence of overseas trained practitioners, who must take an examination conducted by the Australasian Podiatry Council on behalf of the National Office of Overseas Skills Recognition.

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

Fees levied by the Board for registration purposes are:

- Application for registration $145;
- Renewal of registration $135; and
- Restoration of registration $270.

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

2.2.3 Regulation of the conduct of podiatrists

The Act seeks to ensure that podiatrists 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 podiatrist:

- has been convicted of a criminal offence the circumstances of which render the person unfit in the public interest to practise podiatry; or
- is an habitual drunkard or addicted to a deleterious drug; or
- has been guilty of professional misconduct; or
- does not have sufficient physical or mental capacity to practise podiatry; or
- is not of good character.

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 "professional misconduct" is attached at **Appendix D**.

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 "professional misconduct" is such that breaches of the Podiatrists Act and the regulations by podiatrists may also be pursued through the Act's disciplinary system.

A complaint can be made to the Podiatrists Registration Board under the Podiatrists 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 inquiry which may be conducted by the Board or by 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. Where an inquiry is conducted by a PSC the Committee provides a report to the Board and the Board delivers a finding on the complaint.

The Board can make a wide range of protective orders if it is satisfied a complaint is proved after a hearing. These orders include:

- a caution or reprimand;
- an order that the practitioner receive medical or psychiatric treatment or counselling;
- the imposition of conditions on registration;
- an order the practitioner undertake specified educational courses;
- an order that the person report on 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 (except in the case of a complaint that the person has been convicted of an offence); 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 podiatry 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 podiatrists (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 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 podiatrists. The Australian Podiatry Association is the body that represents podiatrists' professional interests and represents the profession to Government, community and other professional bodies, as well as acting as a contact point for the public. The Australian Podiatry Association (NSW) represents podiatrists in NSW and the ACT and is affiliated to the national body the Australasian Podiatry Council.

2.5 Other Service Providers

The Issues Paper noted that there are a number of health practitioners that provide some of the services that are also ordinarily provided by podiatrists. These practitioners include chiropractors, exercise physiologists, masseurs, medical practitioners, nurses, osteopaths and physiotherapists. Submissions made the point that there are also a number of other practitioners who provide services in these areas, including diabetes educators, occupational therapists, orthotists, pharmacists and prosthetists.[3]

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. Chiropractors, medical practitioners, nurses, osteopaths, pharmacists and physiotherapists are also regulated by the relevant professional registration board, which may deal with complaints about those practitioners.

2.6 The Regulation of Podiatry in Other Jurisdictions

While all Australian jurisdictions (with the exception of the Northern Territory) provide for the establishment of a registration board and academic requirements for registration, different arrangements apply in respect of restrictions on practice and titles, the disciplining of practitioners and the handling of complaints. For example, whilst NSW restricts the use of the title *podiatrist* and prohibits the practice of podiatry for fee or reward by unregistered persons, Western Australia and Victoria do not restrict practice. (Although Western Australia does define the scope of podiatry practice it is not an offence for an unregistered person to offer any of those services provided that he or she in no way indicates or leads a person to infer that he or she is a registered podiatrist or able to practise podiatry.)

A summary of the main features of legislation regulating podiatry in other jurisdictions is provided at **Appendix E.**

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 would arise from the provision of services in an unregulated

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[3] Submissions – Australian Podiatry Association (NSW); Ms SJ Hoskins-Marr; Central Coast Area Health Service; New England Area Health Service.

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 that are not justified having regard to the nature of the problem that 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 podiatry for fee or reward.

- The restriction on the use of certain titles by unregistered persons may confer a competitive advantage on podiatrists over other service providers.

- The requirements for registration may restrict competition where the number of persons who are registered (and hence are entitled to use the restricted title and practise podiatry) is limited beyond that which is necessary to ensure that the objectives of the Act can be achieved. Limitations on the number of practitioners, whether those limitations are effected by requirements for academic qualifications or the imposition of other registration 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 practitioners, may inappropriately focus on the commercial conduct of podiatrists thus limiting information to consumers on the different services available.

- The power to impose conditions on registration could, in certain cases, be used to limit competition or punish a practitioner 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 THE PODIATRISTS ACT

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 Podiatrists Act and to consider whether there is a rationale for continuing to achieve these objectives through legislation. If it is established that there is a rationale for legislative intervention, the precise form of intervention must be considered. (see **chapter 4**)

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

> *"An Act to regulate the practice of podiatry, to make provision for the registration of podiatrists, to regulate the qualifications for and the effect of such registration; to constitute the Podiatrists Registration Board and to specify its functions; to repeal the Chiropodists Act 1962 and for related purposes."*

In his second reading speech when introducing the legislation to Parliament in 1989 the then Minister for Health the Hon P Collins said

> *"..the main purpose .. is to assist in maintaining standards of care.. and to protect the public by ensuring that only suitably qualified persons are able to practise."*[4]

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 by ensuring that appropriate standards of care are observed within the practice of podiatry. The Act seeks to do this by ensuring that only people who are considered to have the appropriate education and experience may hold themselves out as podiatrists and practise podiatry. The Act also protects the public by the complaints mechanism, which is designed to exclude unscrupulous or sub-standard operators from the market for podiatry services.

3.2 Submissions

A number of 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 podiatry 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 agreed with the objectives put forward in the Issues Paper and highlighted the potential risks to the "health and safety of consumers" in an unregulated environment, although no submission provided detailed evidence to demonstrate this point.

The Podiatrists Registration Board in its submission agreed with the objects put forward in the Issues Paper and suggested that these objectives should also include protection of the community from "unqualified" practitioners.

The Australian Podiatry Association submitted that

[4] NSW Legislative Assembly Hansard, 2 March 1989, page 5607.

> *"The objectives should, in the first instance, provide for the protection of the general public. There should also be an objective which would be for the protection of the profession itself against people working outside the definition of the Act as this would not be in the interest of public safety."*[5]

> *"Any registration Act will have an impact on competition, that is the very reason it exists – to ensure that the market is not opened up so widely that any person without recognised qualifications is able to practise potentially dangerous procedures which may cause harm to the public."*[6]

3.3 Conclusions

The Department does not consider that the Act should have the objective of protecting the podiatry profession nor does the Department agree that the intention of the Act is to restrict competition. Health professional registration Acts are enacted in the public interest in order to protect the public, ie health care consumers, from incompetent or unethical practitioners whether they be registered or not.

Several submissions expressed the view that the objective of the Act is the protection of those members of the public who seek foot care services. The presumed 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 by no means limited to the acts of registered or unregistered persons that injure a patient, but includes injuries that may result if a patient is unable to access appropriate foot care services, or is discouraged from seeking those services. These can be summarised as follows:

- Consumers (most of whom lack specialised knowledge) may have a limited ability to assess their need for foot care 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 subsequent 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 and well being, with a consequent financial impact on individuals and the economy in general.

- The same problems that may arise from the public's inability to identify competent service providers may arise where the people are unable to access service providers due to unreasonable restrictions on the number of providers or on who may provide services. These restrictions may result in a failure to have complaints treated and a subsequent failure to detect chronic or severe illness or to a failure to seek appropriate treatment at the most opportune time.

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[5] Submission – Australian Podiatry Association (NSW), page 19
[6] ibid, page 20.

The misuse of foot care practices could potentially result in serious harm to consumers, particularly where they have placed a high degree of trust in a practitioner believing them to be appropriately qualified in podiatry. 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 podiatry profession have the objective of protecting the health and safety of members of the public by providing mechanisms to ensure that podiatrists are fit to practise.

4. THE REGULATION OF PODIATRISTS AND COMPETITION

4.1 Introduction

The primary forms of intervention by which the Podiatrists 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 "podiatrist" and the limitation on who may practise podiatry. The restriction on title aims to achieve the objective of the legislation by providing consumers with a simple and understandable means of identifying practitioners who have been assessed as capable of providing professional services. By enabling consumers to identify such practitioners, risks of injury and the costs to consumers of finding qualified practitioners will be reduced. The rationale behind the restriction on practising podiatry is to reduce the risk of any serious health consequences that may be associated with podiatry where it is practised incompetently.

Although the Issues Paper noted that the registration of podiatrists could have benefits for consumers, it was also noted that there may also be disadvantages or costs to consumers and the community in general, primarily through the impact of registration on competition. Registration with restrictions on certain professional titles and on the practice of podiatry may confer a competitive advantage on registered podiatrists 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 podiatrists. This may result in unnecessary costs for consumers. A restriction on the practice of podiatry confers on podiatrists a further competitive advantage as the profession may have a near monopoly on the performance of particular procedures.[7]

This chapter will focus on the impact of the restrictions on the use of the regulated titles and on who may practise podiatry 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 Podiatrists Act is not the only legislation which has an impact on the delivery of podiatry services. The Trade Practices Act, the Fair Trading Act, the Public Health Act and the Health Care Complaints Act are also relevant in this regard.[8]

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 podiatry but also lead to serious injury to consumers.

> *"The restriction to competition created by the current Act is outweighed by the need to protect the public from potential harm, which could occur if the market is opened up to untrained or substandard operators."*[9]

[7] Medical practitioners are exempt from the practice restriction and nurses (and others) may practice basic foot care as part of their normal duties in a hospital or nursing home.
[8] See 2.3
[9] Submission – Illawarra Area Health Service, page 2.

> *"The problem in an unregulated environment is that consumers could be provided "podiatry" services by unqualified, or insufficiently qualified, practitioners."*[10]
>
> *"The [Nurses'] Association supports the regulation of podiatry through the establishment of the Podiatrists Registration Board. We are also comfortable with the restriction of the title podiatrists to those qualified to practise podiatry."*[11]
>
> *"The general public and other health professionals need to be able to identify podiatrists, discover what qualifications and memberships are held as well as feel confident that when they refer patients to podiatrists that there is the expertise present to assist the patient."*[12]

4.3 Options to Achieve the Objective

In view of the submissions received concerning the current Act and its 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 objectives 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 Podiatrists Act being repealed with the result that any person would be able to use the title podiatrist and undertake foot care practices. Consumer protection legislation would prevent practitioners 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, for example certified practising podiatrist, although it must be noted that the use of such a descriptor would not be restricted to members of the profession unless it were used in a manner that is misleading or deceptive.

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 that could be 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 practitioners would be entitled to use a particular title and there would be no practice restrictions. Title regulation would involve a statutory complaints and disciplinary system. The legal framework that applies under option 1 involving consumer protection legislation and private legal action would also continue to apply. In addition voluntary professional associations would continue to regulate the conduct of members.

[10] Submission – Podiatrists Registration Board, page 3.
[11] Submission – NSW Nurses' Association, page 2.
[12] Submission – Australian Podiatry Association (NSW), page 21.

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 practices used within podiatry that are considered to pose a serious risk to the public if performed improperly. It is important to note that not all techniques used by podiatrists would be restricted. This system would provide a competitive advantage to podiatrists and other exempted professions in the restricted practices but would also protect the public from the risk of harm posed by those identified 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 podiatry profession's practice area would be limited to podiatrists, and any other approved or exempted 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 it is likely that the option that has the highest overall benefits or advantages for the community will be the one that most effectively and simply provides information to consumers about the quality of practitioners and limits any potential for serious adverse health consequences. The effectiveness of the system can then be compared to its costs, in particular the anticipated impact on competition.

