

Submission to Health Workforce Principal Committee

Practitioner Regulation Subcommittee

National Registration and Accreditation
Scheme for the Health Professions

Arrangements for handling complaints, and dealing
with performance, health and conduct matters

16 January 2009



Introduction

The Australian Physiotherapy Council and the Australian Physiotherapy Association (APA) are pleased to submit comments that reflect the combined responses for physiotherapy to the proposed arrangements for the handling of complaints, performance, health and conduct matters for the National Registration and Accreditation Scheme for the Health Professions.

This submission provides comments of a general nature, followed by responses to the specific proposals in the consultation paper. For ease of translation by the Project Implementation Team, the responses to the specific proposals are set out using the same numbering system as the Consultation Paper and relevant text from the Consultation Paper is included in italics.

Please contact the Australian Physiotherapy Council Chief Executive Officer, Margaret Grant, margaret.grant@physiocouncil.com.au for further information or clarification of any aspect of this submission.

GENERAL COMMENTS

The range of regulatory tools described in the consultation paper to manage complaints, poor performance, competence, unethical practitioners and health issues have the potential to provide a framework that will operate in the public interest. However, there are a number of aspects of the proposed arrangements for complaints, performance, health and conduct matters that should be further refined and reworked to enhance the accountability and transparency of the processes and to assist in the maintenance of appropriate standards of health care practice.

Roles of the national boards in decision making

Implementation of the national scheme will require the national board to delegate certain responsibilities. Physiotherapy recommends that the framework of delegation of powers to manage complaints, performance, health and conduct matters, retains formal involvement of the national board in the decision making processes to promote consistency in the implementation of approaches to health, performance and disciplinary matters. Such involvement will enhance the Board's existing expertise and better protect the public interest. On a practical level this involvement may be such that Boards routinely consider and endorse reports and recommendations from panels managing health, performance and conduct matters.

Modifications to the three stream approach

Whilst the three stream approach to health, performance and conduct matters described in the consultation paper appears logical, physiotherapy recommends that the model is further refined. In particular, it is suggested that the approach to practitioners in the health stream is more clearly distinguished from the conduct and disciplinary streams.

It is important that the national board is notified of health matters as early as possible. The consultation paper presents the approach to health matters between performance and conduct matters. Whilst this is most likely a result of the order in which the consultation paper was developed, there is a risk of perceptions that notification of health issues will be managed in the same way as conduct and disciplinary issues. This may lead to reluctance to notify to the national board, especially in terms of practitioners' self notification.

Physiotherapy recognises that, in some circumstances, health issues may be identified through notification of a conduct or performance matter. Nevertheless, the approach

taken by the national board in relation to a practitioner's health issue should be distinguished from the approach the board may take to concurrent conduct or performance matters in relation to the same practitioner.

Physiotherapy also notes that the separation of performance and conduct matters described in the consultation paper is arbitrary and that many matters that become the subject of notification include elements of performance and of conduct. In the first instance, it is often the seriousness of the matter and its consequences that determines how the board will proceed, rather than whether the matter leading to the notification is related to performance or conduct. Physiotherapy contends that the distinct separation of subject matter as performance or conduct is theoretical and in practice will be rather more difficult to manage as many matters will be difficult to allocate exclusively to one stream or the other.

Physiotherapy suggests that handling of notifications in relation to performance and conduct matters have a common preliminary (initial) assessment. The preliminary assessment (triage) would identify the seriousness of the matter and its consequences. The primary determinant for further management of the notification would be the seriousness of the matter and its consequences. In some circumstances, this may lead to immediate suspension of registration or the placing of conditions on registration pending further investigation.

This approach would ensure timely and appropriate responses to managing risk to the public and in doing so protect the public interest. All serious matters would be immediately referred to an appropriate agency external to the national registration and accreditation scheme. The external agency would have powers and expertise in the investigation of serious matters. A model for the investigation of serious complaints is discussed below.

Any matters not identified as serious on preliminary assessment would proceed to secondary assessment by the national board. The secondary assessment of the notification would identify the nature of the matter and the secondary determinant for further management would be whether the matter related predominantly to conduct or performance of the practitioner. The matter would be referred to a conduct or a performance panel for further assessment and, where secondary assessment identified that the matter was serious, investigation.

There must be sufficient flexibility for each panel to manage matters with co-existing elements or to refer a matter back to the national board with a recommendation that the board refer the matter to the more appropriate panel. In situations where the latter occurs there must be provisions that minimise duplication of assessment and investigation by permitting and facilitating resumption of assessment and investigation by the other panel rather than de novo assessment and investigation. If panels cannot manage co-existing elements or if provisions that avoid de novo assessment are not included, satisfactory and timely resolution of notifications may be difficult to achieve due to significant double handling, not to mention added expense and inefficiency.

