

**COMPETITION POLICY REVIEW TEAM**

**DEPARTMENT OF HUMAN SERVICES**

**NATIONAL COMPETITION POLICY**

**LEGISLATION REVIEW**

**PHYSIOTHERAPISTS ACT 1991**

**REPORT OF THE REVIEW PANEL**

**February 1999**

The views expressed in this report are the views of the Review Panel and do not represent the views of the South Australian Government. Any action taken in anticipation of the outcomes of the review process is at the risk of persons taking such action.



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## INTRODUCTION

The following report concerns the review of the *Physiotherapists Act 1991*. The review is conducted in compliance with an obligation upon the South Australian Government under clause 5 of the Competition Principles Agreement. The Competition Principles Agreement is one of three agreements signed by the Commonwealth, State and Territory Governments in April 1995. These three agreements give effect to the National Competition Policy.

The obligation contained in clause 5 of the Competition Principles Agreement concerns the review, and where appropriate reform, of legislation which restricts competition. The guiding principle in undertaking this review is that the *Physiotherapists Act* should not restrict competition unless:

(a) *the benefits of the restriction to the community as a whole outweighs the costs;*

*and*

(b) the objectives of the legislation can only be achieved by restricting competition.

The Terms of Reference for this review reflect the requirements of the Competition Principles Agreement. In addition, the Review Panel has considered whether administrative procedures required by the *Physiotherapists Act* are unnecessary or impose an unwarranted burden on any person.

To satisfy the requirements of clause 5 of the Competition Principles Agreement the following documents have been reviewed:

*Physiotherapists Act 1991*  
*Physiotherapists Regulations 1991*

This report has been drafted by the Review Panel pursuant to the Terms of Reference, which are detailed in Appendix 1.

The report is in five parts. The first part concerns the central issues of the review. The second part details the analysis of specific provisions of the Act and regulations. The third part examines the administrative burdens imposed by the requirements of the Act. Part 4 lists the conclusions of the Review Panel and the subsequent recommendations. Finally, Part 5 of the report contains various appendices, including the Terms of Reference.

References to “the Act” are references to the *Physiotherapists Act 1991* and references to sections are references to sections of the Act unless indicated otherwise. References to “the regulations” are references to the *Physiotherapists Regulations 1991* and references to specific regulations are references to regulations contained in the regulations unless otherwise indicated.

## CONSULTATION

This report was preceded by an issues paper which introduced the concepts of Competition Policy, and put forward a preliminary analysis of the Act from that perspective. Submissions were invited from consumers, government bodies, physiotherapists, professional bodies, other health care professionals and all other parties interested in Competition Policy issues. An advertisement was placed in 'the Advertiser', copies of the issues paper were forwarded to organisations believed to have an interest in the matters raised, and a number were sent out on request. A second consultation period occurred on the draft report. The Review Panel accepted verbal or written submissions, by telephone, fax, postage and e-mail.

Appendix 7 contains the consultation list and Appendix 6 contains a list of submissions received by the Review Panel. Where undated submissions are referred to in this report, the submission is that received on the first consultation period.

The closing date for submissions was 8 January 1999.

## PART 1: CENTRAL ISSUES

### 1.1 Purpose of Act

The objects section of the *Physiotherapists Act* states that the Act is an “Act to provide for the registration of physiotherapists and to regulate the practice of physiotherapy; to repeal the *Physiotherapists Act 1945*; and for other purposes”. The Act establishes the Physiotherapists Board of South Australia to achieve these objectives, and empowers it to administer the Act. The overriding purpose of the Act is, or should be under competition principles, to protect the public by ensuring the practice of physiotherapy is of a high standard, and is provided by persons who are identifiable within the community as possessing the necessary qualifications and/or experience to practise physiotherapy. However, this public protection purpose is not stated in the Act.

Submissions were sought on whether the Act should state in its objectives that its purpose is to protect the public. In general, the submissions agree that it should.

#### Recommendations

1. The objects section of the Act should be amended to state “An Act to protect the public by providing for the registration of physiotherapists.....”

### 1.2 Markets

The purpose of legislation review is to analyse the effect of legislative restrictions upon competition in markets. The identification of the relevant markets is imperative, therefore, for an accurate assessment of the impact of legislative restrictions upon competition. Competition within markets is competition in the broad sense of the ability to enter and participate in a market, not in the sense of individual rights to participate in a market. Competition policy, therefore, is not concerned with marginal behaviour, but concerned with broader competitive outcomes. The potential impact of legislated restrictions upon an individual’s participation in a market, therefore, is only relevant to legislation review where the impact on the individual is symptomatic of broader anti-competitive outcomes caused by the legislated restriction. This distinction is important in the context of reviewing legislation which empowers a body to take disciplinary action against individuals in a profession. The ability to restrict or prevent an individual’s participation in a profession is only relevant to legislation review if criteria for imposing such restrictions generally distorts competitive conduct in a market.

## *Physiotherapy Services*

Physiotherapy is defined in section 4 of the Act<sup>1</sup>. In general, only physiotherapists registered under the Act provide physiotherapy services in the narrow sense<sup>2</sup>. However, other health professionals may provide services which fall within the meaning of physiotherapy services in the course of their practice.

In particular, chiropractors, occupational therapists and medical practitioners are examples of persons who are registered under other Acts to provide services which may constitute physiotherapy services. For example, chiropractors may perform spinal manipulation. This does not mean that they are competent, or indeed legally permitted, to provide all physiotherapy services. Further, the Act permits unregistered persons to provide massage services or sports training services in certain circumstances. The market for the services of each profession overlaps when a consumer has a musculoskeletal condition and has a choice between a physiotherapist, chiropractor or other health service provider<sup>3</sup>

Physiotherapists are employed in a wide variety of places, including hospital, community health centres, centres for physically disabled people, mental health centres, rehabilitation centres, sports clinics and fitness centres, government departments and universities. Alternatively they may be employed or self-employed in a private practice. As at 30 June 1998, there were 1286 physiotherapists and 46 physiotherapy companies registered in South Australia<sup>4</sup>.

Competition may occur between physiotherapists and other providers when an employer is seeking to employ a person to undertake certain services. When doing so the employer may consider many factors, including its general duty of care to its clients, consumer expectations and funding arrangements. While the Act, and other legislation, demarcates members of the various professions, it does not restrict these employment decisions. Also relevant to this review is the competition between the employers.

The groups may also compete as individuals or members of a partnership or company in private practice. In that case, the competition relevant to this review is, therefore, the competition between physiotherapy and other professional practices.

This is the broad notion of the market for physiotherapy services. However the ability to substitute services should be considered more closely. For example, substitution between the services of a physiotherapist and a chiropractor may occur when one considers spinal manipulation. However there are treatments that a physiotherapist is qualified to undertake that a chiropractor is not (and vice-versa). Therefore substitution does not always occur "both ways". In addition an employer will generally, in practice, chose a provider based upon the title or scope of practice.

Therefore potential employees and practices from the various groups are generally competing in different sub-markets. This review will consider both the markets for services provided by physiotherapists and the broader market of substitutable musculoskeletal treatment services.

This market is a local market, as consumers will only travel a limited distance to obtain physiotherapy services. Consumers will then choose between the substitutable services offered by

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<sup>1</sup> see discussion on reservation of practice - part 2.2.2

<sup>2</sup> In this paper, the term "physiotherapist" is used to refer to physiotherapists registered under the Act.

<sup>3</sup> Australian Physiotherapy Association (SA Branch) submission at 1

<sup>4</sup> Physiotherapy Board of South Australia *Annual Report 1998*



the different physiotherapy practices in their local area, based on differences such as cost, perceived competence and other factors.

The market for physiotherapy services has changed since the introduction of the first Act in 1945 and the current Act in 1991. There is greater substitutability of services now than in the past. The roles and scopes of other professionals and health care providers in the provision of musculoskeletal treatment are continually expanding over time. Further, the children's market is decreasing and, with an increasing ageing population the demand for physiotherapy services to the aged is increasing. In addition, technological advances make physiotherapy care more accessible and cost effective.

### **Training market**

A requirement of registration is that the applicant have prescribed qualifications. The market for providing physiotherapy training may be affected by the regulations prescribing qualifications and is therefore a market relevant to the review of the *Physiotherapists Act*. Currently there is only one institution in South Australia that is able to provide physiotherapy training. However the training market is still relevant as it relates to potential participants therein.

## **1.3 Restrictions**

Restrictions upon competition are of three types:

- (a) barriers to entering (or re-entering) markets;
- (b) restrictions on competition within markets; and
- (b) discrimination between market participants.

Each of the restrictions identified in the course of this review has been identified in terms of these theoretical types of restrictions. Such categorisation is useful for determining the impact of the restriction upon competition in the relevant market. For the purposes of this review restrictive provisions have been assessed as trivial, intermediate or serious. This assessment is provisional until the consultation process is complete. There is no definitive means of identifying the correct weight to be ascribed to restrictions. The following, however, is the "rule of thumb" utilised during the course of this review. A trivial restriction upon competition has only a minimal effect upon competition within a market. There is no clear-cut delineation between intermediate and serious restriction upon competition. Generally, however, an intermediate restriction upon competition is a restriction which imposes a substantial cost upon competition. In this context "substantial" indicates other than a minimal effect upon competition. By comparison, a serious restriction is a restriction which prohibits entry or re-entry into a market, or prohibits certain conduct within a market.

## **1.4 Costs**

Two categories of cost arise from the restrictions contained in the *Physiotherapists Act*. Firstly, the restrictions upon registration and re-entry to the profession may cause the supply of physiotherapists to be less than the demand therefor. In this context, restrictions upon conducting education and training may also contribute to a shortage of persons attaining sufficient qualifications to enable them to be registered.

Restricting numbers of physiotherapists may cause the cost of physiotherapy services to rise. This therefore, is a cost upon the community. Similarly, a shortfall in the numbers of physiotherapists may reduce the efficiency and effectiveness of available physiotherapy services. The numbers of persons practising physiotherapy is the result of many factors which are discussed below.

The second category of cost is compliance costs. These are the costs of registration and of complying with standards of competency and professional conduct. These costs impact upon

competition if they are sufficient to dissuade participation in the market for physiotherapy services, or are substantial and passed on to consumers as an element of the price charged for physiotherapy services.

## 1.5 Public Benefits

The professional regime established under the *Physiotherapists Act* achieves significant public benefits. Restrictions upon entry to, and participation in the physiotherapy profession ensure that persons claiming to be registered possess the requisite qualifications and experience to fulfil those roles. The provision of professional services is often done in an environment of “information asymmetry” between providers and consumers. Consumers often will judge a professional’s ability to provide a professional service on the basis of their manner and presentation. The consumer will often lack the knowledge to assess the quality of the service being provided or the knowledge or expertise of the practitioner.<sup>5</sup> In such an environment, Government has a legitimate role in ensuring that professionals meet minimum standards of competency. The public can be confident that a person holding themselves out to possess certain qualifications and expertise does in fact hold this level of qualifications and expertise.