In assessing the five options it is important to note that the costs and benefits of each option, including the current system, have been described rather than quantified due to a lack of data.

4.4.1 Option 1 – No regulation

Removal of registration would have the benefit of removing any adverse impacts that statutory registration has on competition. However, there would be a consequential 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 foot care practices 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 the 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 would not be effective in situations where advertised qualifications are held but are not of a sufficient standard for the services the consumer is seeking. This is significant because it is possible that consumers may not be in a position to identify which qualifications are necessary and appropriate for the purpose of

practising safely. In the absence of extensive, and possibly expensive, promotional activities by the profession consumers are likely to incur significant transaction costs in seeking to do this.

- 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.

- 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 practitioners 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 a 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 harm to members of the public.

4.4.2 Option 2 – Co-regulation

The **advantages** of this model are:

- Most consumers who wish to access foot care 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 professional association membership can result in more competent practitioners. The more competent practitioners are the lower the risk of harm 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 registration and association membership.
- Membership requirements may be more restrictive and more expensive than under the existing Podiatrists Act.
- There are costs associated with administering a system of registration. The practice of the current Podiatrists Registration Board is for all costs to be recovered through registration fees.
- Registration 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. However, even if a price premium were observed and registration 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 registration.
- This model may not provide an effective sanction to prevent a regulated practitioner from offering substandard or unethical services to the public, and a disciplinary system operated by a professional association may lack the transparency necessary for consumers to be confident of the ongoing competency of practitioners.
- This model does not address the risk of harm which may be associated with any foot care practices that are dangerous if performed by people without the necessary training.

A number of these additional disadvantages could be addressed in whole or in part by Government accreditation of professional associations, although such accreditation would 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

This option includes many of the advantages and disadvantages outlined for option 2. The additional **advantages** of this option are:

- A disciplinary system that is transparent and fair to all parties will provide consumers with information on the competency of practitioners.
- 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 **disadvantage** of this option is:

- There are increased costs associated with administering a system of registration which also contains a disciplinary structure. In addition to the costs of administration[13] there are additional costs associated with disciplinary investigations and hearings and potentially costs associated with appeals from those hearings

This option provides consumers and other health professionals with a simple and readily accessible mechanism to identify practitioners who have been judged to have the qualifications necessary to practice as podiatrists. Furthermore consumers will be able to relatively easily inquire about the practitioner's qualifications and any conditions to which their practice may be subject.

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 provide certain services.

The disadvantages and advantages that were canvassed in relation to options 2 and 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 core practice restrictions.

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

- The fact that a practice is restricted can provide consumers with information that there may be 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.

- Practice restrictions, when combined with a reservation of professional titles, have the potential to create a captive market which can result in some sections of the public being denied access to services they require.

- Practice restrictions can provide a competitive advantage for the registered group in the performance of certain procedures and have the potential to increase costs to consumers for those services.

- 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 can be difficult.

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[13] The Annual Report for the Year Ended 30.6.2000 for the Podiatrists Registration Board indicated that it received $105,728 in income and spent $74,937.

In the event that particular practices are identified as carrying serious risks to the public this mechanism will provide the means to restrict those practices to persons who have been assessed as having the skills to undertake them.

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 podiatry. The immediate impact of such a system is to confer on the registered profession a virtual monopoly over an entire professional area and substantially reduce competition. This option fails to recognise that there is overlap between the legitimate scope of practice of most professions.

Comprehensive practice restrictions can have the effect of cordoning off a large area of health care services to a small number of practitioners. This restriction on practice can have the undesirable effect of not only preventing other practitioners from developing skills and techniques in the restricted area but may also breed complacency and a lack of innovation and development within the protected group.

The Department considers that this model offers no particular advantages over option 4 **registration with title and core practice restrictions** while amplifying the restrictions on competition inherent in that model.

4.5 Regulatory System

4.5.1 Is there a need for regulation?

Submissions have unanimously supported the retention of a statutory registration scheme for podiatrists based on the risk of harm to consumers from improper techniques. Submissions were divided on the form that a registration scheme should take. Podiatrists, their professional associations and educational institutions, as well as the Podiatrists Registration Board support the current regulatory system, that is title and whole of practice restrictions. Nurses and nursing organisations support regulation which does not restrict the ability of nurses to provide those clinical nursing services which may overlap with the techniques employed by podiatrists. Area health services support regulation with some supporting the current system and others supporting either title regulation or title and core practices regulation.

Submissions advocating less restrictive forms of regulation include the following:

> *"The Committee recommends that the registration of podiatrists should be by title alone.*
>
> *The scope of practice of podiatry, as outlined in the Australian Podiatry Council's Internet site, is such that it is clear that the Council's view of the practice of podiatry overlaps the activities of several other professional organisations. Under these circumstances, the justification for the present restrictions on the practice of podiatry cannot be maintained. It is untenable that such professional practitioners as physiotherapists could be continuously in breach of the Podiatrists Act. It is considered that the multiple exclusions from the provisions of the Act is not an appropriate mechanism to adopt."*[14]

[14] Submission – Medical Services Committee, page 1.

> *"The most appropriate type of regulation would be title regulation. This is less anti-competitive than the current provisions of the Act, whilst still providing protection to consumers that registered podiatrists hold certain statutorily defined qualifications."*[15]
>
> *"Generally, the current Podiatrists Act 1989 (the Act) does not serve the interests of the public as it is unduly restrictive of competition. These restrictions reduce access to some foot care treatments that can be effectively and efficiently delivered by health professionals other than podiatrists."*[16]
>
> *"There are no practising podiatrists residing within the Far West Area Health Service's boundaries. Podiatry services where available, which is currently extremely limited, are reliant on visiting podiatrists. In these locations where a podiatry service is accessed service delivery is limited, fragmented and costly.*
> *…*
> *If current limitations to the delivery of foot care continue then there are grave concerns that Registered nurses will place themselves at risk of prosecution as they attempt to deliver and maintain the health of their communities in the absence of podiatry services."*[17]
>
> *"In general the registration of podiatrists is supported so that consumers and employers have an easily recognisable protection in terms of appropriate skill base and an additional mechanism through which issues may be addressed in terms of competency, malpractice and unqualified practitioners.*
> *…*
> *In relation to foot care it needs to be stated that rural areas will be severely disadvantaged if the Act restricts the provision of this care to podiatrists only"*[18]

Submissions in favour of retaining the current regulatory system, title and whole of practice, include the following:

> *"The application of a therapy on the human body that has the potential to cause serious injury, or death, is a matter of serious concern. The current Act recognises this by making it an offence to practice podiatry, unless appropriately qualified. The problem in an unregulated environment is that consumers could be provided "podiatry" services by unqualified or insufficiently qualified, practitioners."*[19]
>
> *"Due to the risk to public health and safety associated with the care of many foot problems, the practice of podiatry should be limited by a registration Act.*
> *…*
> *The Council is concerned that failure to include a definition could result in a Registration Board without the power to deal effectively with persons who are practising foot care which is in fact podiatry, whilst not actually 'claiming to practise' podiatry or chiropody."*[20]

[15] Submission – Central Sydney Area Health Service, page 1.
[16] Submission – NSW Nurses Association, page 2.
[17] Submission – Far West Area Health Service, page 1.
[18] Submission – Hunter Area Health Service, page 1.
[19] Submission - NSW Podiatrists Registration Board, page 3.
[20] Submission - Australasian Podiatry Council, pages 3-4.

> *"The core practice of podiatry can be summarised as assessment, diagnosis, management and prevention of foot and related disorders over a wide range of the population. As such, the University would recommend that the Act reflect the Australian Podiatry Council's definition of podiatry."*[21] [see section 4.5.1 of the Issues Paper].
>
> *"Podiatry should be restricted by the Act by whole of practice. It is agreed that the Act should define podiatry clearly, yet it should not restrict future development of the profession. It is not necessary to restrict all techniques used by the profession, however clauses should be added to this and other Acts so that overlap by other professions is permitted, provided it is part of their recognised scope of practice. Basic foot care should be restricted in the Act to protect those members of the public who are at risk from treatment by untrained, unregulated operators. Those who administer the care must be educated to recognise pathology and refer on if necessary."*[22]
>
> *"Podiatry is dangerous if performed by unregistered persons, because sharp instruments are used and potentially life-threatening procedures are performed. … The Australian Podiatry Association (NSW) has never sought to prohibit other health professionals from the practise of their own professions and does not expect other professions to encroach upon podiatry."*[23]

The Department of Health accepts and endorses the view that there is a need in the interests of public health and safety for continued statutory regulation of podiatrists. This view is supported by all submissions to the review and by the fact that there is a form of statutory registration for podiatrists in all Australian jurisdictions except the Northern Territory (see **Appendix E**), and many of these have already been subject to review under the Competition Principles Agreement. There is also regulation in many overseas jurisdictions.

Continued statutory regulation with a restriction on title will provide the public with a simple mechanism to assess whether a person has the qualifications that have been adjudged as appropriate to practise as a podiatrist. Consumers will also be assured that a registered podiatrist is subject to a disciplinary system that is designed to maintain professional standards. Therefore the Department of Health recommends that podiatrists continue to be registered in NSW with restrictions on certain professional titles. (Restrictions on practices are considered in section **4.6**.)

4.5.2 Restricted titles

As the Department has recommended a system of title registration consideration must be given to the titles that are to be restricted. The current Act restricts the title *podiatrist* and related titles. As can be seen from the comparison of interstate legislation in **Appendix E** there are different approaches to title restrictions within Australian jurisdictions.

Only one submission to the review gave any real consideration to the title or titles that should be restricted. That suggestion came from the Australasian Podiatry Council which noted that the history of

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[21] Submission - Faculty of Health, University of Western Sydney, page 5.
[22] Submission – Illawarra Area Health Service, page 2.
[23] Submission – Australian Podiatry Association (NSW), pages 23-24.

the podiatry profession is such that the term *chiropody* and the title *chiropodist* were previously used to describe the profession and practitioners.

The current Act does not expressly restrict the term *chiropody* or the title *chiropodist* although it does make reference to the fact that podiatry was previously known as chiropody and may thereby implicitly restrict the term. The Department of Health is not aware of any evidence, nor has any been presented to this review, that unregistered people are using the title chiropodist and that members of the public are thereby misled. Furthermore Western Australia and the ACT do not regulate the title *chiropodist* and the Department is not aware of any evidence that the public have been misled or disadvantaged as a result.

Nonetheless the Department is of the view that protection of the public requires restriction of both the title *podiatrist* and the title *chiropodist* as the term chiropodist is associated, particularly by older people, with podiatrists.

Therefore the Department considers that the titles *podiatrist* and *chiropodist* and variants on them should be restricted to registered podiatrists.

Recommendation 2 – Registration by title

That podiatrists continue to be registered in New South Wales. That the titles *podiatrist* and *chiropodist* be restricted to registered podiatrists.

4.6 Practice Restrictions

As noted above there is significant divergence in views over the type of practice restrictions, if any, that are appropriate in the area of foot care. The current Act restricts the entire scope of the practice of podiatry, effectively as defined by the podiatry profession from time to time, and provides for medical practitioners to be exempt from the restriction and for certain other exemptions in the area of basic foot care.