Model for investigation of serious matters

The national law must define what satisfies the definition of a serious matter – physiotherapy suggests that this could be a list or schedule of specific matters that would be considered serious as well as elements or tests that would indicate a matter not included in the list was serious.

The further investigations of notifications that are determined on preliminary assessment to be related to a serious matter are best handled by an agency that is separate to the

national board and/or its committees and panels. Agencies such as the existing Health Complaints Commissions (HCC) or equivalent have the necessary expertise, systems and processes to undertake such investigations. Replicating this type of expertise, systems and processes within the national registration and accreditation scheme would add unnecessary costs to the scheme. If such agencies are used for serious matters only, unnecessary costs should be avoided.

Involvement of professional/technical expertise

Notifications cover a great diversity of matters and breadth of practice even within professional groups. It is critical that the legislation provides sufficient flexibility for panel members to be selected on the basis of expertise appropriate to the subject matter of notifications and their knowledge of the relevant legislation, policy and precedents.

The legislation must also provide sufficient flexibility for panel members to be retained for sufficient periods of time. This will promote consistent approaches to hearings and determinations, as well as enhancing expertise in management of matters

Involvement of legal expertise

Involvement of legal practitioners in processes for handling complaints and other matters is vital to ensure legalities are properly addressed – for example writing up decisions with sound legal bases.

In addition a practitioner who is the subject of a notification should be informed of their right to have access to their own legal advice/support. This is particularly so for serious matters. In less serious matters a support person (not representative) is important and this person may or may not have legal qualifications.

Alternative dispute resolution

It is noted that alternative dispute resolution is limited to 'conciliation' through a HCC. Contemporary complaint mechanisms extend beyond 'command and control' or punitive approaches to include facilitative alternative dispute resolution methods such as mediation. There is potential for further integration of advisory and determinative alternative dispute resolution processes such as conciliation, dispute counselling and expert referral into the mechanisms in the national scheme.

1.5 Principles

Proposal 1.5.1: *It is proposed that the provisions of the legislation relating to the management of complaints and matters of conduct, health and performance be framed in a way that:*

- a. provides for a robust system to protect public safety that deals effectively with complaints, conduct, health and performance matters and focuses on prevention and early intervention*
- b. builds on the best aspects of State and Territory schemes, rather than replicating one existing disciplinary scheme*
- c. balances the rights and interests of consumers with those of health practitioners*
- d. is compatible with nationally and internally accepted standards and consistent with Australia's international obligations, and*
- e. reflects the wording and intent of the Intergovernmental Agreement.*

Comment

Physiotherapy supports this proposal.

2. Proposed terminology

2.1.1 Notification – *This term is proposed to be used in legislation instead of 'complaint' to describe a matter referred to a board about a registered practitioner, because it encompasses matters referred from a range of sources, not just from clients or patients of the registrant. It also covers self referrals and referrals from colleagues, employers, Medicare, the Professional Services Review scheme, Department of Immigration and Citizenship (DIAC), etc. The terms 'notification' and 'notifier' also reflect the fact that matters may not always come to the board in the form of a complaint from a consumer.*

If the term 'notification' is adopted, then a definition will be required in the legislation to make clear that it encompasses consumer complaints. Using the term 'notification' for the purposes of legislation does not preclude the Agency and the boards from using every day language in their dealings with consumers, for example, having information on the website for consumers on 'how to make a complaint'.

Comment

Physiotherapy supports this proposal.

Alternative options: *Alternative legislative terms for consideration are 'complaint' and 'complainant', or 'report' and 'reporter'.*

Comment

Physiotherapy does not support these options as the terms may be used to describe different sub-sets or stages within the approaches to managing notifications. For example, there may be reports on progress or outcome of a notification. Notifications may be in the form of self-reports, complaints, etc but should be described as notifications.

2.1.2 Preliminary assessment - *This term is proposed to be used to describe the action taken by a board (or a committee of the board) when a matter comes to its attention, in order to determine how it can be best dealt with, whether via a performance, health or disciplinary process. Note: It is proposed there be flexibility to move between the performance, health and disciplinary streams as the circumstances dictate.*

Comment

Physiotherapy supports this proposal. 'Primary assessment' would be another option for consideration within a risk management context. The introduction to this submission further elaborates on this concept.