The provision of information to consumers is, therefore, a significant factor in promoting competition. Deregulation of professions, without a concomitant increase in the knowledge of consumers, to enable them to make informed choices regarding service providers, will expose consumers to risks of harm without providing them with the means of avoiding this harm. Systems of registration provide a mechanism for providing a public record of the practitioner within a profession and any restrictions upon their ability to practise. The compilation of such information and its provision to consumers is a significant public benefit.

Restrictions upon conduct within a profession also preserve public confidence in the standards of professional care provided by members of the physiotherapy profession. For example, the requirement that professionals only operate within their area of professional competence. A broad notion of competency has been adopted by the Review Panel in undertaking this review. This includes not only criteria such as educational qualifications and practical experience but also includes issues of capacity to practise within the field competently. Requirements of capacity to practise within a field will vary between the professions. In some professions, such as physiotherapy, capacity will include physical and mental capacity to carry out activities within the area of practice. Capacity will also include the ability to undertake functions within the area of competency which respects the duty of care and fiduciary duty to consumers.

## 1.6 Other States & Territories

The practice of physiotherapy is subject to legislative regulation in all other States and Territories of Australia. This legislation is similarly the subject of review under the Competition Principles Agreement. As at the date of this report only Victoria<sup>6</sup> and Tasmania<sup>7</sup> have formulated recommendations as to amendments to legislation.

**Such legislation has the same objectives as the South Australian Act and many of the same or similar restrictions. All provide for the registration of**

<sup>5</sup> John Webster “Competition Policy and the Professions - The Issues” in the Australian Council of Professions *National Competition Policy and the Professions* at 5

<sup>6</sup> *Physiotherapists Registration Bill* currently before parliament

<sup>7</sup> new legislation is currently being drafted

**physiotherapists and confer title and practice protection. All have requirements for registration such as prescribed qualifications and “good character” or similar standard. The main difference is that only Tasmania has ownership restrictions<sup>8</sup>.**

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<sup>8</sup> the current draft Bill does not include these restrictions

## PART 2: ANALYSIS OF RESTRICTIONS

### 2.1 Registration Requirements

The registration requirements of the *Physiotherapists Act* do not, of themselves, create a restriction on competition. However these provisions form the basis of the practice protection regime established by the Act. The provisions which achieve practice protection, such as the reservation of title and reservation of practice provisions<sup>9</sup>, generally relate to the practice of physiotherapy by unregistered persons. Practice protection therefore relates to qualifications required to enter the profession.

#### 2.1.1 Qualifications for Registration

The registration requirements of section 18 form part of the regime of practice protection. A natural person or a company may apply to be registered as a physiotherapist under the Act. An applicant shall be registered where that person meets the criteria for registration. Pursuant to section 18, the relevant criteria for a natural person<sup>10</sup> are:

- (a) is of or above the age of 18 years;
- (b) is a fit and proper person to be so registered;
- (c) has prescribed qualifications and experience in the practice of physiotherapy; and
- (d) fulfils all other requirements prescribed by the regulations.

#### *Of or above the age of 18 years*

This requirement is not of itself a barrier to entry, as the qualification requirements generally include the completion of a four year tertiary course, so the applicant will, as a general rule, necessarily be above the age of 18 years. It is therefore a trivial restriction.

#### *Fit and proper person*

The “fit and proper person” standard may constitute an unjustifiable restriction upon competition depending upon how this standard is interpreted and applied by the Board.

There is public benefit in only permitting fit and proper persons to practise physiotherapy. This benefit lies in the protection of the public from persons who have previously been guilty of certain behaviour or are likely to endanger public safety by, for example, not being medically fit to practise.

There are costs to the community of reducing the numbers of physiotherapists available and thereby increasing the costs of such services. However, as long as the Board only excludes those persons who are potential dangers to public safety, these costs are justified in the public interest.

The standard requires that the Board, when determining an application for registration, take into account the applicant’s competency, honesty, knowledge, ability, character, attitudes

<sup>9</sup> sections 26, 27 & 28 - see part 2.2

<sup>10</sup> The requirements of registration of a company are considered in part 2.3.1

and anything else that may be relevant to the public's expectations of what constitutes a person who is fit and proper to practise physiotherapy. The Review Panel understands that, in practice, the Board bases its decision of whether or not an applicant is a fit and proper person on whether the applicant has criminal convictions of such a nature that are likely to affect his or her practice of physiotherapy. This, of course, is only relevant if the applicant declares that he or she has criminal convictions.

The "level" of this standard is also relevant. The Board does not need to limit registration to people who are excellent or perfect<sup>11</sup>, as long as the applicant meets the standard expected by the public.

In addition, the Board's criteria must be transparent. The appeal processes discussed in part 2.5.2 of this paper help to ensure this. However, it is also important that the public and the profession are aware of the standard applied by the Board.

Submissions were sought on whether the fit and proper person requirement should be amended or replaced, for example with a more objective standard. The submissions by the Board and the Australian Physiotherapy Association ("APA") supported maintaining this standard. The Board argued that "fit and proper" is clearly more than an absence of a criminal conviction<sup>12</sup>. The Julia Farr submission was the only other which referred to this issue and said that the standard "could be amended, as long as the practitioner's ability to practise competently was not compromised"<sup>13</sup>.

The Panel is of the opinion that "fit and proper person" is transparent and well understood by the public and the profession. However, the Review Panel considers that it would be helpful for the Board to publish its criteria in, for example, "Guidelines On Registration"<sup>14</sup>. Set criteria with no discretion given to the Board may have the effect of excluding otherwise competent or proper persons from practice or allowing others, who may have behaved improperly but against whom a criminal conviction has not been obtained for some reason, to practise physiotherapy. Further, the Panel received no evidence of the Board interpreting this section in an inappropriate or anti-competitive manner.

All other Australian States and Territories require a similar standard for registration of physiotherapists, for example "good character"<sup>15</sup>, "good fame and character"<sup>16</sup> and "good fame and character and medically fit to practise"<sup>17</sup>. Most other South Australian legislation providing for the registration of health professionals has the "fit and proper person" standard or the "good fame and character" standard, which is likely to be amended to the "fit and proper" standard.

Therefore the Panel recommends that the "fit and proper person" requirement be retained.

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<sup>11</sup> *Wright v Teachers Registration Board* (1983) 111 LSJS 177

<sup>12</sup> Physiotherapist Board of SA submission at 2

<sup>13</sup> Julia Farr Services submission at 1

<sup>14</sup> see part 2.5.2. The APA submission, at 2, suggested that "the Board issue guidelines as to the standards expected by the public and other members of the profession"

<sup>15</sup> ACT, Tasmania and NSW legislation. (ACT legislation also requires competence)

<sup>16</sup> Western Australian legislation

<sup>17</sup> Queensland and Northern Territory legislation

### **Continuing Competence**

At present, the fit and proper standard is only applied upon a person initially registering as a physiotherapist. Renewal of registration each year will be virtually automatic. This means that there is no real standard of continuing competence. The Board does have power to inquire into the suspected mental or physical unfitness or unprofessional conduct of a registered person<sup>18</sup>. Taken together, these powers confer on the Board some power to ensure continuing competence if there is a complaint or some other reason to suspect incompetence. However, there is no power for the Board to ensure continued competence, by for example requiring ongoing professional development or requiring a person to prove competence at regular intervals.

The Review Panel concludes that this provision is an intermediate restriction on competition and the benefits thereof outweigh the costs.

Submissions were sought on whether the Act should provide for a continuing standard of competence. The submissions were not in general supportive of such a standard. The Southern Domiciliary Care submission<sup>19</sup> argued that this would be anti-competitive as not all physiotherapists have access to continuing education. The Board and the APA argued that the current mechanisms in the Act are sufficient to ensure continuing competence<sup>20</sup>.

The Review Panel agrees that there should be no legislative requirement for continuing competence by way of registrants being required to undertake continuing education. However, the Panel believes it would assist the public protection to require that a person be “fit and proper” upon them obtaining a renewal of their registration. This would allow the application for renewal to require a statement of any criminal convictions, bankruptcy or other proceedings or similar information in relation to the previous year. This allows the Board to refuse to reregister or impose conditions on registration on the grounds that a person is no longer fit and proper, rather than taking disciplinary action against that person when and if the Board discovers such conduct.

#### **Recommendations**

2. A registered person should be required to satisfy the Board that they are (still) a “fit and proper person” in order for that person’s registration to be renewed.

### **Qualifications and Experience**

Criteria for registration based upon objective standards of competency, while being restrictions upon entering a profession, may be justifiable in terms of protecting the public where there is a risk of harm to the public from persons who are not competent to provide certain services. A threshold of risk which will justify registration requirements across all professions cannot be quantified as the risks associated with “holding out” in different professions cannot be compared in this manner. The public benefits of registration must be

<sup>18</sup> Section 42 - see discussion on mental or physical unfitness (part 2.5.1) and unprofessional conduct (part 2.4)

<sup>19</sup> Southern Domiciliary Care and Rehabilitation Service submission at 1

<sup>20</sup> for example, sections 29, 41 and 42

weighed against the costs of registration peculiar to that profession. In relation to the services provided by physiotherapists, this degree of risk is significant. Therefore persons holding themselves out as registered persons should be competent in the delivery of physiotherapy services. Attaining a qualification which is necessary to ensure competency is an objective criteria for attaining registration.

Regulation 15 prescribes the qualifications for registration of a natural person to be the completion of at least one of the courses listed in Schedule 1, which includes South Australian, interstate and overseas courses and the Final Certificate of the Australian Examining Council for Overseas Physiotherapists. This allows the Board to register appropriate persons who have overseas qualifications or training which are not prescribed but are sufficient to render them competent. Mutual recognition<sup>21</sup> similarly enables qualified persons from interstate to be registered.

The requirement for the completion of a course is a serious restriction on competition, the costs of which are justified if the content of the course is necessary for the applicant to attain the competency required to practise physiotherapy. In addition, the number of people who may attain the necessary qualifications is limited by the numbers of places in the relevant courses. The numbers of places in a teaching institution is dependant upon funding to those institutions. Other restrictions upon the numbers of physiotherapists include the availability of clinical practice placements and educational standards required to attend the teaching institution and the cost of attending such courses.

The regulations currently do not prescribe any experience as a requirement for registration. However the power to do so is potentially an intermediate form of restriction on the entry of a person to the physiotherapy profession. The costs associated with obtaining such experience may be justified if the experience is necessary to become competent in the practice of physiotherapy.

Restricting the number of physiotherapists practising may lead to anti-competitive costs if the demand therefor exceeds the supply or the costs of physiotherapy services thereby increase.

The prescribing of qualifications required for registration under the Act is, in addition, a restriction on entry to and conduct within the market for physiotherapy training courses. This is potentially an intermediate restriction. However if there is public benefit in the registration regime established by the Act, this restriction confers a net benefit to the public.

Anti-competitive costs in the training market will only arise if restricting the number of training courses available substantially reduces the number of qualified physiotherapy professionals in the market. The Panel notes that there is currently only one training provider in South Australia, the University of South Australia. However, there have been no approaches to the Board, in at least the last three years, in relation to the prescribing of additional training courses. Further, the “number of physiotherapy four year degree courses has increased by 60 percent in the past four years”<sup>22</sup>. Therefore, in reality, this restriction on the training market is only trivial.