4.6.1 Basic foot care

The Issues Paper noted that the current Act and regulations provide that podiatry is restricted to podiatrists and medical practitioners and that certain other individuals may provide basic foot care. These individuals include people, such as nurses as well as unregistered people, who are employed in a health care facility and provide basic foot care as part of their normal duties.

Podiatry is defined in section 3(1) of the Act as:

> ***Podiatry*** *(formerly known as chiropody) means the diagnosis, treatment and prevention of ailments or disorders of the foot within the accepted practise of podiatry in New South Wales.*

Basic foot care is defined by clause 21(2) of the regulation as:

> *.. the fundamental attention given to normal toe nails and skin surfaces of the foot, including the cutting of toe nails, the removal of superficial dead skin material*

interdigitally and the application to the skin of emollients or rehydrating agents, when indicated.

It is clear from the definition of podiatry that it is concerned with ailments or disorders of the foot, ie unhealthy feet, while the definition of basic foot care demonstrates that it relates to normal or healthy feet. This understanding of the scope of basic foot care is borne out by a number of submissions which noted that basic foot care is the type of foot care that people would normally provide for themselves.

> *"It is the view of the A.Pod.C that "basic foot care" is essentially the routine care of normal skin and nail which must be performed for all persons as a daily hygiene task."*[24]

> *"All members of the community practise basic self-foot care (nail cutting and foot hygiene) on a regular basis..."*[25]

> *"Basic foot care does not imply podiatry, but rather the least service required for the care of an individual in maintaining their foot health status.*
>
> *Basic foot care is just that, care that a healthy, reasonable person would have done for himself or herself previously ie cut their own toenails. This is a normal act of hygiene and does not involve any pathology."*[26]

It is therefore arguable that the regulation is of no effect as dealing with a matter other than podiatry. Alternatively it can be argued that basic foot care deals with the prevention of ailments or disorders of the foot and is therefore part of the practice of podiatry as defined. It is clearly also arguable that as basic foot care deals with healthy feet there is no risk to health and safety where it is performed by people other than podiatrists.

Notwithstanding the restriction in the Podiatrists Act it is clear that a number of health practitioners, both registered and unregistered, provide a range of foot care services. Submissions from a number of area health services and organisations representing nurses have noted that nurses provide foot care services within the scope of their normal nursing duties.

> *"Nurses have always included the care and treatment of feet in their practice in similar ways that physiotherapists, medical practitioners, masseurs, exercise physiologists and osteopaths have done. In fact where nurses have successfully completed accredited advanced footcare courses set up and taught by qualified podiatrists, the skill and treatment overlaps with podiatry are quite substantial. These advanced foot care nurses have been in practice for nearly fifteen years in areas of NSW and are based in regional areas where podiatrists have not been available and to where they have been unwilling to relocate."*[27]

> *"..the provision of "basic foot care" is within the practice of nursing and .. registered and enrolled nurses provide nursing care in a variety of contexts and settings. The Board considers that (a) provisions within the Podiatrists Act should not preclude nurses from*

[24] Submission - Australasian Podiatry Council, page 5.
[25] Submission – Faculty of Health, University of Western Sydney, page 6.
[26] Submission – South Western Sy dney Area Health Service, page 3.
[27] Submission – NSW Nurses' Association, page 2.

> *practising nursing in any setting and (b) nor should it be in the realm of the Podiatrists Act to prescribe or indicate what is nursing care."*[28]

No submission presented evidence that unregistered or unauthorised people practising basic foot care, as defined, present any risk of harm to members of the public. The Department is similarly unaware of any complaint to the Health Care Complaints Commission, or its interstate equivalents, that any member of the public has been injured by a basic foot care practitioner.

However submissions from the Podiatrists Registration Board and the Australian Podiatry Association have argued that restrictions on basic foot care are in the public interest.

> *"The Board considers that the provision of "basic foot care" should be restricted by the Podiatrists Act, and considers that the restriction in the current Act is adequate."*[29]

> *"'Basic foot care' should remain restricted in the Act. It is in the public interest to have such a restriction. ... All members in the community undertake certain self-care activities, but where a health professional attends to some of this care, there is an immediate overlay of 'health' which then places the practitioner into another category of care provider (above the 'ordinary' citizen) with specific flow-on responsibilities and expectations."*[30]

It is important to note that the current regulation, and in fact the previous regulation, provides for a person employed in a hospital, nursing home or community health centre to provide basic foot care where it is part of their normal duties. There is no requirement that such a person be a health professional or have any specific training whatsoever nor is there a specific requirement for any supervision of such a practitioner.

Notwithstanding the fact that untrained and unregistered people are able to perform basic foot care and the submissions from the Board and Association, there has been no evidence presented that suggests that basic foot care carries with it any real risk of harm or that any member of the public has been injured or in any manner disadvantaged by the provision of basic foot care services by unregistered people.

4.6.2 Restrictions on foot care practices

As noted above in **4.5** submissions from podiatrists supported the current regulatory system with a complete practice restriction. Other submissions did not specifically address the issue of practice restrictions other than to argue that nurses should not be restricted in practising nursing.

Submissions that advocate a complete restriction on the practice of podiatry include the following:

> *"Podiatry practice should be restricted by whole of practice, and regulated as it is now; if practice were to be restricted to core practices then that would prevent further development and expansion of podiatry services and podiatrists may be prevented from competing with other health professionals, contrary to the aims of competition legislation. The current description of podiatry may be somewhat restrictive to the other occupational*

[28] Submission – Nurses Registration Board of NSW, page 1.
[29] Submission – Podiatrists Registration Board, page 3.
[30] Submission – Australian Podiatry Association (NSW), page 27.

> *groups, but surely there must be protection allowed for the podiatrist in his/her area of expertise – the art and skill that is uniquely podiatry."*[31]

The regulatory option that would see podiatry restricted by title and core practice restrictions would not however result in podiatry being restricted to those core practices alone. A restriction on core practices does not mean that podiatry would be defined in terms of core practices but rather that those foot care practices that are considered to be dangerous if carried out by people without adequate training would be defined and restricted to those practitioners who are considered to be appropriately trained. Therefore under a regulatory system that included core practice restrictions the legislation need not seek to define podiatry just as other health professions such as chiropractic, medicine, nursing, osteopathy and physiotherapy are not defined. However, the podiatry profession has during consultations expressed a strong preference for the legislation to continue to define the scope of podiatry practice and the Department will continue to consult with the profession on this matter during the drafting of any legislation to implement this report's recommendations.

If a core practice model were adopted definitions of the restricted core practices, and the restrictions, would be placed in the Public Health Act in keeping with that Act's focus on the protection of public health and safety.

> *"The Board considers that the existing regulatory environment [title and whole of practice restriction] is appropriate ...*
>
> *The Board considers that the practice of podiatry should be restricted by the Podiatrists Act, and considers that the definition outlined in the current Act is adequate."*[32]

The Board has also advocated removing the caveat "for fee or reward" in the practice restriction so that any person who provides foot care services, and notwithstanding the concerns expressed in section **4.6.1** this is presumed to include basic foot care, to another on a voluntary or free basis would be committing an offence. At the extreme end of the scale, and assuming that the existing whole of practice restriction were retained, this would mean in effect that a person who cut the toenails of a family member, including their own child, would be committing a criminal offence. The Department acknowledges such a situation would be extreme and the likelihood of a person being prosecuted for cutting the toenails of his or her child is so remote as to be for all intents and purposes non-existent. However, the Department is of the view that a provision that implicitly outlaws this type of domestic activity should not be enacted. However, removal of the caveat in conjunction with a more targeted restriction of certain practices is supported.

The Issues Paper asked that submissions that advocated retention of practice restrictions, whether those restrictions are by core practice or whole of practice, provide evidence of risks to public health and safety to support the proposed restrictions. Most submissions supporting practice restrictions relied on a claimed inherent risk from foot care practices in general, most commonly relating to infection control, rather than providing detailed anecdotal or research evidence.

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[31] Submission – Australian Podiatry Association (NSW), pages 26-27.
[32] Submission – Podiatrists Registration Board, page 3.

The two submissions that supplied evidence of risk to the public were those from the Faculty of Health at the University of Western Sydney and the Australian Podiatry Association. In its submission the University noted that:

> *"There is evidence of a significant risk to the public when people attempt to treat such conditions* [disorders of the foot and leg] *without appropriate manual dexterity and infection control practices that have resulted in patient death as a direct result of inappropriate treatment of an ingrown toenail."*[33]

In support of this view the University has cited a case note appearing in the journal *The Foot.*[34] That case involved an 87 year old English woman with a history of peripheral vascular disease who had an ingrown toenail treated by a person who was not a registered podiatrist (there is no discussion of the person's qualifications or training). The patient developed gangrene and died of sepsis some 5 weeks after the treatment. This case suggests that there may be certain instances where aspects of podiatry practice may be harmful if not carried out with due care to any underlying disease and infection control procedures. This case note was also referred to in, and attached to, the submission from the Australian Podiatry Association.

The University also provided evidence that diabetic patients are at an elevated risk of injury from foot care practices as well as being at risk where foot pathology is not detected.

> *"In Australia 5% of patients with diabetes have reported foot ulcerations with complications from the same resulting in 2,800 amputations each year* (Colagiuri et al National Diabetes Strategy and Implementation Plan, Canberra, Diabetes Australia 1998.). *The provision of high quality foot care to this population is essential: foot care screening, education programs and podiatry services reduce rates of amputation* (Sowell et al "Effect of podiatric medical care on rates of lower-extremity amputation in a Medicare population" Journal of the American Podiatric Medical Association 89(6): 312-317).[35]

As with the case cited above the arguments that are generally advanced to support continued restriction of podiatry involve issues of infection control, systemic disease detection and appropriate wound management. However, there is a broad range of health practitioners, including nurses, who have training, skills and experience in these areas.

No submission produced evidence demonstrating that every aspect of the foot care practices undertaken by podiatrists is so inherently dangerous as to justify a whole of practice restriction.

Furthermore the Australasian Podiatry Council, the peak professional body for Australian podiatrists, said in its submission:

> *"The Australasian Podiatry Council recognises, acknowledges and welcomes the appropriate role of other health professionals in the management of the foot, however due to the risk to public health and safety.. believe protection of title to be essential. The provision of footcare by alternative personnel is problematic only when they are holding*

[33] Submission – Faculty of Health, The University of Western Sydney, page 4.
[34] Rawes ML, Jennings C, Rawes FL, Oni OOA, "Fatal chiropody" The Foot, volume 5, pages 36-37
[35] Submission, University of Western Sydney, pages 4-5.

> *out to undertake podiatry or chiropody and the Board must have power to investigate such persons."*[36]

This statement is however at odds with other statements in the Council's submission in which it endorses a whole of practice restriction.

Given the above and the fact that a range of health practitioners, both registered and unregistered, have areas of practice which overlap that of podiatry the Department proposes that any restrictions on foot care practices be limited to clearly defined core practices. Regulation with core practice restrictions is consistent with existing or proposed regulatory models for chiropractors, dentists, optometrists, osteopaths and physiotherapists. (Medical Practitioners, psychologists and nurses are registered by title alone, although the practice of midwifery is currently restricted.)

In adopting this approach the Department has recommended that practice restrictions be placed in the Public Health Act. The rationale for this approach is that the Public Health Act is concerned with risks to public health while professional registration Acts are concerned with the regulation of individual professions. Furthermore in a situation where a number of registered professions are able to undertake restricted practices it is inappropriate for those restrictions to be contained in a single professional Act with the implication that that profession is solely or primarily responsible for the restricted practices.