Alternative options: *Alternative terms for consideration (used in some Acts) are 'investigation' or 'preliminary investigation'.*

Comment

Physiotherapy does not support the use of these terms. The purpose of a preliminary assessment and the purpose of a preliminary investigation are different. The terms are not synonymous.

2.1.3 Notifications assessment committee – *This term is proposed to be used to describe the committee or committees that may be established by a board under the legislation to make the preliminary assessment of a matter and what course of action is required.*

Comment

Physiotherapy supports this proposal.

This function may not necessarily need to be handled by a committee in all instances. Boards could be empowered to delegate this function to appropriately qualified and experienced staff employed to provide support in either the national or local offices as the outcome of the preliminary assessment would be whether the matter and its consequences was serious – this triage role would not need to be performed by a committee.

Alternative options: *Alternative terms for consideration are 'complaints assessment committee', 'investigations committee'.*

Comment

Physiotherapy does not support the use of these terms. The purpose of a preliminary assessment and the purpose of a complaints assessment or investigation are different. The terms are not synonymous.

2.1.4 Responsible HCC – *This term is proposed to be used to describe a health complaints or health services commissioner or other similar body, established under relevant State or Territory legislation and responsible for, amongst other things, conciliating consumer complaints against health service providers.*

Comment

Physiotherapy supports this proposal but recommends that the responsibilities of the 'Responsible HCC' are clearly defined and include investigations and the wider scope of alternative dispute resolution processes. Clarification of the jurisdiction of the "responsible HCC" under the National Law is required.

2.1.5 Performance management committee – *This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of practitioners whose performance may be unsatisfactory.*

Comment

Physiotherapy supports this proposal if the role of this committee is to oversee the management of practitioners on the basis of referral by the national board. This committee would not have a role in the assessment or investigation of notifications.

2.1.6 Performance assessment – This term is proposed to be used to describe the assessment that a board or a performance management committee may, under legislation, request a practitioner undergo, in order to determine whether the practitioner has sufficient knowledge, skill and judgement to practise in the regulated health profession.

Comment

Physiotherapy supports the use of this term

2.1.7 Performance panel – This term is proposed to be used to describe a panel or panels appointed by a responsible board, to hear and determine a performance (competence) matter.

Comment

Physiotherapy supports this proposal

2.1.8 Health management committee – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of practitioners whose performance may be unsatisfactory.

Comment

Physiotherapy supports this proposal if the role of this committee is to oversee the management of practitioners on the basis of referral by the national board. This committee would not have a role in the assessment or investigation of notifications. It is also not clear whether the reference to unsatisfactory performance is intended – this committee would oversee the management of impaired practitioners who require ongoing management of their health as part of the conditions on practice.

2.1.9 Health assessment – This term is proposed to be used to describe the assessment that a board or health management committee may request a practitioner undergo, in order to determine whether the practitioner's capacity to practise is affected by a physical or mental impairment or habitual misuse of alcohol or other drugs. It may include, but is not limited to an examination by a medical practitioner. Alternatively, it may be a neuropsychological assessment by a registered psychologist, for example, of a practitioner who has suffered a head injury.

Comment

Physiotherapy supports this proposal.

Alternative options: Alternative terms for consideration are 'medical examination' and 'impairment assessment'. The term 'medical examination' is not preferred because it may be perceived as too narrow in scope.

Comment

Physiotherapy does not support this option.

2.1.10 Health panel – This term is proposed to be used to describe a panel appointed by the board (or a health management committee) to conduct a hearing with respect to a practitioner whose capacity to practise may be affected by a physical or mental impairment or habitual misuse of alcohol or other drugs.

Comment

Physiotherapy supports this proposal but recommends that the role of the panel is clarified as one of assessment rather than conducting a hearing. If a disciplinary matter arises in the course of assessing a health issue, the matter can be referred back to the national board and then referred to a conduct or a performance panel for further

assessment and, where necessary, investigation. As outlined in the introduction, management of impaired practitioners should remain separate to investigations and inquiries into conduct and performance matters.

Alternative options: *Alternative terms for consideration (used in some Acts) are ‘impaired registrants panel’, ‘impairment review panel’, ‘health assessment panel’ or ‘personal assessment panel’.*

Comment

Physiotherapy supports the term health assessment panel as it better describes the role of the panel as outlined in the physiotherapy comments in 2.1.10 above

2.1.11 Conduct management committee – *This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of investigations and hearings into the conduct of practitioners who may have engaged in unsatisfactory professional conduct.*

Comment

Physiotherapy recommends the term Professional Conduct Panel to accurately describe the role of the committee.