All the submissions which addressed this issue agreed that this restriction is justified in the public benefit, due to the potential risks involved in physiotherapy treatment<sup>23</sup> and therefore the necessity that physiotherapists are competent to provide such treatment. This cannot be

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<sup>21</sup> as discussed in part 2.1.4

<sup>22</sup> University of South Australia submission at 1-2

<sup>23</sup> see discussion on risks in part 2.2.2

achieved “without access to significant specialists teaching expertise, specialist laboratory facilities (eg anatomy), recognised clinical teaching locations and significant funds commitment”<sup>24</sup>. The Review Panel agrees that the benefits outweighs the costs of this restriction.

There are no viable alternatives to prescribing qualifications (and experience) required or successfully completing an examination to practise physiotherapy which adequately meet the objective of establishing the competency of a potential physiotherapist, within the current regime of practice protection. A possible alternative to prescribing qualifications and all other requirements for registration could be a model where there are no requirements to register, other than the completion of a form and the payment of an administration fee. The Board, or other body, would then have power to deregister in the case of incompetence, unprofessional conduct etc. However, this would not sufficiently protect the public by minimising the risk of irreversible harm. Other alternatives are discussed in part 2.2.2 in relation to reservation of practice.

All other Australian States and Territories have prescribed or approved qualifications as a requirement for registration.

The Review Panel concludes that there are no alternatives which adequately protect the public, and that therefore the requirement for prescribed qualifications and experience should be retained.

One submission<sup>25</sup> suggested that there should be a requirement for the completion of one year’s experience in a supervised situation prior to registration. However, there is no evidence that there has been any harm caused by the lack of this requirement to date. Further, this requirement would introduce anti-competitive costs where such supervision is unavailable. Therefore, the Review Panel considers that this requirement should not be introduced.

### **All other prescribed requirements**

This term may enable the regulations to require attributes which do not relate to the competency of applicants. Such attributes may be unjustifiable restrictions on competition. However the regulations do not currently prescribe any other requirements for registration. This requirement is therefore a trivial restriction.

## **2.1.2 Application for Registration**

Under section 19, an application for registration must be made in the prescribed manner and form and must be accompanied by the prescribed application fee. Similarly an application for renewal of registration must be in the prescribed manner and form and be accompanied by the prescribed fee<sup>26</sup>.

The prescribed forms are set out in Schedule 3 to the Regulations. The forms are not onerous in their requirements and accordingly would be unlikely to create a barrier to entering the profession. As such the forms constitute only a trivial restriction upon competition.

However, the application fee may constitute a restriction if it dissuades entry to the profession or is substantial and passed on to consumers. For a natural person, the application fee is \$50.00 and renewal fee is \$65.00. The full schedule of fees is contained in Appendix 2.

<sup>24</sup> University of South Australia submission at 2

<sup>25</sup> Julia Farr Services submission at 2

<sup>26</sup> section 22



The current annual practice fee for physiotherapists in South Australia is comparable to most interstate fees. A comparative table of fees and number of registrants is contained in Appendix 3.

The differences in the registration fees in different jurisdictions reflect the differences in the income and expenditure of the regulatory authorities in each jurisdiction, the priorities of the regulatory body and the attitudes of the community within the jurisdiction to regulation. In particular, the number of registered persons and funding structure in each State should be considered. In South Australia, the Board is completely self - funded, whereas in other States, the Board may be underwritten by government or share administration with another registration Board.

The public benefit of a fee relates to recovery of the costs of administering the Act. If there is public benefit in the regime established under the Act, the registration fee can be seen as a justifiable restriction. The object of a system of registration is to not only ensure the competence of persons entering the profession but to provide a record of information available to the public and employers in relation to the registered person's qualifications, conditions on registration and any disciplinary action taken against that person. The amount of a fee is referable to the Board fulfilling its statutory roles under the Act.

Submissions were sought as to whether the fees restrict entry to the physiotherapy profession. None of the submissions suggested that they do.

The Review Panel concludes that the requirement of a fee is also a trivial restriction, and is justified, subject to the system of registration and practice protection being justified, in the public interest.

The only alternatives to the fee would be some other form of funding for the administration of the Act, such as government funding. This would clearly impose a greater cost upon the community and therefore the fee requirement should be retained.

### **2.1.3 Limited Registration**

Section 21 enables limited registration where the applicant for registration lacks the necessary qualifications or does not satisfy the Board that he or she is a fit and proper person to be registered unconditionally but fulfils the other requirements.

Under sub-section 21(3), the Board may impose restrictions upon the places and times in which a registered person may practise physiotherapy, limit the areas of physiotherapy in which that person may practise, limit the period of registration, or impose any other condition as the Board thinks fit. This provision enables the Board to place a restriction upon a person's conduct within the physiotherapy profession.

The costs of this restriction are minimised if the Board utilises criteria which accords with community and professional views on whether a person should be entitled to unrestricted registration. This restriction may be either trivial or intermediate depending on the conditions placed upon practice.

Examples of where the Board utilises this power include to permit physiotherapists from overseas to undertake research or study in South Australia or to work on the basis of a Working Holiday Visa, and to permit physiotherapists from outside South Australia accompanying sporting teams.

There is a benefit to the public in limitations being placed upon the registration of persons where the skills or expertise of the person are insufficient for them to qualify for unrestricted registration. This provision may actually enhance involvement in the physiotherapy profession by enabling the Board to provide limited registration to a person who otherwise would not qualify for registration and, therefore, would be prevented from practising as a physiotherapist.

Provided that the criteria which the Board apply are based upon competency, and are applied consistently there are minimal anti-competitive costs of complying with this section. While conditional registration is a restriction upon the individual professional, it is not an unjustifiable restriction upon competition in the market for physiotherapy services.

There are no alternatives to this provision which would adequately protect the public, and therefore this provision should be retained.

However, the Review Panel considers that it would be helpful to publish its criteria for imposing conditions in guidelines on registration<sup>27</sup>.

## **2.1.4 Restriction of Movement Between Jurisdictions**

### **Mutual Recognition**

Systems of registration may inhibit movement of physiotherapists between jurisdictions, where physiotherapists registered in another jurisdiction are unable to register in South Australia. Such a restriction reduces the pool of physiotherapists within South Australia and thereby reduces the level of competition between physiotherapists. Registration regimes established under the *Physiotherapists Act*, however, do not restrict movement of physiotherapists between jurisdictions due to the operation of the system of Mutual Recognition established under the *Mutual Recognition Act 1992 (Commonwealth)*.

Mutual Recognition enables physiotherapists in equivalent occupations interstate to be registered in South Australia. The object of the scheme is, essentially, that if a physiotherapist satisfies the requirements for registration interstate that person will be registered in South Australia without further training. A person registered pursuant to this regime is subject to the same laws regarding practice as other physiotherapists registered in South Australia.

The *Mutual Recognition Act* (sub-section 20(5)) does preserve the ability of the Board to impose conditions upon practice provided these conditions do not arise from the fact that the applicant is registered pursuant to the Mutual Recognition Scheme. While the scheme alleviates constraints upon the registration of physiotherapists from interstate, the scheme does not, therefore, alter the restrictions embodied within the conditions imposed by the Board upon practice. The impact of these conditions upon competition are analysed above.

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<sup>27</sup> see discussion in part 2.5.2

## **Consequences of action against registered physiotherapists in other jurisdictions**

*Section 46 provides that where a registered physiotherapist's right to practise is suspended or cancelled due to action against that person in another State or Territory, then that person's registration under the Act is automatically suspended or cancelled, unless the Board determines otherwise.*

This is a restriction on the entry to the physiotherapy profession and a trivial restriction on competition. However the public benefit is likely to outweigh the cost, if the person is barred from entering the South Australian market for physiotherapy services due to public benefit reasons determined interstate. There are no alternatives which would adequately protect the public.

## **2.2 Practice Protection**

### **2.2.1 Reservation of Title**

Title reservation is achieved by sections 27 and 28 along with the registration requirements discussed above.

Section 27 prevents the holding out of a person who is not registered under the Act as being so registered.

Section 28 prevents an unregistered person from using a prescribed word, or its derivatives, to describe him or herself or a service that he or she provides. Currently the prescribed words are "physiotherapist", "physical therapist", "manipulative therapist" and "electrotherapist". However a chiropractor may use the title "manipulative therapist".

All submissions which addressed this issue agreed that title protection is necessary to protect the public interest. The public benefit arising from title protection is the confidence conferred on consumers that a particular physiotherapist has qualifications and expertise rendering that

person competent, as determined by the Board, to provide physiotherapy treatment. This benefits extends to other legislation or schemes such as WorkCover which refer to "registered physiotherapists". As pointed out in the submissions<sup>28</sup>, the titles "physiotherapist" and "physical therapist" are internationally recognised.

Any assessment of restrictions associated with reservation of title involves an assessment of the qualifications and/or experience required to utilise the title, and whether this level of expertise demands that the profession be recognised by the public through the use of a reserved title. As the Review Panel concluded in Part 2.1, the requirements for registration are necessary to protect the public.

The costs of title protection are the costs of registration, as discussed above. The Review Panel concludes that the public benefits outweigh the costs of the restriction and that, therefore, the restrictions contained in sections 27 and 28 are justified in the public interest. The alternatives to legislating to reserve titles include self-regulation, whereby the membership of a professional body entitles the member to use a certain title, as in the case of the title "Certified Practising Accountant". However, such a system is only appropriate where there is no reservation of practice required. Membership of such a body could not be

<sup>28</sup> Physiotherapy Board of SA and University of SA submissions

compulsory and therefore is not effective to achieve the reservation of practice as in the current system under the Act. In addition, legislative title protection is important for third parties, such as health insurance funds and government agencies to be able to readily identify providers and determine eligibility to provide particular services. Self-regulation could not achieve this.

All other Australian States and Territories have legislation conferring title protection.

The Panel is of the opinion that in the case of physiotherapy, reservation of practice as well as reservation of title is required since the risk of harm or injury is too great<sup>29</sup>, therefore self-regulation would not be sufficient.

Therefore, the Panel recommends that sections 27 and 28 are retained.

## 2.2.2 Reservation of Practice

Section 26 provides that a person<sup>30</sup> must not practise physiotherapy for fee or reward or use prescribed equipment in the provision of services that constitute physiotherapy unless that person is registered or that person comes within the class of exceptions contained in subsection 26(2).

### Physiotherapy

“Physiotherapy” is defined by section 4 to mean:

(a) any treatment applied to the human body (including manipulative therapy, electrotherapy, therapeutic exercise and massage) for the purpose of preventing, curing or alleviating any abnormality of movement or posture or any other sign associated with physical disability;

(b) any related service or advice; and

(c) *an act or activity of a class declared by regulation to be physiotherapy.*

The reservation of practice is a barrier to entry into the market for physiotherapy services. It is a serious restriction on competition.