4.6.3 Other jurisdictions

Queensland

The Queensland Government's *Review of Medical and Health Practitioner Registration Acts Draft Policy Paper* (September 1996) proposed that soft tissue surgery and nail surgery of the foot be restricted practices and that they be limited to podiatrists, medical practitioners and nurses. It is important to note that this proposal did not follow a full scale review of health practitioner practice restrictions and that full scale review is currently underway.

Victoria and Western Australia

Both Victoria and Western Australia have no restrictions on foot care practices and rely on title restrictions alone, although the Western Australian Act does define podiatry in reasonably comprehensive terms. The Department is not aware of any evidence that consumers of podiatry services in those jurisdictions have been adversely affected by non-podiatrists providing foot care services.

South Australia

The South Australian Chiropodists Act 1950 defines chiropody as

> *"the diagnosis and treatment by medical, surgical, electrical, mechanical or manual methods or by any proclaimed treatment of ailments or abnormal conditions of the parts of the human body below the knee"*

The Act restricts the practice of chiropody to chiropodists (podiatrists), medical practitioners and physiotherapists.

Tasmania

The Tasmanian Podiatrists Act 1995, which has recently been subject to a review, defines podiatry as

[36] Submission – Australasian Podiatry Council, page 4.

> *"the diagnosis and treatment by medical, surgical, electrical, mechanical or manual methods of ailments or disorders of the foot or foot related structures and appropriate preventative treatment and education"*

The practice of podiatry is restricted to podiatrists, medical practitioners, nurses and physiotherapists.

The Northern Territory
There is no registration of podiatrists in the Northern Territory.

Ontario
By way of an overseas example the Canadian province of Ontario adopts a core practices model for all regulated health professions. Section 27(2) of the Regulated Health Professions Act 1991 lists a number of restricted practices which may only be undertaken by registered health professionals authorised to do so by their own registration Acts. Included in those practices are:

- performing a procedure on tissue below the dermis,…; and
- administering a substance by injection or inhalation.

Each of the Chiropody Act 1991, the Medicine Act 1991 and the Nursing Act 1991 authorise the relevant professionals to perform these procedures, although podiatrists are restricted to

> *Cutting into subcutaneous tissues of the foot;*
> *administering, by injection into feet, a substance designated in the regulations; and*
> *prescribing drugs designated in the regulations.*

4.6.4 Focused consultation on the core practices of podiatry

Having considered the submissions received and noting that they did not contain comprehensive or systematic discussion of inherently dangerous foot care practices, the department decided to seek further expert assistance. To that end the Podiatrists Registration Board, the Australian Podiatry Association (NSW), the Australasian Podiatry Council and the University of Western Sydney were each asked to nominate a podiatrist to assist the Department's further examination of podiatry.

As a result of those consultations officers of the Department have a more detailed understanding of the skills and expertise of podiatrists and the significant role that they play in health care. Information was provided on:

- The education and professional training of podiatrists.
- The Australian Podiatry Council's Accredited Podiatrist Program.
- The use of pharmacological therapies including a range of medicaments and dressings.
- Surgery of the foot including superficial soft tissue and nail surgery under local anaesthesia.
- Podiatric surgery, including
  i) the use of both local and general anaesthesia;
  ii) deep tissue surgery; and
  iii) bone and tendon surgery, including lengthening of tendons, within the foot and ankle and potentially into the calf muscle area.
- The Australian College of Podiatric Surgeons.

The use of scheduled medications, including injectable local anaesthetics, is restricted by the Poisons and Therapeutic Goods Act 1966. Therefore any treatments requiring the use of restricted medications are effectively restricted to persons authorised to access those medications under that Act. Podiatrists are authorised by clause 7 of Appendix C of the Poisons and Therapeutic Goods Regulation 2002 to possess a range of injectable local anaesthetics for use in the practice of podiatry.

Similarly the practice of podiatric surgery, as defined by the Australian College of Podiatric Surgeons, requires access to scheduled medications, including anaesthetics, and the assistance of other health professionals including medical practitioners and nurses. Podiatric surgery cannot be provided by people who are unable to access medications, operating facilities, and appropriate professional assistance. Therefore there would appear to be no need to explicitly restrict those practices.

However, notwithstanding that the consultation did not demonstrate that all of the practices employed by podiatrists are so inherently dangerous that they should be restricted to podiatrists alone the Department is convinced that certain foot care practices have the potential for serious consequences.

4.6.5 Core practice restrictions

A number of practices utilised by podiatrists have the potential to cause harm, in some cases serious harm, to patients if improperly performed. These practices include the use of scalpels and other sharp instruments to cut the soft tissues of the foot and to excise toe nails in whole or part.

Clearly any activity which involves breaking or cutting a patient's skin with surgical instruments carries with it a risk of contamination and disease transmission. The types of potential infections include blood borne diseases such as HIV and Hepatitis B and C, as well as the far more prevalent multi resistant staphylococcus aureus (MRSA). The potential for infection transmission is significantly reduced by the observance of basic infection control principles which are taught to health professionals during their undergraduate education and incorporated in relevant regulations, such as the Medical Practice Regulation 1998, the Nurses (General) Regulation 1997, the Physiotherapists Regulation 1995 and the Podiatrists Regulation 1995.

While there is no statistical evidence available on rates of transmission of the above infections from foot care practices there have been a number of widely reported cases of HIV and Hepatitis transmission from health care practices where basic infection control procedures were not strictly observed. Both the community as a whole and the public health system have a legitimate interest in ensuring that as far as possible the risk of serious infection transmission is avoided. Therefore there is a legitimate community interest in ensuring that only those health practitioners who are appropriately trained in infection control and regulated are able to cut into foot tissues.

In addition to cutting into the soft tissues of the foot podiatrists use scalpels and other sharp instruments to debride hypertrophic and necrotic foot tissues[37]. In feet hypertrophic tissues are commonly corns and calluses and necrotic tissues generally surround ulcers and other significant injuries which are characterised by a breach in skin integrity. Clearly the use of sharp instruments in these situations, while not designed to cut into living tissues, carries with it a substantial risk that skin integrity will be

[37] Hypertrophy is defined in Mosby's Medical Nursing and Allied Health Dictionary, 3rd ed 1990, as *an increase in the size of an organ caused by an increase in the size of cells rather than an increase in the number of cells.*
Necrotic is defined in the same dictionary as *pertaining to the death of tissue in response to disease or injury.*

compromised or that living tissues will be cut. The same infection risks apply as with the deliberate cutting of foot tissues and the same basic infection control procedures must be followed in order to minimise the risk of disease transmission. Therefore there is a legitimate interest in ensuring that only appropriately trained and regulated health practitioners who are appropriately trained in infection control are able to debride hypertrophic and necrotic foot tissues.

The treatment of the feet of people who are immuno-compromised, and those who are suffering from a form of peripheral neuropathy[38] or peripheral vascular insufficiency to the feet also carries with it significant risks. These risks are largely related to reduced nerve sensation and the consequent inability of the patient to detect or react to further injury caused by a procedure, and to the reduced ability (sometimes inability) of injured tissues to repair themselves. In such situations it is clearly in the interest of patients that only appropriately trained people, and this includes appropriately trained to know the limitations of their professional abilities, are able to provide treatment.

The assessment and appropriate referral of people with compromised immune and peripheral vascular systems or neuropathic disease for additional treatment is an important further consideration. In this respect podiatrists have the education and expertise to diagnose and treat many of the complaints that these people present with and where they lack the ability to provide appropriate treatment are able to identify the most appropriate practitioner for a referral.

In support of the role of podiatrists in treating and diagnosing diabetics the University of Western Sydney has provided statistical information on the use of podiatry services by diabetics, sourced from Diabetes Australia[39]. This information shows that over 800,000 Australians have diabetes, of which some 85-90% have type 2 diabetes and of these 50%, or some 350,000, are undiagnosed. Diabetes Australia estimates that over 50,000 Australians are diagnosed with diabetes every year.

Diabetics are generally more susceptible to peripheral vascular problems and as a result more likely than other members of the community to seek podiatric services. The University estimates that podiatrists are responsible for diagnosing and referring for appropriate medical treatment some 25% of previously undiagnosed diabetics. This equates to over 12,000 cases per annum Australia wide or 4,000 cases in New South Wales alone.

The restriction of foot care services to these classes of patients on public health grounds is further supported by the submission of Professor D K Yue, Director of the Diabetes Centre, Royal Prince Alfred Hospital:

> *"These individuals represent an extremely high risk group of patients. A slight delay in diagnosis and treatment can greatly increase the likelihood of serious foot infection and amputation. In my role as the Director of one of the largest diabetes services in this state, I am constantly reminded of the importance to ensure that diabetic patients receive early and optimum care for their lower limb complications. It is my opinion that for this particular group of patients, when their foot treatment is outside the setting of a hospital and not under direct supervision of a medical practitioner, it should be provided only by qualified podiatrists."*[40]

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[38] Neuropathy is defined in Churchill's Medical Dictionary, 1989, as *any disease of the central or peripheral nervous system.*
[39] http://www.diabetesaustralia.com.au
[40] Submission – Professor D K Yue, page 1.

The Public Health Act currently restricts the use of shortwave and microwave diathermy and electrical stimulation by interferential to a range of registered health professionals including podiatrists.

4.7 Conclusion

Following extensive consultation with the relevant professions the Department concluded that there should be practice restrictions in those foot treatment areas that involve piercing or cutting the skin of the feet (and toenails) under anaesthetic; debridement of diseased and dead tissue on the feet; and treatment of the feet of people suffering from diseases of the immune system and circulatory systems.

Therefore the Department recommends that:
1. invasive procedures performed on the feet and toenails under anaesthesia be restricted to medical practitioners and podiatrists, and that
2. debridement of hypertrophic and necrotic tissues of the foot, and treatment of the feet of immuno-compromised or vascular compromised individuals and individuals suffering from peripheral neuropathy be restricted to medical practitioners, podiatrists and registered nurses.

In the case of registered nurses it is recommended that the exemptions apply in respect of practitioners who are employed by a public health organisation within the meaning of the Health Services Act 1997, a licensed nursing home under the Nursing Homes Act 1988 or licensed private hospital or day procedure centre under the Private Hospitals and Day Procedure Centres Act 1988. This restriction is designed to ensure that registered nurses undertake the restricted foot care practices within environments in which there are appropriate professional referral and supervisory networks. The Department also considers that it may be appropriate for the Podiatrists Registration Board and the Nurses Registration Board to examine the potential to establish foot care courses for nurses as has previously been done in the case of basic foot care.

It is important to note that while the Department proposes to restrict the treatment of the feet of people with compromised immune and peripheral vascular systems or neuropathic disease, it is not the intention to prevent health professionals such as physiotherapists from providing their normal professional services. It is also not the Department's intention to prevent enrolled nurses from continuing to undertake their normal professional duties including providing simple foot care services to people with healthy feet. Any restrictions will be drawn with this in mind and the relevant professions will be consulted during the drafting of the provisions.