There is public benefit in consumers having confidence that persons who provide certain treatment have the qualifications and expertise to provide that treatment. The degree of risk involved in such treatment is relevant. It is accepted that the practice of physiotherapy carries with it some degree of risk. It is therefore appropriate to protect the public in some manner. However, it may not be necessary to impose such a comprehensive practice restriction. For example, title protection could be maintained and unregistered persons could be prohibited from performing certain acts, which are considered to be potentially dangerous. Alternatively, titles only could be reserved to registered persons. Title reservation also confers a small degree of practice reservation.

It is noted that the class of persons who are entitled to practise physiotherapy is broad and includes persons qualified under other legislation, persons who practise massage and sports trainers in certain circumstances. This limits the restrictive effect of practice protection. However there may be other classes of professional who are barred from entering the market.

<sup>29</sup> see part 2.2.2

<sup>30</sup> “person” means either a natural person or a body corporate. For discussion on corporate practitioners see part 2.3

The submissions referring to this matter support practice protection to some degree. For example, the Board argues that “physiotherapists are primary contact practitioners requiring skills in diagnosis and treatment, as they accept patients without medial referral”<sup>31</sup>.

The Review Panel accepts that there are risks of irreversible harm or injury in the case of joint manipulation and the use of electrotherapy modalities. Both the Board and the APA argue that “the manipulation of the spine by untrained persons can cause serious injury including death, stroke or paralysis”<sup>32</sup> and that such risks are well documented<sup>33</sup>. A summary of reported risks of joint manipulation is contained in Appendix 4. The use of electrotherapy modalities is also considered potentially dangerous, and can cause thermal and electrical burns<sup>34</sup>, electric shocks and abnormal skin reactions<sup>35</sup>. A summary of the risks involved in electrotherapy modalities is contained in Appendix 5.

Other examples of potential harm include misdiagnosis, exacerbation of underlying disease (eg carcinoma or juvenile diabetes in the case of magnetic fields) and death by interference with electronic devices (eg interferential or magnetic field with pace maker)<sup>36</sup>.

The costs of reservation of practice to the public are the costs of registration as discussed in part 2.1, and are justified if the system of registration is necessary to maintain public protection and confidence in the physiotherapy profession.

The Review Panel concludes that the public benefit outweighs the costs of practice protection, but only as it relates to certain core practices, listed below, which carry risks of irreversible harm. Therefore only these core practices should be reserved to registered persons, with appropriate exemptions. The Panel initially considered that the definition of “physiotherapy” in section 4 should be removed. However, upon considering further submissions<sup>37</sup>, the Panel is of the opinion that any restriction conferred by such a definition is trivial, as it is of minimal legal effect and simply provides a guide as to who should be entitled to be registered. Therefore the definition of “physiotherapy” should be retained.

### **Prescribed Equipment**

Currently there is no equipment prescribed by the regulations, despite some argument that certain equipment is potentially dangerous enough to require restriction, for example electrotherapy equipment and therapeutic ultrasound. However sub-section 26(1)(a), as it currently is, restricts the practice of physiotherapy to competent persons. Therefore these persons should be competent in the use of certain equipment in the provision of physiotherapy services. Accordingly, this section adds little to the Act, other than it may

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<sup>31</sup> Physiotherapists board of SA submission at 2

<sup>32</sup> Australian Physiotherapy Assoc (SA Branch) submission at 5

<sup>33</sup> Physiotherapy Board of SA submission at 2 cites the examples of Dvorak and Orelli 1985, Grant 1994 and Rivett 1997

<sup>34</sup> for example Guirro et al 1997; Kalnowski, Brogan and Sleeper 1996; Makin, Graham and Kaithley 1995 as cited by the Physiotherapy Board of SA at 2

<sup>35</sup> Physiotherapy Board of SA submission at 5

<sup>36</sup> Australian Physiotherapy Assoc (SA Branch) submission at 5

<sup>37</sup> Physiotherapists Board submission (8/3/99) and University of South Australia submission (11/3/99)

confuse the public or the profession. The same would be true if core practices were restricted, as is recommended. It is therefore a trivial restriction.

Submissions were sought on whether this restriction should be removed. All the submissions addressing this issue agree that certain equipment is potentially dangerous if used by untrained persons, for example Functional Electrical Stimulation and Transcutaneous Electrical Nerve Stimulation<sup>38</sup> as well as those discussed above. The Review Panel concedes that the use of some equipment may be dangerous. However, the prescription of certain core practices can include the use of certain equipment. Therefore there is no need for this provision to be retained.

### Alternatives

The Review Panel considered alternative means to achieve protection of the public conferred by the reservation of practice, such as protection under the common law, the *Fair Trading Act 1987 (South Australia)* and the *Trade Practices Act 1974 (Commonwealth)*. These Acts contain similar consumer protection provisions, but those in the *Trade Practices Act* apply to companies and the *Fair Trading Act* to natural persons and unincorporated associations. There is also protection under the common law, most importantly claims in negligence. This requires the consumer to initiate legal action against the registered person, which they may not be in a financial position to do.

These alternatives generally focus on compensation or punishment, rather than protecting the public by attempting to remove the potential for harm. In the case of physiotherapy and other health professions, financial compensation does not properly compensate for an irreversible injury or death. The importance of prevention is therefore greater.

Other alternatives which focus on prevention are legislation such as the *Public and Environmental Health Act 1987 (SA)* and the *Radiation Protection and Control Act 1982(SA)*. While these Acts do provide some protection, they are specific to certain areas of practice and are not therefore not adequate in themselves.

Self-regulation is not an option as an alternative to reservation of practice as it can only regulate persons who voluntarily become members of an association and therefore become subject to its competency and other requirements. Whilst market forces will encourage the majority of professionals to become members, there will always be persons practising a profession who are not members and therefore whose competence is not subject to scrutiny other than by the means discussed above.

All other Australian States and Territories, except Victoria, reserve the practice of physiotherapy to physiotherapists (with relevant exemptions). The current Victorian legislation<sup>39</sup> provides that only physiotherapists may sue for physiotherapy fees or use scheduled appliances or methods. However, the new Bill provides title protection and that only a registered physiotherapist may carry out any act which is required to be carried out by a registered physiotherapist by or under an Act<sup>40</sup>.

The Review Panel has therefore concluded that these alternatives would not protect the public sufficiently due to the nature of physiotherapy and the significant degree of risk involved. Therefore reservation of practice should be retained, but only as it relates to potentially dangerous procedures.

### **Recommendations**

<sup>38</sup> Julia Farr services submission at 2

<sup>39</sup> *Physiotherapists Act 1978 (Vic)*, section 24(2)

<sup>40</sup> section 57(c)

3. Section 26(1) should be amended by deleting subsections (a) and (b), namely “practise physiotherapy for fee or reward or use prescribed equipment in the provision of services that constitute physiotherapy” and replacing it with “perform the following acts:
  - (a) joint manipulation or adjustment;
  - (b) use for therapeutic purposes such electrical or physical modalities as prescribed in the regulations;
 or any prescribed acts”.
4. The regulations should initially prescribe the following electrical or physical modalities:
  - (a) laser;
  - (b) high frequency currents (eg short wave diathermy);
  - (c) low/medium frequency currents (eg interferential high voltage galvanic);
  - (d) therapeutic ultrasound;
  - (e) ultraviolet;
  - (f) direct current.
5. Section 26(2) should be deleted.
6. There should be an exemption from s26(1) (or equivalent) for medical practitioners.
7. Exemptions should apply to the following persons in relation to protected acts:
  - (a) in relation to recommendation 3(a) chiropractors;
  - (b) in relation to activities or electrical physical modalities prescribed by regulation, such persons as are exempted by regulation.

### 2.2.3 Other Practice Protection Provisions

#### **Board’s approval required if physiotherapist has not practised for five years**

Section 29 provides that a registered physiotherapist who has not practised physiotherapy for five years or more must not practise physiotherapy for fee or reward without first obtaining the approval of the Board.

The Board may, before granting its approval, require the physiotherapist to undertake a refresher course or to obtain specified qualifications or experience. The Board may also make its approval subject to conditions restricting the physiotherapist’s right to practise. This is an intermediate restriction upon competition.

There is public benefit in ensuring the skills and knowledge of physiotherapists are current.

The cost to the physiotherapist who has not practised for five years may be justified if the conditions imposed or the refresher, or other, course required to be undertaken is necessary for the protection of the public and the maintenance of physiotherapy standards.

Submissions were sought as to whether there is public benefit in requiring physiotherapists who have not practised for five years or more to undergo formal training, or whether other criteria should be used to assess competency.

All submissions addressing this issue agreed that there is public benefit in this restriction. The APA<sup>41</sup> argued that physiotherapy “is a rapidly developing science and a person who has not practised and kept up with developments for some time certainly needs some form of ‘refresher training’. The period of five years out of practice may be arbitrary but it conforms with the requirements of the Mutual Recognition Agreement, in that most States (excluding NSW) have settled on that period”.

<sup>41</sup> Australian Physiotherapy Association (SA Branch) at 7

The Review Panel concludes that the public benefits outweigh the costs of this restriction. There are no adequate alternatives<sup>42</sup> which protect the public in this manner. Therefore this provision should be retained.

**Practitioners to be indemnified against loss**

Section 30 has not been proclaimed but is still relevant to this review. It purports to prohibit a person from practising as a physiotherapist unless he or she is insured by a person approved by the Board and to an extent approved by the Board against civil liabilities that might be incurred by that person in the course of their practice.

This restricts a persons ability to practise physiotherapy and acts a potential barrier to entry to the physiotherapy profession.

There is public benefit in ensuring registered persons are adequately insured to cover any liabilities incurred by them against a member of the public.

Anti-competitive costs only arise from this section if the cost of the insurance deters persons from practising and thereby significantly reduces the number of physiotherapists entering the profession. The cost of such indemnity for a member of the Australian Physiotherapy Association varies from \$57.95<sup>43</sup> to \$720<sup>44</sup> per annum. In addition, there may be further administration costs to the Board, which may be passed on to physiotherapists and hence consumers. However, there was no evidence provided in the submissions to indicate that this requirement would deter a person from entering the market.

All submissions which addressed this issue agreed that indemnity insurance was important to protect the public. The APA<sup>45</sup> points out that “most States have moved or are moving to empower their Registration Boards to require appropriate professional indemnity insurance cover to be a condition of registration”.

The Review Panel concludes that in practice this restriction is trivial and is justified in the public interest.

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<sup>42</sup> see discussion on continuing competency in part 2.1.1

<sup>43</sup> for Hospital and Allied Institutions employed members only with private earnings up to \$10,000 pa - amount of cover \$500,000

<sup>44</sup> for full time private practitioners - amount of cover \$20,000,000

<sup>45</sup> Australian Physiotherapy Association (SA Branch) submission at 8



**Recommendations:**

8. Section 30 should be proclaimed.

## 2.3 Business Restrictions

### 2.3.1 Restrictions On Ownership

Section 26, as discussed in part 2.2.2, also applies to bodies corporate. The section creates a requirement that incorporated practices, in order to practise physiotherapy for fee or reward, be registered under the Act, unless they fall within one of the exceptions in sub-section 26(2). The Act goes on to prescribe requirements for the registration of companies, most importantly who the members should be.

Section 26 also creates a prohibition on the employment of a physiotherapist by an unregistered natural person.

Sub-section 18(2) provides for the registration of a company as a physiotherapist if its memorandum and articles of association comply with certain conditions in relation to directors, members, voting rights etc. In particular, sub-section 18(2) restricts the ownership of physiotherapy practices to physiotherapists and their prescribed relatives. In addition, the Board must be satisfied that the memorandum and articles of association comply with these conditions and are “otherwise appropriate” to a company formed for the purpose of practising as a physiotherapist.

Sections 32 to 37 contain restrictions on the conduct of companies, including administrative requirements and restrictions on the number of physiotherapists a registered company may employ.

These sections constitute a barrier to entering the physiotherapy profession (as a employer/director/shareholder) and on the conduct of incorporated physiotherapy practices. They also enable the Board to potentially restrict competition depending on its interpretation of “otherwise appropriate”. They are therefore serious restrictions upon competition.

There may be public benefit in having appropriately qualified persons own and run a physiotherapy practice and in particular be responsible for the safety and public protection issues of a practice. If the Board is to discipline a company in relation to, for example, unprofessional conduct, it may be important for the Board to be able to discipline the directors also. If the directors are not registered persons their only liability lies under the general law such as the *Trade Practices Act*, corporations law and the common law.

There may also be a benefit to the public in preventing the over commercialisation of the physiotherapy profession. The object of these sections may be to prevent the establishment of large physiotherapy companies and “chain-stores”. These types of practices may tend to focus on profit-margins ahead of their duty to their patients. However, the Review Panel has received no evidence that unregistered persons would have lower professional and ethical standards that registered persons. In any event, it will always be up to the individual registered person to maintain his or her own standards of professionalism.

*The anti-competitive costs of this section include that the fees charged for physiotherapy services may be higher than in a situation where ownership is unrestricted, due to, for example, economies of scale. There may also be a cost to consumers in not permitting the establishment of multidisciplinary practices. There is an additional cost to the public in excluding unregistered person with business and managerial skills.*

The Panel notes that the only other Australian State or Territory which contains ownership restrictions is Tasmania. However, as a result of the Tasmanian review, the current Bill does remove these restrictions.

The APA submission supports the removal of these restrictions as long as the provision of the physiotherapy services by a body corporate are controlled and supervised by a physiotherapist and the Board is provided with details of the company. It argues that there is a risk that competition may be restricted if large companies (eg health funds) take over practices. The Board in its submission argues that these restrictions should be retained in the interests of public protection. However, should they be removed, the Board seeks “additional powers to discipline or restrict the conduct of practices owned or managed by unregistered persons as being in the public interest”<sup>46</sup>.

The Review Panel concludes that the ownership restrictions are not justified and should be removed. Of course, only qualified persons should be permitted to perform physiotherapy treatment. The reservation of core practices referred to in part 2.2.2 has this effect. The Review Panel is of the opinion that there should be some responsibility by an (unregistered) employer of a registered person to maintain a competent standard of physiotherapy treatment. This is not completely covered by existing law and could lead to problems such as attempts by employers to influence registered persons to provide inadequate service or over-service. The Victorian review of its dentist legislation recommends that upon removing all ownership restrictions an offence should be created “for an employer to unduly influence an employee to perform dentistry in a manner detrimental to the welfare of the consumer”<sup>47</sup>. The Review Panel believes that this provision should also be included in the South Australian Act. Additionally, the Panel believes that as part of the penalties for such offence, the Board should be given power to restrict the practice of companies and directors.

This would introduce a restriction on the conduct of employers of physiotherapists, but the restriction on competition is assessed to be trivial. The public benefit is clearly to protect the public by preventing the possible problems discussed above. There may be some compliance costs to the employer which could be passed on to the consumer, but these costs are minimal.

The alternatives to this provision would be to retain the registration requirement for companies, but to remove all the requirements as to members and conduct. Then, the Board could discipline the company as a registered person. The Review Panel believes that this alternative is not practical and places too much of a restriction on the company. The other alternative is to leave the regulation of companies to the general law such as the *Trade Practices Act*, as discussed in part 2.2.2. The Review Panel considers that due to the risks of irreversible harm<sup>48</sup> these alternatives are not adequate in themselves to protect the public. To assist with the enforcement of these provisions, physiotherapists should be specifically required to provide the Board with addresses of all premises in which they practise as well as the name and address of their employer, upon registering and re-registering. This would not be a restriction on competition and would not impose an unwarranted burden on registered persons.

**Recommendations:**

9. All ownership restrictions, direct and indirect, contained in the Act should be removed.

<sup>46</sup> Physiotherapists Board of SA submission at 6

<sup>47</sup> Victorian Department of Human Services *Review of Dentists Act 1972 and Dental Technicians Act 1972, Final Report*, (July 1998) at 19

<sup>48</sup> also discussed in part 2.2.2

10. It should be an offence for an employer to unduly influence an employee to perform physiotherapy treatment in a manner detrimental to the welfare of the consumer.
11. Where a company or other employer is found guilty of such an offence, the Board should have power to restrict their (including the directors') practice of physiotherapy.
12. Registered persons should be required to provide the Board with the address of all premises in which they practise and the name and address of their employer, upon registering and re-registering.

### 2.3.2 Approval of names

Regulation 23 provides that a registered physiotherapist must not practise under a name (whether a company name or a business name) unless that name has first been approved by the Board. This gives the Board power to potentially restrict the conduct of physiotherapists and hence restrict competition. This is an intermediate restriction on competition.

The public benefit of such a restriction may be to prevent misleading, deceptive, sensational or other such names. However this is not clearly stated or implied in the regulation, other in than in general terms in section 15(2).

The anti-competitive cost of this restriction will depend on how the Board exercises its power and the type of names not approved by the Board.

In any event, the Review Panel considers that there is sufficient protection under the advertising restrictions discussed in part 2.4, and it is not necessary for the protection for the public to obtain the prior approval of the Board.

#### Recommendations

13. The requirement for the Board to approve business names, regulation 23, should be removed.

## 2.4 Disciplinary Actions

The Board is empowered by the Act, under section 42, to discipline physiotherapists if, after conducting an inquiry, the Board is satisfied that there is proper cause for disciplinary action against that person. Such inquiry may be initiated by the Board on its own initiative or upon receipt of a complaint. However, the Board may refuse to inquire into a complaint if it considers it to be frivolous or vexatious.

Upon the Board finding a proper cause for disciplinary action against a physiotherapist, it may reprimand the physiotherapist, impose a division 5 fine (not exceeding \$8,000), or may suspend, cancel or impose conditions in relation to the physiotherapist's registration<sup>49</sup>.

Therefore, the Board's powers to discipline are potentially restrictions upon the conduct of physiotherapists.

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<sup>49</sup> section 42(4)

Sub-section 42(6) provides that there is proper cause for disciplinary action against a registered physiotherapist if:

- (a) the registration was obtained improperly;
- (b) the physiotherapist has been convicted, or is guilty, of an offence against this Act, an offence involving dishonesty or an offence punishable by imprisonment for one year or more;
- (c) the physiotherapist is guilty of unprofessional conduct.

Central to the restrictions, therefore, is the Board's interpretation of "unprofessional conduct". There is no definition of "unprofessional conduct" in the Act, unlike other South Australian Acts, such as the *Dentists Act 1984*. However the Board is bound by the common law in its interpretation, which in summary says that:

"Unprofessional conduct is not necessarily limited to conduct which is 'disgraceful or dishonourable', in the ordinary sense of those terms. It includes conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency."<sup>50</sup>

Restrictions upon conduct, and hence upon competition, arising from the disciplinary structure of the Act, will only give rise to unjustifiable anti-competitive costs if inappropriate standards of "unprofessional conduct" are applied. The criteria used by the Board should be the standards expected by both the public and the profession. It may be possible that the standard required by the profession is different than that required by the public<sup>51</sup>. For example, the public may require a lower standard of service at a lower cost; the profession may require advertising restrictions which may preserve the profession rather than protect the public. The Review Panel has not seen any evidence that the Board has applied inappropriate, or too high, standards of unprofessional conduct. Therefore the restriction is trivial.

In any case, the standard applied by the Board should be transparent. The consistency of the standard throughout the health professions may also assist the public's understanding of the standard required. Some other South Australian Acts which regulate the health professions define "unprofessional conduct" to include improper or unethical conduct and incompetence or negligence in relation to the practice of (physiotherapy), as well as a breach of the Act<sup>52</sup>.

The Review Panel therefore believes that a similar definition should be contained in the Act. The submissions which address this issue concur.

### **Code of Ethics**

The Board's Code of Ethics provides insight into how the Board interprets "unprofessional conduct". This Code is not provided for in the Act and is not enforceable in itself. Therefore, it is not within the terms of reference of this review. However, the Code is used by the Board, the profession and the public as a guide as to the type of conduct that is seen as unprofessional. As such, the Code is relevant to the review.

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<sup>50</sup> *In Re A Practitioner* (1927) SASR 58 at 60-61 at page 1

<sup>51</sup> see also discussion on "fit and proper" in part 2.1.1

<sup>52</sup> For example the *Dentists Act 1984*, section 4

The Code is important in the context of public protection, in that it makes the Board's interpretation of "unprofessional conduct" more transparent to both the public and the profession. This is particularly important in the environment of information asymmetry and where each profession may have a different standard of conduct. It is important for the Code to be readily available to the public and the profession.

The Governor has power<sup>53</sup> to prescribe regulations to regulate the conduct of physiotherapists and to declare any conduct to be unprofessional. Currently there are no such regulations, but this could allow for the Code to be effectively prescribed in the regulations. This might make the Board's interpretation even more transparent. This would also give an additional safeguard in the legislative process. However, professional practice is continually changing and it may be unwise to entrench a Code where changes would take time, and to remove any discretion from the Board.

Alternatively, the Act could define "unprofessional conduct" to include a breach of the Code, thus making the Code enforceable and removing doubt. However, without the Code being approved by another party, such as the Minister, the Board's power in this respect may be increased.

Submissions were sought on the status and enforceability of the Code. The general opinion was that the enforceability of the Code would increase awareness of the Board's interpretation and application of "unprofessional conduct", but that there should be flexibility in this interpretation.

The Review Panel concludes that the Board's Code should be referred to in the Act and that the Minister should approve such Code. The Code should be referred to as a "Code of Conduct" to reflect public protection issues.

#### **Recommendations:**

14. The definition of "unprofessional conduct" should be inserted into the Act, and should read - "unprofessional conduct" includes:
  - (a) improper or unethical conduct in relation to the practice of physiotherapy; and
  - (b) incompetence or negligence in relation to the practice of physiotherapy; and
  - (c) conduct in contravention of a Code of Conduct approved by the Minister from time to time."
15. The functions of the Board should include to make recommendations to the Minister in relation to a Code of Conduct.
16. The approved Code of Conduct should be published in the *South Australian Government Gazette* and a copy thereof provided to all registered physiotherapists.