Recommendation 3 – Practice restrictions

The Public Health Act be amended to provide that
1. the undertaking of invasive procedures performed on the feet and toenails under anaesthesia is restricted to medical practitioners and podiatrists; and
2. (a) the undertaking of debridement of hypertrophic and necrotic tissues of the foot, and
   (b) the undertaking of treatment of the feet of immuno-compromised or vascular compromised individuals and individuals suffering from peripheral neuropathy,
   is restricted to medical practitioners, podiatrists and registered nurses who are employed by a public health organisation, a nursing home, a private hospital or a day procedure centre.

5. ENTRY REQUIREMENTS

5.1 Introduction

The Podiatrists Act contains a number of criteria an applicant for registration must meet. 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 podiatrist and from practising podiatry for fee or reward.[41] 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 Qualifications for Registration

For a person to be eligible for registration as a podiatrist he or she must satisfy the Board as to his or her competence. The Act provides in section 6(1)(a) that competence is established for initial registration by an applicant holding a qualification recognised by the Board as qualifying the person as competent to practise podiatry (see **Appendix C**). The Board has approved a number of Australian qualifications for registration and the Mutual Recognition Acts have the effect of expanding the range of registrable qualifications to all qualifications accepted in any participating jurisdiction, including New Zealand.

The Issues Paper sought comment on whether the mechanisms by which competency is assessed are appropriate. The Paper also asked whether the mechanisms by which courses of training are recognised for registration require amendment and if an alternative means of assessing an applicant's competence should be developed. All submissions that addressed this matter have argued that the current range of qualifications accepted by the Board is appropriate and that there is no evidence of competent people being denied registration.

The Australasian Podiatry Council has argued that competency should be assessed against the Council's Competency Standards and that the assessment of qualifications should be conducted on a national basis. The University of Western Sydney has echoed this view and supported an "official accreditation process" which is nationally consistent. The Australian Podiatry Association has largely reflected these views in its submission that the current systems of course accreditation and examinations for overseas trained applicants are appropriate.

On the other hand the Central Sydney Area Health Service submitted that:

> *"Whilst the Australian* [sic] *Podiatry Council is the appropriate agency to assess qualifications, there is a need to amend the process of accreditation. There should be greater transparency in the process, and accrediting courses by regulation or publishing course accreditation guidelines should be introduced."*[42]

While the Department is not aware of any evidence that suitably qualified and competent people have been denied registration due to the Board's requirements it is considered that a more transparent system of course accreditation is in the public interest. Such a system of accreditation may in time result in more

[41] Medical practitioners are exempt from this latter prohibition.
[42] Submission – Central Sydney Area Health Service, page 1.

people becoming registered and therefore greater competition in the market and greater choice for consumers of foot care services.

The Department recognises that use of the Australasian Podiatry Council allows for a transparent and nationally consistent system for accrediting educational courses. However the Council is not subject to statutory oversight and its determinations cannot be appealed through the Courts or administrative tribunals. Furthermore the Board is the statutory regulating authority and the decision as to whether a course should be accredited or not must remain within its purview. Therefore 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 authorities to develop consistent accreditation guidelines the Australasian Podiatry Council could then undertake assessment of courses on behalf of all registration authorities. Where an institution is aggrieved by a decision of the Board to refuse 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 that 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 that are currently prescribed to ensure that they are all of an appropriate standard. In the event that the Board forms the view that one or more courses of training should no longer be prescribed, they will be removed from the Regulation on the condition that any action taken is 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 Podiatrists Registration Board have the power to approve courses of training for the purposes of registration;
- the Regulations set out criteria under which educational institutions can apply 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 Podiatrists Registration Board review the courses that are currently prescribed for the purposes of registration.

5.3 Good Character

The Act currently provides that "good character" is a prerequisite to registration as a podiatrist. 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 and practising as podiatrists.

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

> *"Character is relevant when it affects the fitness to practise; it is in the public interest that practitioners are of "good character". … Good character is a universal requirement for the registration of health professionals."*[43]

On the other hand the Australasian Podiatry Council has argued that:

> *"..the requirement for "good character" should be removed in view of its subjectivity…"*[44]

Although the Health Care Complaints Commission did not make a submission to this review its submissions to other health professional Act reviews have strongly supported the retention of the requirement for applicants to be of good character. In its submission to the review of the Physiotherapists Registration Act the Commission argued:

> *"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."*[45]

The Department supports the view of the majority of submissions that retention of the "good character" requirement is an essential part of satisfying the legislative objective of protecting the public. Consumers of podiatry services build relationships with their podiatrist 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 podiatrists. 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 the view of the Health Care Complaints Commission that there is no reason to believe that registration boards are incapable of objectively applying the test of good character is endorsed. There is no evidence that the Podiatrists Registration Board has applied the test of good character in an inappropriate way or that fit and proper practitioners have been denied registration based on the requirement.

5.4 Age

[43] Submission – Australian Podiatry Association (NSW), page 30.
[44] Submission – The Australasian Podiatry Council, page 6.
[45] Health Care Complaints Commission, submission to the review of the Physiotherapists Registration Act 1945, pages 4-5.

The Podiatrists Act currently provides that a person may not be registered as a podiatrist unless he or she has reached the age of 20 years. The Issues Paper asked whether this requirement serves the public interest and whether it should be retained.

A number of submissions addressed this point with the overwhelming majority expressing the view that the age requirement should be removed on the ground that it is unnecessary.

> *"The University would strongly support the removal of the age restriction. It is redundant and unnecessary."*[46]

When considering the age restriction it must be acknowledged that Australian podiatry graduates complete four year courses 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 age of 20 years be removed.

5.5 Competence in the English Language

Section 7 of the Act provides that a person may not be registered unless the Board is satisfied that he or she has knowledge of the English language that is adequate for the practice of podiatry. The Issues Paper noted that there is concern that imposing English competence as a requirement for registration may be used to limit service providers in the market by arbitrarily discriminating against practitioners trained overseas.

There is no evidence or suggestion that the English competency provisions have been used in a discriminatory manner, however 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 retention of the English language requirement.

The Faculty of Health at the University of Western Sydney submitted that:

> *"..the practitioner must have verbal English language skills that allows the person to be able to*
> - *gain appropriate information from the patient in order to ensure an accurate diagnosis can be ascertained*
> - *establish an appropriate rapport with the patient*
> - *act as an advocate for the patient with government and non government organisations."*[47]

In the context of the review of the Optometrists Act 1930 the Council on the Aging (NSW) argued that:

[46] Submission – Faculty of Health, University of Western Sydney, page 8.
[47] Submission – Faculty of Health, the University of Western Sydney, page 8.

> *"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."*[48]

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

- Consumers could be put to unnecessary expense when they seek out a registered podiatrist and discover that the podiatrist is unable to communicate effectively.
- The requirement for podiatrists 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 spoken English.
- A podiatrist 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.

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 that may, if not complied with, provide grounds for refusing registration. These matters include physical and mental capacity 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 that the person does not have the physical or mental capacity to practise podiatry and referring the matter to a Professional Standards Committee or a Board inquiry.

A small number of submissions addressed this issue with all agreeing that the Board should consider the physical and mental capacity of an applicant where it may effect the applicant's ability to practise.

The objective of the Act and the role of the Board are the protection of the public. In order that the Board may be pro-active 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 an applicant for registration. 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.

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[48] Submission to the Review of the Optometrists Act 1930 – The Council on the Aging (NSW), page 2.

Similar considerations apply where a person seeks to restore their registration after a period of time off the Register and it is therefore appropriate that the Board also have the power inquire into a person's competence on an application for restoration of registration.

Recommendation 6 – Competence for registration

That when a person applies for registration or restoration of their registration the Podiatrists 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.

5.6.2 Criminal convictions

As noted in the Issues Paper the current Act allows the Board to refuse to register a person based on criminal convictions that in the opinion of the Board render the person unfit for registration. The Issues Paper asked whether this power should be extended to include those instances where a person has been found guilty of an offence but no conviction has been recorded. There was virtually no discussion of this matter in submissions.

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 the community can continue to have confidence in the registration process and the integrity of health practitioners the Department is of the opinion that it remains important for registration boards to be able to consider criminal offences committed by applicants prior to an application for registration.

The Department is also of the view that these provisions should apply to both convictions and to offences that are proven but where a conviction is not recorded. 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 necessarily focus on the need to protect the public from unethical practitioners. This recommendation will not apply to spent convictions as provided for in the Criminal Records Act 1991 and to minor traffic matters which will be prescribed by regulation.

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 and provisional registration. Provisional registration is granted where an applicant is entitled to registration and has lodged a completed application pending a meeting of the Board, or to an applicant who has successfully completed their studies whilst awaiting the formal awarding of a recognised qualification. The Issues Paper asked whether the Board should have the power to grant additional forms of registration such as temporary registration or conditional registration for specific purposes.

Of the submissions that addressed this issue all, with the exception of that from South Western Sydney Area Health Service, supported the Board having power to grant temporary registration. Temporary registration could be used by the Board to facilitate overseas practitioners or academics visiting to undertake teaching or research or attend continuing education programs, and it may also be used for practitioners who visit with overseas sporting or cultural organisations such as dance companies.

The Department is of the view that the Podiatrists Registration Board should have the power to grant temporary registration and to grant that registration subject to whatever conditions it considers appropriate.

Recommendation 8 – Temporary registration

That the Podiatrists Registration Board be able to grant temporary registration subject to such conditions as the Board considers appropriate.

5.8 Appeals

Currently there is a right of appeal to the District Court against a decision to refuse to register a person as a podiatrist. Modern registration Acts that establish professional tribunals provide for appeals in registration matters, including the granting of registration subject to conditions, 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 practice. Referral of appeals to a tribunal also helps to minimise cost and inconvenience and to ensure consistent decision making in matters relating to professional practice and competence.

Given that this report recommends (see **recommendation 13**) the establishment of a Podiatrists 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, to refuse to restore the registration of a person, or to impose conditions on a person's registration as a podiatrist should be made to the Podiatrists Tribunal.

6. REQUIREMENTS FOR CONTINUING REGISTRATION

6.1 Introduction

One of the main aims of the Podiatrists Act is to make available to patients information about the competence of practitioners using the title *podiatrist*. In the case of ongoing registration there is heavy reliance on establishment of competence through the initial registration criteria, 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.

No submission has supported the introduction of annual competency assessments and a number have argued that there is no evidence that podiatrists are failing to maintain their professional capabilities.

> *"I have no evidence to suggest that any podiatrist working within SWSAHS fails to maintain standards of competency, nor do I know of any consumers exposed to harm."*[49]

> *"There is no evidence that practitioners are failing to maintain standards at an appropriate level."*[50]

If a system of regular performance assessments were introduced, there would be additional costs to the profession and the community. The Podiatrists 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. As no evidence has been put forward to demonstrate that practitioners are failing to maintain their competence the Department does not support this particular option.

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[49] Submission – South Western Sydney Area Health Service, page 3.
[50] Submission – Australian Podiatry Association (NSW), page 33.

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 continuing professional education helps to ensure that practitioners keep their knowledge up to date and remain competent. However, if continuing professional education were made a requirement for renewal of registration, a barrier to continuing registration would be created as the cost of training programs, including time costs, would have to be borne by individual podiatrists. 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 podiatrist 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. In addition, as noted above, there is no evidence that podiatrists are failing to maintain professional standards.

No submission has argued that continuing education should be a mandatory requirement for registration to ensure that practitioners maintain their standards. However, there has been comment that a voluntary system may have merit.