### **Advertising**

The Code contains provisions purporting to restrict advertising. For example, it prohibits false, misleading and deceptive advertisements<sup>54</sup>. The cost of any advertising restriction is generally to potentially reduce the information available to consumers. This type of restriction is clearly in the public benefit and, arguably, within the meaning of "unprofessional conduct". The Review Panel believes that this type of advertising restriction is justified.

Another type of advertising prohibited by the Code is that which "is vulgar or sensational such as would be likely to adversely affect the standing of the physiotherapy profession"<sup>55</sup>. This type of restriction is not be justifiable on public benefit grounds, as any benefit is conferred on the profession only and as such does not outweigh the cost.

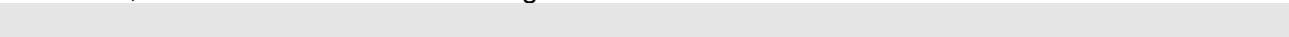
<sup>53</sup> under section 57

<sup>54</sup>section 10(1) & (2)

<sup>55</sup> section 10(3)

The alternative to the Act restricting advertising is the reliance on the *Trade Practices Act* and the *Fair Trading Act*, which prohibit misleading and deceptive conduct. However, the Panel believes that there is benefit to the public in having a body with specific knowledge of the profession be responsible for this matter. Further, the Board is more accessible to the public and can act more quickly.

The Panel therefore considers that “misleading and deceptive advertising” should be prohibited. However, this prohibition should be contained in the Act so that unregistered persons who advertise physiotherapy services are covered to the same extent as registered persons. Therefore, there should be no advertising restrictions in the Code.



**Recommendations:**

17. The misleading and deceptive advertising of physiotherapy services should be an offence.
18. A Code of Conduct should not be approved where it contains provisions purporting to restrict advertising (this should not be a legislative requirement).

**2.5 Actions of the Physiotherapists Board**

The Act continues the existence of the Physiotherapists Board of South Australia<sup>56</sup>.

The Board is responsible for the registration of physiotherapists, administration of the Act and discipline under the Act. As an administrative and disciplinary body, it is possible for the Board to create and impose restrictions upon competition in the physiotherapy profession.

The membership and proceedings of the Board, legislative restraints upon the use of powers, including appeals processes, and the functions of the Board are relevant, therefore to the extent to which it could restrict competition through the exercise of its functions.

**2.5.1 Functions of the Board**

Section 15 lists the functions of the Board. These functions include:

- (a) the registration and professional discipline of physiotherapists;
- (b) exercising a general oversight over the standards of physiotherapy practice;
- (c) monitoring the standard of courses of instruction and training available to:-
  - (i) those seeking registration as physiotherapists; and
  - (ii) registered physiotherapists seeking to maintain and improve their skills in the practice of physiotherapy,
 and consulting with educational authorities in relation to the establishment, maintenance and improvement of such courses; and
- (d) exercising the other functions assigned to it by or under this Act.

These functions, together with the provisions discussed above, have the potential to enable the Board to restrict entry into and participation within the physiotherapy profession.

However the scope for the Board to use its powers to restrict competition is purportedly minimised by sub-section 15(2), which directs that the “Board must exercise its functions with a view:

- (a) to ensuring that the community is provided with physiotherapy services of the highest standard; and
- (b) to achieving and maintaining professional standards of competence and conduct in the practice of physiotherapy”.

The requirement for physiotherapy services to be of “the highest standard” sets a virtually unachievable standard. If taken literally, it means that only the top physiotherapist should be registered. Even with a broader interpretation, a standard is set which may be a higher than that expected by the public and the profession. This is clearly a serious restriction on competition. The alternatives are for this sub-section to be removed altogether or for

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<sup>56</sup> section 5

another standard to be substituted, for example a “good”, “competent” or “acceptable” standard.

Submissions varied in their opinions on this matter, between “competent”<sup>57</sup> and “highest”<sup>58</sup> standards. The APA pointed out, in their submission, that the “physiotherapy profession and to provide services of a ‘high’ standard”<sup>59</sup>, but that this need not be a legislative requirement. The Review Panel agrees and concludes that a competent standard is sufficient to protect the public.

Sub-section 15(2) effectively restricts the Board’s powers to restrict competition by limiting their scope to competence and conduct. This could be even more limited by a requirement that the Board exercise its functions in the public interest. The submissions concur with the Review Panel that the Board’s public protection function should be stated in the Act.

#### **Recommendations**

19. Sub-section 15(2)(a) should be removed.
20. Sub-section 15(2) should state that the “Board must exercise its functions to with a view to *protecting the public* by achieving and maintaining *appropriate* professional standards of competence and conduct in the practice of physiotherapy”.

### **Mental or physical unfitness**

Part of the Board’s functions under the Act is to deal with the possible mental or physical unfitness of a registered person.

Section 42 also empowers the Board to make inquiries into allegations (either on complaint or on its own initiative) that a registered person is mentally or physically unfit to practise physiotherapy. If the Board is then satisfied that the person is mentally or physically unfit to practise physiotherapy at all or on an unrestricted basis, it may impose conditions on, suspend or cancel that person’s registration.

Section 41 allows the Board to require a person to submit to a medical examination, if the Board suspects that person to be mentally or physically unfit to practise physiotherapy. If the person fails to comply with this requirement, that person’s registration is suspended until the requirement is complied with.

The ability to impose conditions on, suspend or cancel registration is a restriction on a person’s ability to practise physiotherapy. This is a trivial restriction.

There is obvious public benefit in a body being able to restrict the practice of persons who are not fit to practise physiotherapy. This is an extension of the “fit and proper person” standard required upon entry to the market. As with that requirement, the Board must consider the registered person’s competence and capacity. Without some power to maintain a continuing standard of competence, the public benefit of the “fit and proper person” standard is reduced.

<sup>57</sup> Australian Physiotherapy Association (SA Branch) submission at 9

<sup>58</sup> Julia Farr Services submission at 2

<sup>59</sup> at page 9



As long as the Board uses objective standards of fitness, the anti-competitive cost is minimal. The legislative safeguards discussed in part 2.5.2 also help to minimise any potential anti-competitive cost.

There are no alternatives to this restriction which adequately protect the public.

## **2.5.2 Legislative safeguards**

### **Constitution and Proceedings**

Provisions regulating the composition and proceedings of the Board are legislative safeguards upon the use of the powers of the Board to restrict competition. The constitution of the Board is set out in section 6 of the Act. The constitution of the Board is relevant to the review, as a Board with balanced physiotherapist / non-physiotherapist membership is perhaps less likely to be able to achieve anti-competitive market design outcomes through the use of powers ascribed to the Board.

The Board has four members who are physiotherapists, one medical practitioner, one legal practitioner and one representative of persons receiving physiotherapy services. It is arguable that the professions dominate the Board and an additional consumer representative may enhance the Board's focus on public protection.

Submissions were sought on consumer representation on the Board. There was overall support among the submissions for a second consumer representative to be appointed. Council on the Ageing pointed out, in its submission, that two consumer representatives cover a wider variety of consumer interests and therefore bring additional expertise to the Board. The Panel agrees with this approach.

Council on the Ageing also suggested that there be physiotherapist representatives from both the private and public sectors on the Board. The Review Panel agrees that this would assist the Board's functions by increasing its expertise. However, this often occurs in practice and the Review Panel therefore believes that this is not needed as a legislative requirement.

### **Recommendations**

21. The Board should include a second member to represent the interests of persons receiving physiotherapy services.

Provisions regulating the terms and conditions of office of Board members (section 7), the personal interests of members (section 9) and the proceedings of the Board (section 10) are additional legislative safeguards upon the use of the powers of the Board to restrict competition.

Section 43 provides further legislative safeguards against the Board using its powers to restrict competition by providing for natural justice to be afforded to a person in relation to whom an inquiry is to be held.

### **Appeals mechanism**

Section 47 of the Act enables appeals to the Supreme Court against any decisions or orders of the Board in the exercise or purported exercise of its powers or functions under this Act.

The powers of the Supreme Court in relation to an appeal from a decision of the Board or the Tribunal are set out in section 47(3). These powers are to:

- (a) affirm, vary or quash the decision, reprimand or order appealed against, or substitute, or make in addition, any decision or order that should have been made in the first instance;
- (b) remit the subject matter of the appeal to the Board for further hearing or consideration or for re-hearing;
- (c) make any further or other order as to costs or any other matter as the case requires.

Appealing an unfavourable decision to the Supreme Court is a costly and time consuming exercise both for the Board and the physiotherapist. This means that the appeals safeguard may not be as efficient in practice as it could be. Unfortunately there is little alternative in the current judicial structure, other than using the mechanism of the Administrative and Disciplinary Division of the District Court.

Most other States have combined health tribunals with varying functions, such as the New South Wales Health Care Complaints Commission. However in most cases, that system operates in parallel to the specific disciplinary body and there is no appeal from the disciplinary body to the combined Tribunal. Such a system does, however, assist in providing greater transparency of decisions and accessibility to the consumer. In these circumstances, the Review Panel considers the current appeals mechanism to provide adequate protection, subject to the appeals body being the District Court rather than the Supreme Court.

**Recommendations:**

22. References to the Supreme Court in the Act should be amended to “the Administrative and Disciplinary Division of the District Court”.

**Other Safeguards**

As discussed above, the Board exercises discretionary functions in a number of situations, such as deciding on whether a person is “fit and proper” to be registered or a person is “medically or physically unfit” or is guilty of “unprofessional conduct”. In relation to unprofessional conduct decisions, the Board has prepared a Code of Ethics, as discussed above, to explain its decision-making procedure. The Review Panel believes that a similar set of guidelines in relation to all discretionary decisions would assist in promoting objective criteria and hence transparency of the Board’s decisions. This should not be a legislative requirement at this stage.

**Recommendations:**

23. The Board should publish and make available to the public and the profession guidelines on:
- (a) Registration criteria;
  - (b) Reregistration criteria;
  - (c) Criteria for mental or physical unfitness;
  - (d) Unprofessional Conduct (in the absence of an approved Code of Conduct).

The Review Panel considers that the above legislative safeguards, subject to the recommendations, are sufficient to protect the public. The submissions received support this conclusion.

## PART 3: ADMINISTRATIVE REQUIREMENTS

The Review Panel is required during the course of this review to examine the provisions of the Act which impose administrative obligations upon persons and determine whether these obligations are unnecessary or impose an unwarranted burden. The provisions of the Act which impose administrative requirements are:

- Section 16**      The Board must keep proper accounts of its financial affairs and prepare a statement of accounts which must be audited each financial year.
- Section 17**      The Board must prepare and deliver to the Minister, on or before 30 September, an annual report detailing the administration of the Act and containing statistics in relation to complaints received and orders and decisions made by the Board.
- Section 19**      The requirement that an application for registration be made in the prescribed manner and form. The forms are set out in Schedule 3 to the regulations. An applicant must, if the Board so requires, furnish the Board with such information, papers or documents as it specifies and verify any information by statutory declaration.
- Section 22**      The requirement that an application for renewal of registration be made in the prescribed manner and form. The form is set out in Schedule 3 to the regulations.
- Section 24**      The Registrar must keep a register of physiotherapists which must be kept up to date and be available for inspection.
- Section 25**      The Registrar must provide any certificate in relation to registration upon request and payment of the prescribed fee.
- Section 31**      Where a physiotherapist has been ordered by a court to pay compensation or has agreed to pay a sum of money in relation to a negligence claim, that person must provide the Board with information in relation to the claim. The information is prescribed in regulation 20.
- Section 33**      The requirement to obtain the Board's approval to alter a company's memorandum or articles of association.
- Section 37**      A registered company must lodge with the Board in July of each year a return in the form approved by the Board containing the information required by the Board.
- Section 40**      Medical practitioners are required to report to the Board an illness of a physiotherapist which has resulted in or is likely to result in mental or physical incapacity stating the reasons for his or her opinion, the views of any other medical practitioner and other prescribed information, which is set out in regulation 21.
- Regulations Part 2**      Requirements in relation to election of members to the Board.

There were no submissions received which argued that any of the above administrative requirements imposed an unwarranted burden on any person.

The Review Panel notes that the removal of ownership restrictions will include the removal of sections 33 and 37 and therefore does not need to consider these sections.

Sections 16 and 17 are common provisions and are necessary to ensure accountability of the Board. The burden on the Board is not significant, as it is general business practice to keep accounts of financial affairs.

Sections 19 and 22 are necessary for the Board to administer the Act, maintain accurate records of registered persons and to ensure competence. The burden on the registered person to provide this information is minimal.

Section 24 and 25 are necessary to achieve the objectives of the Act. It is important for this information to be available to the public and profession. There is minimal burden on the Board.

Section 31 is necessary to assist the Board to investigate possible unprofessional conduct. The burden on the registered person is insignificant as this information should be readily available.

Section 40 is common to the health professions and is necessary to enable the Board to enforce section 41, where a registered person may be mentally or physically unfit to practise physiotherapy. The burden on the medical practitioner is to forward the required information, which is not significant.

Part 2 of the Regulations is necessary to ensure a fair election procedure. The burden is on the Board and is not unwarranted.

Accordingly, in relation to these provisions, the Review Panel concludes that that there are no administrative procedures under the Act and Regulations which are unnecessary or impose an unwarranted burden on any person.

## PART 4: CONCLUSION

### 4.1 Conclusions

#### Restrictions

The provisions relating to registration, reservation of practice and title, disciplinary actions and ownership restrictions in the *Physiotherapists Act* establish and maintain the system of practice protection. This system contains significant restrictions on entry to the physiotherapy profession and conduct within the profession. The most significant are the specific provisions relating to the practice protection regime which restrict entry to the physiotherapy profession to appropriately qualified persons. This is a serious restriction. There are also restrictions upon the conduct of registered persons in the practice of physiotherapy, such as the restrictions on unprofessional conduct. There are also restrictions on the conduct of physiotherapy as a business, such as the ownership and advertising restrictions.

#### Public Benefits

The system of practice protection established by the *Physiotherapists Act* achieves significant public benefit. The public benefit conferred by the Act is the protection of the public from potential harm by incompetent physiotherapists. It provides the public with confidence that registered physiotherapists have appropriate qualifications and with information about a particular physiotherapist's qualifications, expertise, and the results of any Board decisions against that person.

#### Costs

The two categories of cost, as referred to in part 1.4, arise in the case of the restrictions contained in the *Physiotherapists Act*. The Review Panel did not receive any evidence that restricting the numbers of physiotherapists causes a shortage of appropriately trained persons. However, the restrictions do cause the cost of such services to be higher than in an unrestricted system. Compliance costs under the *Physiotherapists Act* are generally minimal, because they are such a small percentage of the total expenditure of a physiotherapy practice. However compliance costs of obtaining the necessary qualifications are more significant. Subject to the recommendations listed below, the Review Panel assesses that the public benefit of the restrictions contained in the *Physiotherapists Act* outweighs the costs of the restrictions.

## **Alternatives**

The objective of these restrictions is, in summary, to protect the public. The Review Panel has considered the alternatives to the legislative restrictions on competition to achieve these objectives.

Such alternatives are:

1. Consumer protection legislation such as the *Trade Practices Act* and the *Fair Trading Act*;
2. Protection under the common law, such as claims in negligence, breach of contract and misrepresentation;
3. Public health legislation, such as the *Public and Environmental Health Act 1987* and the *Radiation Protection and Control Act 1982*;
4. Self - regulation;
5. Corporations Law.

The Review Panel has concluded that these alternatives are not sufficient to protect the public and that therefore the objectives of the Act cannot be achieved, at this time, by means other than legislative restrictions on the physiotherapy profession.

## **4.2 Recommendations**

On the basis of the analysis set out in this report the Review Panel recommends:

### **Legislative Changes**

1. The objects section of the Act should be amended to state “An Act to protect the public by providing for the registration of physiotherapists.....”
2. A registered person should be required to satisfy the Board that they are (still) a “fit and proper person” in order for that person’s registration to be renewed.
3. Section 26(1) should be amended by deleting subsections (a) and (b), namely “practise physiotherapy for fee or reward or use prescribed equipment in the provision of services that constitute physiotherapy” and replacing it with “perform the following acts:
  - (a) joint manipulation or adjustment;
  - (b) use for therapeutic purposes such electrical or physical modalities as prescribed in the regulations;
 or any prescribed acts”.
4. The regulations should initially prescribe the following electrical or physical modalities:
  - (a) laser;
  - (b) high frequency currents (eg short wave diathermy);
  - (c) low/medium frequency currents (eg interferential high voltage galvanic);
  - (d) therapeutic ultrasound;
  - (e) ultraviolet;
  - (f) direct current
5. Section 26(2) should be deleted.
6. There should be an exemption from s26(1) (or equivalent) for medical practitioners.
7. Exemptions should apply to the following persons in relation to protected acts:
  - (a) in relation to recommendation 3(a) chiropractors;
  - (b) in relation to activities or electrical physical modalities prescribed by regulation, such persons as are exempted by regulation.
8. Section 30 should be proclaimed.
9. All ownership restrictions, direct and indirect, contained in the Act should be removed.
10. It should be an offence for an employer to unduly influence an employee to perform physiotherapy treatment in a manner detrimental to the welfare of the consumer.

11. Where a company or other employer is found guilty of such an offence, the Board should have power to restrict their (including the directors') practice of physiotherapy.
12. Registered persons should be required to provide the Board with the address of all premises in which they practise and the name and address of their employer, upon registering and re-registering.
13. The requirement for the Board to approve business names, regulation 23, should be removed.
14. The definition of "unprofessional conduct" should be inserted into the Act, and should read - "unprofessional conduct' includes:
  - (a) improper or unethical conduct in relation to the practice of physiotherapy; and
  - (b) incompetence or negligence in relation to the practice of physiotherapy; and
  - (c) conduct in contravention of a Code of Conduct approved by the Minister from time to time."
15. The functions of the Board should include to make recommendations to the Minister in relation to a Code of Conduct.
16. The approved Code of Conduct should be published in the *South Australian Government Gazette* and a copy thereof provided to all registered physiotherapists.
17. The misleading and deceptive advertising of physiotherapy services should be an offence.
19. Sub-section 15(2)(a) should be removed.
20. Sub-section 15(2) should state that the "Board must exercise its functions to with a view to *protecting the public* by achieving and maintaining *appropriate* professional standards of competence and conduct in the practice of physiotherapy".
21. The Board should include a second member to represent the interests of persons receiving physiotherapy services.
22. References to the Supreme Court in the Act should be amended to "the Administrative and Disciplinary Division of the District Court".

### **General Recommendations**

18. A Code of Conduct should not be approved where it contains provisions purporting to restrict advertising.
23. The Board should publish and make available to the public and the profession guidelines on:
  - (a) Registration criteria;
  - (b) Reregistration criteria;
  - (c) Criteria for mental or physical unfitness;
  - (d) Unprofessional Conduct (in the absence of an approved Code of Conduct).







## PART 5: APPENDICES

### APPENDIX 1

#### TERMS OF REFERENCE

##### SUMMARY

Under the Competition Principles Agreement, in relation to legislation that contain restrictions upon competition, the Government of South Australia is required to show evidence that:

- (a) the benefits of any restriction to the community outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition

The *Physiotherapists Act 1991* will be examined during the legislative review in accordance with the obligations contained in Clause 5 of the Agreement. Regulations enacted under the *Physiotherapists Act 1991* will be examined concurrently.

##### REVIEW PANEL

Rod Squires: Department of Human Services (Chair)  
 Richard Krantz: Registrar, Physiotherapists Board of South Australia  
 Jane Richards: Solicitor, Competition Policy Review Team

##### OBJECTIVES OF THE REVIEW

When considering the appropriate form of regulation the Review Panel will attempt to achieve the following objectives:

1. Regulation should only be retained where the benefits to the community as a whole outweigh the costs: and if the objectives of the regulation cannot be achieved more efficiently through other means, including non-legislative approaches.
2. Pursuant to Clause 1 (3) of the Agreement, in assessing the benefits of the regulation regard shall be had, where relevant, to:
  - effects on the environment
  - social welfare and equity
  - occupational health and safety
  - economic & regional development
  - consumer interests, the competitiveness of business including small business
  - efficient resource allocation
3. Compliance costs and the administrative burden on small business should be reduced where feasible.

## ISSUES TO BE ADDRESSED

1. Clarify the objectives of the *Physiotherapists Act 1991*, including the identification of the public benefit of the Act, and provide assessment of the importance of these objectives to the community.
2. Identify restrictions to competition contained in the Act, regulations made under the Act, and any relevant Codes of Practice:

*2.1 describe the theoretical nature of each restriction (eg: barrier to entry, restriction to competitive conduct within the market, discrimination between market participants)*

2.2 identify the markets upon which each restriction impacts

2.3 provide initial categorisation of each restriction (ie: trivial, intermediate or serious)

3. Analyse and describe the likely effects of these restrictions on competition in the relevant markets and on the economy generally:
  - 3.1 what are the practical effects of each restriction on the market ?
  - 3.2 assign a weighting to the effect of each restriction in the market
  - 3.3 assess what is the relative importance of each restriction in a particular market to the economy as a whole
4. Assess and balance the costs and the benefits of the restriction.
5. Where t restriction is justifiable on the basis of public benefit, consider whether there are practical alternative means for achieving the objectives of the *Physiotherapists Act 1991*, including non-legislative approaches.
6. Consider whether any licensing, reporting or other administrative procedures are unnecessary or impose a burden on any person.