> "*The option of a voluntary scheme for continuing education where the minimum level of continuing education is stated and those who satisfy the Board's standards are provided with a statement, is to be supported. This provides employers with an indication of the employee's commitment to continuing education without penalising those who do not comply with the Board's standards.*"[51]

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. 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

Should additional information be provided to enable a proper assessment of the practitioner's ongoing good character and competence? Clearly, a board can only take action to protect the public where it has received information pointing to the desirability of doing so. Relevant information may come from a range of sources and is not limited to complaints.

6.4.1 Current position

Currently the Act only requires an applicant for renewal of registration to pay a fee, although the Podiatrists Registration Board has

[51] Submission – Central Sydney Area Health Service, page 2.

> *"..recently resolved to amend the Podiatrists Code of Professional Conduct, approved by the Board under section 13 of the Podiatrists Act, to require podiatrists to provide details of convictions for offences, current complaints, refusal, suspension or deregistration of registration in other jurisdictions, to the Board. The Board recommends that the Act be amended to provide that podiatrists be required to provide such details to the Board."*[52]

The Department supports a more comprehensive process for renewing registration so as to enable the Board to assess whether any action needs to be taken by it in the interests of protecting the public. This approach is consistent with the Board's recent amendment to its Code of Professional Conduct and provisions in the Chiropractors Act, the Dental Practice Act, the Medical Practice Act, the Osteopaths Act, the Physiotherapists Act and the Psychologists Act.

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 are a number of podiatrists who are registered with two or more registration boards, for example those who are registered as both nurses and podiatrists. The Podiatrists Act, along with other health registration Acts, makes no provision for the sharing of information between registration 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 practitioner in any context. Equally certain professional shortcomings which fall short of justifying deregistration, such as a failure to 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 a health registration board (the primary board) in NSW takes disciplinary action against a practitioner and the board is aware that the practitioner is, or has been, registered with another health registration board (the secondary board) the primary board should be under a duty to notify secondary boards about disciplinary findings and the orders made as a result of those findings. A secondary board could then, where appropriate, make a complaint about the practitioner and institute disciplinary proceedings. In extreme cases a secondary board could take emergency action to protect the public by suspending the practitioner and then make a complaint and initiate disciplinary proceedings.

6.4.3 Impairment action by another health registration authority

The above discussion relating to disciplinary action taken by another health registration authority can equally apply to action taken on the basis of a practitioner's impairment. Impairment action is taken by a

[52] Submission – Podiatrists Registration Board, page 4.

registration board in order to protect the public from a practitioner whose ability to practice is impaired whether that is due to drug or alcohol addiction or to physical or mental incapacity. 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.

Recommendation 10 – Action by other registration authorities

(a) That the Act be amended to provide that where a practitioner who is also registered with another health registration board in New South Wales has a disciplinary finding made against them by the other registration authority that finding may form the basis of a complaint to the Podiatrists Registration Board.

(b) 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.

6.4.4 Conclusion

The Department has 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 **7.10**);
- 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 Department is of the view that a person whose registration has lapsed should, on seeking to have that registration restored, be required to provide the Board with the same declarations as a person who is having their registration renewed. This requirement will assist the Board in determining whether to hold an inquiry into the applicant's competence as provided for in **recommendation 5**.

Recommendation 11 – 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) involve minors; or
    - (b) relate to conduct occurring in the course of practice;
- significant illness which may adversely affect fitness to practise;
- 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;
- continuing professional education activities; and
- practice status.

7. DISCIPLINARY SYSTEM

7.1 Introduction

The current Podiatrists Act utilises what is effectively a single tier disciplinary system in that the Board considers all complaints, although in appropriate cases in conjunction with the report of a Professional Standards Committee. 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. As noted in **section 2.2** complaints about podiatrists may be made to the Podiatrists Registration Board or the Health Care Complaints Commission (HCCC).

A statutory disciplinary system that 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 podiatrists.

Clearly disciplinary investigations and hearings involve costs for the HCCC, the Board and podiatrists. However, these costs are far outweighed by the benefits produced from removing incompetent or unethical practitioners from practice 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, in both cases, neither system would achieve the protective objectives of the Podiatrists Act because there is no ability to prevent practitioners who have been found to have practised unethically or incompetently from using the title *podiatrist* or practising. Furthermore, legal action depends upon the individual effected being prepared to invest time and money in pursuing his or her cause of action.

7.2 Two-Tier Definition of Misconduct

The Podiatrists Act contains a single definition of "professional misconduct" (See **Appendix D**). The Issues Paper canvassed the introduction of a two-tier definition of "professional 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 Podiatrists Act facilitates this distinction.

Most 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 Board supports the introduction of a two tier definition of misconduct along the lines of the relevant provisions of the Nurses and Medical Practice Acts."*[53]

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

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[53] Submission – Podiatrists Registration Board, page 5.

7.3 Power to Compel a Practitioner to Respond to a Complaint

The Podiatrists Act does not confer on the Board the power to compel a podiatrist 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 the Medical Board and the Health Care Complaints Commission identified this 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. Failure to respond to a request without reasonable cause would be a breach of the Act and therefore constitute "unsatisfactory professional conduct". This recommendation is consistent with recent amendments to the Medical Practice Act.

Recommendation 12 – Definition of misconduct

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

- "Unsatisfactory professional conduct" is defined as:

  (a) any conduct by the podiatrist that demonstrates a lack of adequate knowledge, skill, judgement, or care in the practice of podiatry,
  (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 podiatrist to comply with a direction of the Board to provide information with respect to a complaint against the podiatrist,
  (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 podiatrist in the course of the practice or purported practice of podiatry.

- "Professional misconduct" is defined to mean "unsatisfactory professional conduct of a serious nature which may lead to the suspension or de-registration of the podiatrist".

7.4 Grounds for Making a Complaint

Under section 14(1) of the Podiatrists Act a complaint can be made that a podiatrist

(a) has been convicted either in or outside New South Wales of an offence which, from the circumstances under which it was committed, render the registered podiatrist unfit in the public interest to practise podiatry; or
(b) is an habitual drunkard or addicted to any deleterious drug; or
(c) has been guilty of professional misconduct; or
(d) does not have sufficient physical or mental capacity to practise podiatry; or
(e) is not of good character.

It is important that the basis for making a complaint about a podiatrist under the Podiatrists Act complement the basis for a complaint under the Health Care Complaints Act. Under the Health Care Complaints Act a complaint can be made about the professional conduct of a practitioner or about a health service that affects the clinical management or care of an individual. It is also essential that the grounds for making a complaint complement the grounds for refusing registration, which were discussed in **chapter 5**. 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. As the Department has also recommended, **recommendation 10**, that a two tier definition of misconduct be introduced it is necessary that a complaint can be made that a podiatrist has been guilty of unsatisfactory professional conduct or professional misconduct.

Therefore the Department recommends that a complaint be able to be made about the professional conduct of a registered podiatrist or about the provision of a podiatry service by a registered podiatrist. In particular a complaint may be made that a podiatrist:

- is guilty of unsatisfactory professional conduct or professional misconduct;
- has been found guilty in a criminal matter whether or not a conviction is recorded;
- suffers from an impairment;
- does not have the physical or mental capacity to practise; or
- is not of good character.

Recommendation 13 - Grounds for complaint

A complaint may be made about:

- the professional conduct of a registered podiatrist; or
- the provision of a podiatry service by a registered podiatrist.

In particular a complaint may be made that a podiatrist

- is guilty of unsatisfactory professional conduct or professional misconduct,
- 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,
- suffers from an impairment,
- does not have the physical or mental capacity to practise,
- is not of good character.

7.5 Disciplinary Structures

The existing disciplinary structure in the Podiatrists 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 considered 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 adopted by the Chiropractors Act 2001, the Optometrists Act 2002, the Osteopaths Act 2001, the Physiotherapists Act 2001 and the Psychologists Act 2001.

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 affect 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 Podiatry Care Assessment Committee/Board and Tribunal model

This is a modification of the model currently applied by the Dentists Act. Under this system serious complaints would be referred to the Tribunal for a hearing and less serious complaints could be referred to the Podiatry Care Assessment Committee (PCAC). The PCAC would have a role in conciliating and investigating complaints about podiatrists and would make recommendations to the Board for their resolution.

The PCAC would provide a forum for independent expert assessment of concerns raised by patients as to the standards of podiatry services provided to them. The PCAC 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 PCAC could refer a patient for an independent examination and obtain such other evidence, professional reports and advice, as it considers desirable. The PCAC would be constituted by three podiatrists 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 and responds to complaints in a prompt manner. 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. 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 Podiatrists Act. The Dental Board receives around 80 complaints each year and about 80% are referred to the DCAC for consideration.[54] By way of comparison in the five reporting years 1995/6 to 1999/2000 the Podiatrists Registration Board's complaints screening committee considered 32 complaints regarding treatment provided by registrants or the conduct of registrants. Of these complaints only one was referred to a PSC hearing, and no matters have been referred to a full Board inquiry.[55]

7.5.3 Submissions

Very few submissions addressed the issue of disciplinary structures. The submission from the Podiatrists Registration Board endorsed the adoption of a PSC/Tribunal system modelled on that in the Nurses and Medical Practice Acts. The other three submissions to address this issue, including that from the Australian Podiatry Association, broadly supported the current disciplinary system. No submission addressed the issue of the costs and benefits of any disciplinary system.

As noted above the Dental Act model has been adopted following reviews of a number of other health registration Acts. 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 podiatry profession and should be adopted in the Podiatrists Act. The Department is however cognisant of the differences between professions and the model adopted in the Podiatrists Act will be developed so as to ensure that it functions in a manner appropriate for the podiatry profession.

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 PCAC. If such a structure were adopted then complaints, other than complaints of professional misconduct, would be considered by the relevant Board after investigation by the PCAC, the HCCC or the Board's Inspector. Complaints of professional misconduct would be considered by the Tribunal.

The Board would be able to make the following orders:

- caution or reprimand the podiatrist;
- order the podiatrist to seek medical or psychiatric treatment or counselling;
- order the podiatrist to undertake additional training;
- order the podiatrist to seek advice on the management of their practice;
- order the podiatrist to report on the status of their practice to the Board, or its nominee; and
- impose conditions on the podiatrist's practice.

[54] Dental Board of NSW Information Bulletin (October 1997) p.5
[55] Podiatrists Registration Board Annual Reports 1995/6 to 1999/2000.

The Department envisages Board inquiries being conducted in a non-legalistic informal manner. It is suggested that inquiries will generally be conducted through written submissions, with key participants, such as the practitioner in question, being able to make oral submissions as well. It is emphasised that Board inquiries are not to be “mini tribunals” and that 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 podiatrist.

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

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 PCAC/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 PCAC 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 PCAC has recommended be the subject of an inquiry. It is therefore proposed that where the PCAC recommends that the Board inquire into unsatisfactory professional conduct the Board must inquire into the matter or refer it to the Tribunal for hearing. In the interests of accountability 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 14 – Revised disciplinary structure

That a revised disciplinary structure be introduced whereby:

- The Podiatry Care Assessment Committee will be established to consider and investigate complaints, referred from the Board regarding standards of professional services. The Podiatry Care Assessment 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 Podiatry Care Assessment Committee, the Health Care Complaints Commission or the Board's Inspector.