## CONSULTATION

*The Review Panel will review submissions received in the consultation process undertaken within the prescribed period. A list of Key Interest Groups will be compiled and provided with a copy of the Draft Review Panel Report for comment.*

## REPORT

*The Report to the Minister will contain:*

Terms of Reference of the review  
 Persons and groups consulted  
 Analysis and recommendations

**APPENDIX 2****SCHEDULE OF REGISTRATION FEES<sup>60</sup> - SOUTH AUSTRALIA****Registration Fees:**

Natural person \$ 50.00

Company \$220.00

**Renewal Fee:**

Natural person \$ 65.00

Company \$ 65.00

**Limited registration Fee:** \$ 50.00

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<sup>60</sup> from the Physiotherapists Board of South Australia

## APPENDIX 3

**COMPARISON OF REGISTRATION FEES AND NUMBER OF  
REGISTRANTS  
PHYSIOTHERAPISTS - NATURAL PERSONS**

<b>Jurisdiction</b>	<b>Application for Registration fee</b>	<b>Annual Registration fee</b>	<b>Number of registered physiotherapists</b>
South Australia	\$ 50.00	\$ 65.00	1286
New South Wales	\$ 60.00	\$ 65.00	5150
Victoria	\$ 160.00	\$130.00	3544
Tasmania	\$ 75.00	\$ 62.00	320
Queensland	\$ 85.00	\$ 55.00	2440
ACT	\$ 100.00	\$100.00	248
Northern Territory	\$ 40.00	\$ 25.00	340
Western Australia	\$ 87.00	\$ 55.00	1550

## APPENDIX 4

### REPORTED RISKS OF JOINT MANIPULATION<sup>61</sup>

STUDY	COMPLICATION	RISK ESTIMATE
Assendelft, Bouter, Knipschild (1996)	Vertebrobasilar accident	from 1/20,000pts to 1/1 mill cervical manipulations
	Cauda Equina Syndrome	1/1mill treatments
Dvorak, Orelli (1985)	Major complication	1/400,000 manipulations
	'Slight' neurological complication	1/40,000 cases
Haynes (1994)	'Stroke'	<5/100,000 patients receiving neck manipulation
Michaeli (1993)	Vertebrobasilar accident	1/228,050 manipulations
Gutman (1983)	Vertebrobasilar accident	2-3/1mill cervical manipulations
Henderson, Cassidy (1988)	Vertebrobasilar accident	1/1 mill manipulations
Shekelle et al (1992)	Cauda Equina Syndrome	1/100 mill manipulations

#### References:

1. Assendelft W J J, Shekelle PG, Koes BW, Spinal manipulation for low back pain (protocol)Cochrane Library 1996 - Issue 3.
2. Shekelle P G, Adams AH, Chassin R, Hurwitz E L Brooks R H, Spinal Manipulation for low back pain. *Ann Intern Med* 1992; 117: 590-8.
3. Laderman J P, Accidents of spinal manipulation. *Ann Swiss Chiropractors Assoc* 1981; 7: 161 - 208.
4. Winer C, Catastrophes following forceful cervical manipulation, a review of the literature, *AAMM Bulletin* 1987 Mar.
5. Assendelft W J J, Bouter S M ,Knipschild P G, Complications of spinal manipulation: a comprehensive review of the literature, *J Am Prac* 1996 42(5):475-80.
6. Dvorak J, Orelli F, How dangerous is manipulation of the cervical spine? Case reports and results of survey, *Manual Medicine* 1985; 2: 1-4.
7. Haynes M J , Stroke following cervical manipulation in Perth. *Chiropractic J of Aus* 1994; 24: 42-6
8. Michaeli A , Reported occurrence and nature of complications following manipulative physiotherapy in South Africa. *Aust Physiotherapy* 1993; 39: 309-15
9. Gutmann g, Verterzungn der Arteria vertebralis durch manuelle therpaie. *Manuelle Medizin* 1983; 21: 2-14

<sup>61</sup> Reproduced from New South Wales Health Department *Review of the Chiropractors and Osteopaths Act 1991, Issues Paper* (June 1998), Appendix C

10. Henderson D J, Cassidy J D, Vertebral artery syndrome, Part A: vertebrobasilar accidents associated with cervical manipulation. Invernion H (Ed) Upper cervical syndrome: chiropractic diagnosis and treatment, Baltimore Md: Williams & Wilkins, 1988: 194-206.
11. Powell F C, Hanigan W C, Olivero W C, A risk/benefit analysis of spinal manipulation therapy for the relief of lumbar or cervical pain, Neurosurgery 1993; 33: 73-79.

**APPENDIX 5****RISKS OF ELECTROTHERAPY<sup>62</sup>**

<b>ELECTROTHERAPY MODALITY</b>	<b>HARM TO PATIENT</b>	<b>CAUSE</b>
Laser	Damage to eyes Soft tissue damage	Disregard of safety procedures*
High Frequency Currents eg short wave diathermy	Soft tissue damage (burn) as result of overheating	Unsafe application of electrodes eg inappropriate position of patient and/or of electrodes  Disregard of contraindications to the application eg inadequate sensation, poor circulation  failure to test patients ability to differentiate temperature sensation Unsafe length of treatment
Low/Medium frequency Currents eg interferential/high voltage galvanic	Soft tissue damage	Improper cleaning procedures of electrodes, skin Skin damage, frail skin Inappropriate length of treatment
Therapeutic Ultrasound	Soft tissue damage Thermal burn	Uneven output from sound head Holding sound head still particularly over bony prominence interference from other equipment Overdose
Ultraviolet	Damage to eyes Burn	Failure to follow safety precautions Overdose

**RISKS OF ELECTROTHERAPY contd**

<b>ELECTROTHERAPY MODALITY</b>	<b>HARM TO PATIENT</b>	<b>CAUSE</b>
Direct Current	Electrolytic burn	Improper cleaning procedures of electrodes, skin  Skin damage, frail skin

<sup>62</sup> reproduced from Australian Physiotherapy Assoc (SA Branch) submission, Appendix C



		Inappropriate length of treatment Incorrect calculation of dosage
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## APPENDIX 6

### MATERIAL CONSIDERED BY REVIEW PANEL

- Australian Council of Professions *National Competition Policy and the Professions* (1997)
- Australian Health Minister's Advisory Council *Final Report of the Working Group Advising on Regulatory Requirements for Unregistered Health Occupations* (20 February 1997)
- Physiotherapists Board of South Australia *Annual Report 1998*
- Physiotherapists Board of South Australia *Code of Ethics* (September 1996)
- Hansard *Second Reading - Physiotherapists Bill* (7 March 1991)
- Health Department of Western Australia *Discussion Paper - Review of Western Australian Health Practitioner Legislation* (October 1998)
- National Competition Council *Considering the Public Interest under the National Competition Policy* (November 1996)
- Pew Health Professions Commission, report for the Taskforce on Health Care Workforce Regulation *Reforming Health Care Workforce Regulation: Policy Considerations for the 21st Century* (US, December 1995)
- Queensland Health *Review of Medical and Health Practitioner Registration Acts* (September 1996)
- Victorian Government Department of Human Services *Review of Physiotherapists Act 1978 - Discussion Paper* (October 1997)
- Victorian Department of Human Services *Review of Dentists Act 1972 and Dental Technicians Act 1972 - Final Report* (July 1998)
- *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70
- *Wright v Teachers Registration Board of South Australia* (1983) 111 LSJS 177
- Job Guide Online <http://www.deetya.gov.au/jobguideonline/Text/Jobs/>
- *Physiotherapy Act 1978 (Vic)*
- *Physiotherapists Registration Act 1945 (NSW)*
- *Physiotherapists Act 1977 (ACT)*
- *Physiotherapists Act 1964 (Qld)*
- *Physiotherapists Act 1951 (Tas)*
- *Health Practitioners and Allied Health Professional Registration Act (NT)*
- *Physiotherapists Act 1950 (WA)*
- Submissions:
  - ◆ Council on the Ageing (4 January 1999)
  - ◆ Julia Farr Services (6 January 1999)
  - ◆ Southern Domiciliary Car and Rehabilitation Service (6 January 1999)
  - ◆ The Physiotherapists Board of South Australia (7 January 1999)
  - ◆ University of South Australia, Division of Health Sciences (7 January 1999)
  - ◆ Australian Physiotherapy Associations (South Australian Branch) (8 January 1999)
  - ◆ The Physiotherapists Board of South Australia (8 March 1999)
  - ◆ Chiropractors' Association of Australia (8 March 1999)
  - ◆ University of South Australia (11 March 1999)

**APPENDIX 7****CONSULTATION LIST**

Mr Richard Krantz  
 Registrar  
 Physiotherapists Board of SA  
 1st Floor  
 43 Greenhill Road  
**WAYVILLE SA 5034**

Hand Rehabilitation & Upper Limb Centre  
 339 South Terrace  
**ADELAIDE SA 5000**

Nursing Mothers' Assoc of Aust  
 Sharps Road  
**CAREY GULLY SA 5144**

Professional Senior Physiotherapy  
 Julia Farr Services  
 103 Fisher Street  
**FULLARTON SA 5063**

University of South Australia Faculty of  
 Health & Biomedical Science  
 City East Campus  
 North Terrace  
**ADELAIDE SA 5000**

Ms G Jackson  
 Council of the Ageing  
 43 Flinders Street  
**ADELAIDE SA 5000**

Each Special Interest Group (14)  
 Aust. Physiotherapists Association  
 Unit 8/ 15 Fullarton Road  
**KENT TOWN SA 5071**

Pensioner Physiotherapist Services  
 297 Oaklands Road  
**OAKLANDS PARK SA 5044**

Athletics SA  
 Santos Stadium  
 Railway Terrace  
**MILE END SA 5031**

Mr Graham Golley  
 NED  
 Australian Sports Organisation for the  
 Disabled  
 PO Box 3015  
**UNLEY SA 5061**

Arthritis Foundation of SA  
 Unit 1, 202 Glen Osmond Road  
**FULLARTON SA 5063**

BINSA  
 1 Northcott Street  
**TORRENSVILLE SA 5031**

Neurological Resource Centre of SA Inc  
23A King William Road  
**UNLEY SA 5061**

Muscular Development Fitness Unit  
Memorial Hospital  
Sir Edwin Smith Avenue  
**NORTH ADELAIDE SA 5006**

Mr Steven Spence  
Media, Entertainment & Arts Alliance  
241 Pirie Street  
**ADELAIDE SA 5000**

Southern Region  
Domiciliary Care & Rehabilitation Services  
670 Marion Road  
**PARKHOLME SA 5046**

Eastern Region  
Domiciliary Care & Rehabilitation Services  
Hampstead Road  
**NORTHFIELD SA 5085**

Ausdance  
GPO Box 108  
**ADELAIDE SA 5001**

Instructor  
Morgan Resource Management  
GPO BOX 2583  
**ADELAIDE SA 5001**

Cystic Fibrosis Association of SA Inc  
219 Sturt Street  
**ADELAIDE SA 5000**

Multiple Sclerosis Society of SA  
274 North East Road  
**KLEMZIG SA 5087**

Alfreda Rehabilitation  
1202 Old Port Road  
**ROYAL PARK SA 5014**

Northern Region  
Domiciliary Care & Rehabilitation Services  
Haydown Drive  
**ELIZABETH VALE SA 5113**

Western Region  
Domiciliary Care & Rehabilitation Services  
21a Belmore Terrace  
**WOODVILLE SA 5012**

TAFE  
Adelaide Campus  
120 Currie Street  
**ADELAIDE SA 5001**