- 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 podiatrist's registration.
- Issue a caution or reprimand.
- Order the podiatrist to seek medical or psychiatric treatment or counselling.
- Order the podiatrist to undertake further training.
- Order the podiatrist to report on the status of their podiatry practice to the Board, or its nominee.
- Order the podiatrist to seek advice on the management of their podiatry practice.

The Tribunal is to be able to exercise any of the above powers of the Board. The Tribunal will also have the power to suspend or de-register the podiatrist.

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 Board; and
- one representative of consumers appointed by the Board from a panel of consumers nominated by the Minister.

The Acts that 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 Podiatrists 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 Podiatry Care Assessment Committee

The DCAC comprises four members, three dentists and a consumer. The Podiatry Care Assessment Committee (PCAC) will be constituted in a similar manner with three podiatrists and a consumer. It is recommended that, in order to emphasise the transparency of the process undertaken by the PCAC, 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 PCAC. 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.

The only submission to directly address the issue of the composition of disciplinary bodies has argued in support of Board members being precluded from sitting on those bodies.[56]

Recommendation 15 – Constitution of disciplinary bodies

That the Podiatrists Tribunal be constituted as follows:

- a legal practitioner with extensive experience, appointed by the Governor;
- two registered podiatrists 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 Podiatry Care Assessment Committee be appointed by the Minister and be constituted as follows:

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

That Board members should not be eligible to sit on the Tribunal or the Podiatry Care Assessment Committee.

[56] Submission – Ms SJ Hoskins-Marr, page 2.

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 order. 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 PCAC/Board proceedings

The PCAC 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 PCAC 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 PCAC 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 Podiatrists Tribunal. Therefore when a complaint is investigated by the Committee or an inquiry is conducted by the Board legal representation will not be allowed.

7.10 Medical Examination

The Act provides that the Board may order a podiatrist 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. Most submissions that addressed this point, including those from the Board and the Australasian Podiatry Council, agreed that the Board should have the power to order a practitioner who is subject to a complaint to undergo a medical examination. The exception was the submission from the Australian Podiatry Association, which argued that the status quo should prevail.

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 practice. 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 16 - Medical examinations
That the Board have the power to order that a podiatrist 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 (unless it is one prescribed by regulation) or who is found guilty of a sex or violence offence whether or not a conviction is 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. This will provide an additional means for obtaining relevant information in a timely manner and will emphasise to practitioners the 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 offences 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 charges for offences that involve minors or that occur in the course of practice balances the presumption of innocence with the Act's objective of protecting the public. 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.

Submissions on this issue were broadly supportive of requiring courts and practitioners to provide information on convictions to the Board.

Recommendation 17 – Criminal convictions

That:

- Courts be required to notify the Board of any podiatrist 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 podiatrist who is found guilty of a sex or violence offence, irrespective of whether a conviction is recorded;
- Podiatrists 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
- Podiatrists are to be under an obligation to notify the Board within seven days if charged with a sex or violence offences 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 a number of 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. Such an order may be made for up to eight weeks and may be renewed with the approval of the Chair or Deputy Chair of the relevant Tribunal. Where a Board's emergency powers are exercised the Board must refer a complaint to the Tribunal or a Professional Standards Committee (in the case of the Medical and Nurses Boards) or a Board inquiry at the same time.

This matter was not discussed in the Issues Paper, however the Department is of the opinion that the nature of podiatry practice is such that the inclusion of emergency powers is appropriate. In the review 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 18 - Emergency powers

That the Podiatrists 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 Podiatrists 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 Podiatrists 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 19 - 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 Podiatrists 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 Podiatrists 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 20 – 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 14(2)(c) of the Podiatrists Act requires that a complaint about a podiatrist is to be verified by a statutory declaration.

It has been recommended in reviews of other health professional Acts that the requirement for a statutory declaration should only apply when it is decided to refer a complaint for a disciplinary hearing. It has also been suggested that the Health Care Complaints Commission, and other prescribed office holders, be exempted from the requirement. 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. Other statutory office holders are subject to similar oversight.

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 and other specified public officials 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 podiatrist should the complaint proceed to disciplinary action.

Recommendation 21 – Statutory declarations

That a complaint to the Podiatrists 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. That prescribed statutory office holders be exempt from the requirement to verify a complaint by statutory declaration.

7.16 Codes of Conduct

The Podiatrists Act provides for the Board to establish a code of professional conduct that sets out the rules of conduct to be observed by podiatrists in practice. The Act does not make compliance with a code mandatory. The Issues Paper sought comments on the mechanisms by which a code of conduct is established and whether or not breach of a code should be grounds for complaint about a podiatrist. The current Code of Professional Conduct covers a range of issues including but not limited to standards of conduct, professionalism, privacy and confidentiality.

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 such a code has such an impact will depend on the content of the code itself.

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 is 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 or association with members of other professions). Practitioners may feel obliged to observe such standards even though they are not legally binding, although 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.

All submissions on this point endorsed the Board having the power to make a code of conduct, although the Australasian Podiatry Council questioned the value of the current Code and suggested it be reviewed.

On balance, the Department supports the Act continuing to provide a power for the Board to make a code of conduct as a code:

- is a valuable tool for directing practitioners on the standards to be adopted;
- can 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 the codes to be approved by the Minister for Health, the Department or another appropriate body; subjecting the codes to the potential for disallowance by Parliament under the *Interpretation Act 1987*; and establishing a formal system for developing the codes 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 codes 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 include a full assessment of the respective advantages and disadvantages of its provisions.

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 22 – Codes of conduct

That the Act provide for the making of a code of conduct by the Board following 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 Podiatrists 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 podiatrist 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 Registration 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 Podiatrists Act. Of the few submissions that addressed this point those from the Podiatrists Board and the Central Coast Area Health Service supported the introduction of an impaired registrants system, the submissions from the Illawarra Area Health Service and the Australian Podiatry Association argued against such a system on the basis of need, while the submission from the Australasian Podiatry Council was non-committal.

The Department is of the view that an impairment system is in the interests of the public and practitioners and therefore recommends that the Act provide for the establishment of impaired registrants panels that will be charged with inquiring into and managing podiatrists 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 Podiatrists Act should be constituted in a similar fashion, that is by two people at least one of whom is a registered podiatrist. This structure ensures that at least one of the members of a panel is a peer of the podiatrist and also allows the panel to have other expert membership, such as a medical practitioner or psychologist, as required in particular cases.

Recommendation 23 - Impaired practitioners

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

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 podiatrist or a corporation engaged or associated in the practice of podiatry is authorised to advertise*".[57] The Podiatrists Regulation 1995 provides that advertising by a podiatrist or a corporation in relation to podiatry must not:

(a) *be false, misleading or deceptive; or*
(b) *create an unjustified expectation of beneficial treatment; or*
(c) *promote the unnecessary or inappropriate use of the services of a podiatrist; or*
(d) *claim prominence for a podiatrist in the practice of podiatry; or*
(e) *compare a podiatrist's practice with that of any other podiatrist.*[58]

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

Recent amendments to the Public Health Act 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 podiatrists and podiatry corporations. If the power to regulate advertising was deleted from the Act, advertising would be controlled by the Public Health Act and the Trade Practices and Fair Trading Acts, which prohibit misleading and deceptive conduct.

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 its precise terms. It should be noted that the existing restrictions in the regulations are quite closely modelled on consumer protection legislation (ie the Trade Practices and Fair Trading Acts).

Only a few submissions addressed the issue of advertising restrictions. Of those submissions that did address the issue all were in favour of retaining the current restrictions on the basis that they are in the public interest and protect health care consumers. Submissions have addressed the effect of misleading or deceptive advertising on consumers and the cost and impracticality of consumers seeking redress through the legal system, the Department of Fair Trading or the Australian Competition and Consumer Commission.

[57] section 34(2)(i)
[58] clause 18(1)

> *"Retention of advertising restrictions in the Podiatrists Act should remain in place to protect health care consumers. One cost benefit is noted in the paper in regard to consumer time and cost to pursue complaints."*[59]
>
> *"Advertising should be restricted, where appropriate in the interests of public health and safety, as in the current Act. The Trade Practices Act reinforces the criteria for advertising restrictions set down by the Podiatrists Act, but the current provisions for advertising should remain in the Act."*[60]

The Department is of the view that the general thrust of submissions, that restrictions on certain types of advertising are in the public interest, is correct and the Department supports the Podiatrists 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 podiatrists have engaged in false, misleading or deceptive advertising. In such a case consumers 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. In certain cases the Board may also be placed under pressure, whether that be by members of the public or by members of the podiatry profession or another competing profession, to undertake prosecutions.

- 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, warranting disciplinary action, which flowed from that advertising, the matter would have to be dealt with in unrelated proceedings in separate fora.

- If relevant restrictions on advertising were retained in the regulations, unlawful advertising could be dealt with by the Board or the Podiatrists Tribunal as unsatisfactory professional conduct rather than as criminal prosecutions in the Local Court. There would be financial advantages to both the Board and the practitioner and the practitioner would not run the risk of receiving a criminal conviction.

- Prosecution of advertising breaches, in matters such as creating a false expectation of beneficial treatment, involves an assessment of the veracity of any claims made. The Podiatrists Registration Board is well placed to undertake this task.

- The Podiatrists Act contains a broad range of sanctions ranging 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.

- The Podiatrists Regulation prohibits advertising that promotes the *unnecessary or inappropriate* use of the services of a podiatrist. This restriction is not replicated in consumer protection legislation and without it in place there would be greater scope for resources to be used unnecessarily, potentially at the expense of more beneficial uses.

[59] Submission – Central Coast Area Health Service, page 2.
[60] Submission – Australian Podiatry Association (NSW), page 29.

As noted above, the extent to which restrictions will impact on competition will depend on their precise terms. The advertising restrictions in the Podiatrists Regulation are generally modelled on consumer protection legislation. However, the restrictions in the Regulation on advertising that:

(a) claims prominence for a podiatrist in the practice of podiatry; or
(b) compares a podiatrist's practice with that of any other podiatrist

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 prohibitions on claims of prominence and practice comparisons constrain normal forms of competitive behaviour resulting in less informed consumers, and must be considered in the context of the prohibition on advertising which is *false, misleading or deceptive.* It should also be noted that the prohibition on advertising claims of superiority has been progressively removed from regulations governing other registered health professionals.[61] It is of note that no submission provided any justification for retaining these restrictions. The Department of Health has been unable to identify any substantive benefits that flow to consumers through these restrictions and therefore the Department supports the removal of the prohibitions on claims of superiority and practice comparisons in advertising by podiatrists.

The existing restrictions on advertising extend to corporations that provide podiatry 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 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.

[61] Eg Medical Practice Regulation 1998, Dental Technicians Registration Regulation 1998, reports of the reviews of the Chiropractors and Osteopaths Act, the Optometrists Act and the Physiotherapists Registration Act.

Recommendation 24 – Advertising

That the regulations regarding advertising by podiatrists provide that a podiatrist or a corporation providing podiatry 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 podiatrist.

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

10.1 Composition

The Podiatrists Act provides that the Podiatrists Registration Board is to have nine members appointed by the Governor. Section 19(4) of the Act provides that the Board is to consist of the following members:

- 3 are to be podiatrists nominated by the Australian Podiatry Association (NSW);
- 2 are to be podiatrists nominated by the Minister, at least one of whom has expertise in matters relating to education;
- 1 is to be a barrister or solicitor nominated by the Minister;
- 1 is to be a person nominated by the Minister, being an officer of the Department of Health or an employee of a public health organisation;
- 1 is to be a person who represents the community, nominated by the Minister; and
- 1 is to be a medical practitioner nominated by the Minister.

The Issues Paper canvassed whether any changes were needed to the current composition of the Board. Of the submissions that addressed the Board composition there was little if any consensus in the approach that should be adopted. Submissions variously advocated the status quo; a reduction in Board size; dedicated representation of public sector podiatrists and rural podiatrists; and reduction in the influence of the Australian Podiatry Association.

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

- The current Board comprises nine members, which is larger than a number of other registration boards for the smaller professions, such as chiropractic, osteopathy and optical dispensing, each of which have seven members. Therefore the Department proposes that the Podiatrists Registration Board comprise seven members.
- The traditional composition of health professional registration boards provides for a majority of members to be drawn from the regulated profession. The Department proposes to continue this approach.
- The inclusion on the Board of a podiatrist involved in the education of podiatrists is important due to the Board's role in accrediting educational courses for registration purposes. Educational institutions will be asked to provide the Minister for Health with the names of appropriate candidates.
- While the current Act provides for three members of the Board to be nominees of the Australian Podiatry Association the Department considers that there should be a more flexible means of obtaining input from professional associations. Furthermore the prescribing of the Australian Podiatry Association over all other professional associations may have the effect of impeding the establishment and development of alternative associations. Furthermore podiatrists in the public sector have suggested that many public podiatrists do not join the Association. Notwithstanding this view it is a fact that the Australian Podiatry Association is the largest and most representative professional body representing podiatrists and should therefore be specifically mentioned in the legislation. Therefore the Department recommends that the Minister select two podiatrists taken from lists of nominees provided by professional associations representing podiatrists, including the Australian Podiatry Association (NSW).

- The Department considers that the Minister for Health should nominate one podiatrist to the Board. This may provide an opportunity for individuals who may not otherwise have an opportunity to serve on the Board to be selected. This mechanism may also provide an opportunity for service by public sector and rural podiatrists as appropriate.
- 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 a lay person who can represent the community's views. The Department recommends that there be one member of the public on the Board.

The approach to the constitution of the Podiatrists Registration Board is consistent with the approach that is being taken with other health professional registration boards, such as the Chiropractors Registration Board and the Osteopaths Registration Board.

Recommendation 25 – Board composition

That the Podiatrists Registration Board have seven members and be constituted as follows :

- one podiatrist selected by the Minister;
- one podiatrist with experience in the tertiary education of podiatrists selected by the Minister from nominations provided by tertiary education institutions providing undergraduate podiatry education in New South Wales;
- two podiatrists selected by the Minister from nominations provided by one or more professional podiatry associations including the Australian Podiatry Association (NSW);
- one legal practitioner selected by the Minister;
- one officer of the Department of Health or a public health organisation selected by the Minister; and
- one person, who is not a podiatrist, selected by the Minister to represent consumer and community views.

10.2 Terms of Board Members

The Podiatrists 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.

Submissions were divided on this issue. The Podiatrists Registration Board, The Australian Podiatry Association and the Illawarra Area Health Service argued that there is no need to limit the number of terms that a Board member can serve. On the other hand the Central Coast Area Health Service and Ms SJ Hoskins-Marr endorsed limiting the number of consecutive terms a Board member can serve.

The Department has recommended in reviews of other health professional registration Acts 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.

On balance the Department considers that in this respect the podiatry profession is no different to other professions and that Board members should be limited to a maximum of three consecutive terms with each term not to exceed four years.

Recommendation 26 – Terms of Board members

That:
- a person may not hold office as a member of the 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 Podiatrists Registration Act does not provide a general power of delegation to the Board. It is noted that both the Medical Board and the Nurses Registration Board have such a power and that all recent health professional registration Acts provide the relevant boards with the power to delegate many of their functions.

In light of the Parliament's decisions to provide health professional registration boards with the power to delegate many of their functions the Department supports the Podiatrists Registration Board having powers of delegation.

Recommendation 27 – Delegation

That the Podiatrists 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 may not delegate any of its functions in respect of complaints or disciplinary proceedings to the Registrar or any other member of staff of the Board.

11. OTHER ISSUES

11.1 Professional Indemnity Insurance

The Podiatrists Act is silent on the issue of professional indemnity insurance. Submissions to the review have endorsed the desirability of professional indemnity insurance but no submission has endorsed the position that it be made a mandatory.

It is proposed to leave detailed consideration of professional indemnity insurance to the Health Care Liability Act 2001. The recent review of that Act has recommended that all health professions be required to hold indemnity insurance.[62]

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.

However no substantive arguments have been provided to indicate that there is a need for this requirement to be mandated,. In fact the only submissions to address this issue is that from the Australian Podiatry Association which provided evidence of the profession's vigorous approach to fee disclosure.

> *"In recent months the Council of the Australian Podiatry Association (NSW) has worked toward producing documents to assist practitioners to formulate their own fee schedules... It is the position of the Australian Podiatry Association (NSW) that it is advisable for all practitioners to display an estimate of the fees to be charged and members are encouraged to do so."*[63]

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. The Association's effort to encourages practitioners to disclose their fees is one option as is a publicity campaign directed at consumers which encourages them to be more pro-active 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.

Submissions from the Australian Podiatry Association, the Podiatrists Registration Board and the Illawarra Area Health Service supported the regulation of record keeping practices. However, submissions have not addressed the issue of the adequacy of existing record keeping practices nor have

[62] www.health.nsw.gov.au/csd/llsb/insurance/HCLReport.pdf
[63] Submission – Australian Podiatry Association (NSW), page 39.

they addressed whether or not any failings in this area can be addressed by other, non-legislative, methods such as by a code of conduct.

On balance, the Department is of the view that if there is a real problem with the record keeping practices of podiatrists, and none has been identified, dealing with this matter via a code of conduct is the most appropriate approach.

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.

The NSW Parliament has passed the Health Records Information Privacy Act 2002, which addresses the issue of health records in general. The Act is expected to commence in March 2004.

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 podiatrist's registration. Again the only submission to address this issue was that from the Australian Podiatry Association, which argued that the status quo should prevail, although no evidence or argument was provided in support of that position.

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 is 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 podiatrists to any person who may be interested. This would include any conditions on a podiatrist'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 Podiatrists 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 podiatrist's residential address, be available to members of the public.

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

Appendix A – Terms of reference for the review of the Podiatrists Act 1989

1. The New South Wales Department of Health will review the Podiatrists 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 podiatry 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 received

Australian Podiatry Association (NSW)
Australasian Podiatry Council
Ms C Bourke
Central Coast Area Health Service
Central Sydney Area Health Service
Far West Area Health Service
Mr A Frye
Ms SJ Hoskins-Marr
Hunter Area Health Service
Illawarra Area Health Service
New England Area Health Service
New South Wales Department of Health Nursing Branch
New South Wales Nurses' Association
New South Wales Podiatrists Registration Board
Ms VL Nube
Nurses Registration Board of New South Wales
Mr N Partridge
South Western Sydney Area Health Service
University of Western Sydney Macarthur, Faculty of Health
Wentworth Area Health Service
Professor D K Yue

Appendix C – Qualifications accepted by the Podiatrists Registration Board

For the purposes of section 6. (1)(c) the diplomas/certificates recognised by the Board are as follows.

Australian qualifications

- Diploma of Chiropody awarded by the NSW College of Chiropody.
- Associate Diploma in Chiropody/Podiatry awarded by Sydney Technical College.
- Diploma of Health Science (Podiatry) awarded by Sydney Technical College.
- Diploma of Health Science (Podiatry) awarded by Sydney Institute of Technology.
- Diploma in Chiropody awarded by the Australian Chiropody Association (Victoria).
- Diploma of Applied Science (Chiropody/Podiatry) awarded by Lincoln Institute of Health Science.
- Bachelor of Applied Science (Podiatry) awarded by Lincoln Institute of Health Sciences.
- Bachelor of Applied Science (Podiatry) awarded by La Trobe University.
- Bachelor of Podiatry awarded by La Trobe University.
- Advanced Certificate in Chiropody awarded by the South Australian Institute of Technology.
- Diploma in Applied Science (Podiatry) awarded by the South Australian Institute of Technology.
- Diploma of Applied Science - Podiatry awarded by the University of South Australia.
- Bachelor of Applied Science (Podiatry) awarded by the University of South Australia.
- Diploma in Chiropody awarded by the Western Australian Institute of Technology.
- Diploma in Applied Science (Podiatry) awarded by the Western Australian Institute of Technology.
- Diploma in Applied Science (Podiatry) awarded by Curtin University of Technology.
- Diploma in Chiropody awarded by the Queensland Institute of Technology.
- Diploma of Applied Science (Chiropody/Podiatry) awarded by the Queensland Institute of Technology.
- Diploma of Applied Science (Podiatry) awarded by the Queensland University of Technology.
- Bachelor of Applied Science - Podiatry awarded by Queensland University of Technology.

Overseas qualifications

Persons who completed courses in chiropody/podiatry overseas are required to successfully complete the examination conducted by the Australasian Podiatry Council, on behalf of the National Office of Overseas Skills Recognition (NOOSR), in order to become eligible for registration. Information concerning the examination is available from:-

The Executive Officer
Australasian Podiatry Council
41 Derby St
COLLINGWOOD 3066
Telephone: (03) 94163111
Facsimile: (03) 94163188

Reciprocity

Persons who hold diplomas/certificates that are not recognised by the Board who were registered in another State or Territory of Australia prior to 1 March 1993 may apply for registration.

Appendix D - Podiatrists Act 1989 definition of "professional misconduct"

Section 3(1)

'**Professional misconduct**" includes:

(a) any conduct that demonstrates a lack of adequate:

- i). knowledge;
- ii). experience;
- iii). skill;
- iv). judgement; or
- v). care,

by a registered podiatrist in the practice of podiatry; and

(b) a registered podiatrist's contravening (whether by act or omission) a provision of this Act or the regulations, and

(c) a registered podiatrist's failure to comply with an order made or a direction given by the Board under section 16; and

(d) any other improper or unethical conduct relating to the practice of podiatry.

Appendix E - Features of legislation regulating podiatrists in other States and Territories

	Practice restrictions	Exemptions	Restricted Titles	Discipline carried out by	Statutory Code of Conduct
NSW	Full	Medical practitioners; people authorised to perform basic foot care.	Podiatrist.	Board.	Yes.
ACT	Full	Medical practitioners; physiotherapists.	Podiatrist.	Board.	No.
QLD (Under review)	Full	Medical practitioners; people providing treatment in a hospital.	Podiatrist; chiropodist.	Board.	No.
SA	Full (for fee or reward).	Medical practitioners; physiotherapists.	Podiatrist; chiropodist; foot specialist; foot therapist.	Board.	No.
TAS	Full	Medical practitioners; nurses; physiotherapists.	Podiatrist; chiropodist.	Board.	No.
VIC	None	N/A	Registered podiatrist; registered chiropodist.	Hearing panel.	No.
WA	None	N/A	Podiatrist	Board.	No.