2.1.12 Conduct investigation – *This term is proposed to be used to describe the investigation that is undertaken by the board or a conduct management committee, in order to determine whether disciplinary action should be taken against the practitioner.*

Comment

Physiotherapy recommends the term Professional conduct investigation. Physiotherapy recommends that all investigations are undertaken by an appropriate external agency on referral by the board or its committees. The board and committees should only undertake assessments and preliminary inquiries. In some situations, the national board may employ staff to undertake preliminary information gathering and make a recommendation to the board – the board or committee will make the final determination on the action to be taken.

2.1.13 Conduct panel – *This term is proposed to be used to describe the panel appointed by a board following investigation, to hear allegations that a practitioner has engaged in unsatisfactory professional conduct.*

Comment

Physiotherapy recommends the term Professional Conduct Panel.

2.1.14 Responsible tribunal – *This term is proposed to be used to describe the relevant State or Territory tribunal responsible for hearing and determining matters of serious professional misconduct by registered practitioners, and appeals from certain board decisions.*

Comment

Physiotherapy supports this proposal.

2.1.15 Not of good character – *This term is proposed to be used to describe a registrant who is not considered suitable to practise because of a defect in their character.*

Alternative option: *Alternative terminology for consideration (used in some Acts) is ‘not a fit and proper person’.*

Comment

Physiotherapy recommends that further consideration be given to a more objective term than either 'Not of good character' or 'Not a fit and proper person'. If these terms are retained, there must be objective tests to avoid arbitrary interpretation of these subjective terms.

2.1.16 Impairment – *This term is proposed to be used to describe a physical or mental condition, or habitual misuse of drugs or alcohol which affects the capacity of a practitioner to practise safely and competently.*

Comment

Physiotherapy supports this proposal.

2.1.17 Unsatisfactory professional performance – *This term is proposed to be used to describe departures from an acceptable standard of professional competence or performance that are not so serious as to warrant suspension or cancellation of registration. See Attachment 1 for proposed definition.*

Comment

Physiotherapy supports this proposal.

2.1.18 Unsatisfactory professional conduct – *This term is proposed to be used to describe conduct that is less serious and unlikely to result in suspension or cancellation of a practitioner's registration, and therefore does not require referral to an external tribunal for hearing. See Attachment 1 for proposed definition.*

Comment

Physiotherapy supports this proposal.

Alternative Option: *An alternative term for consideration (used in some Acts) is 'unprofessional conduct'.*

Comment

Physiotherapy does not support this option.

2.1.19 Professional misconduct – *This term is proposed to be used to describe conduct that is so serious that if the allegations are proven, might warrant suspension or cancellation of the practitioner's registration, and therefore requires the board to refer the matter for hearing by the responsible tribunal. See Attachment 1 for proposed definition.*

Comment

Physiotherapy supports this proposal.

3.3 Proposed definitions for what constitutes a departure from professional standards

Proposal 3.3.1: *The definitions of unsatisfactory professional conduct, professional misconduct, and unsatisfactory professional performance contained in Attachment 1 are proposed for inclusion in the legislation.*

Comment

Physiotherapy supports this proposal.

4.1 Who may make a notification

Proposal 4.1.1: *It is proposed that the legislation provide for any person (including an organisation) to make a notification to a board, rather than listing in legislation the particular persons or classes of person who may make a notification.*

Comment

Physiotherapy supports the principle of this proposal and seeks clarification whether “any person” includes entities or individuals that do not have a separate legal identity – for example an officer of the physiotherapy department where a registrant practises.

4.2 In what form may a notification be made

Proposal 4.2.1: *It is proposed that the legislation provide that a notification must:*

- *be made in writing*
- *contain the particulars of the allegations*
- *identify the practitioner against whom the notification is made, and*
- *identify the notifier.*

Comment

Physiotherapy supports this proposal. Presumably ‘own motion’ provisions could apply where there was an anonymous notifier that gave sufficient cause for concern.

Proposal 4.2.2: *It is proposed that the legislation provide a role for the responsible board to ensure that a person who wishes to make a notification is given reasonable assistance to do so.*

This would allow assistance to be provided to a person who is not able, on their own, to put their complaint in writing, or who needs assistance to clarify the nature of their complaint (for example, persons with a disability or from a non-English speaking background).

Comment

Physiotherapy supports this proposal.

4.3 What sort of matter may be the subject of a notification

Proposal 4.3.1: *It is proposed that the legislation set out the grounds on which a notification may be made about a registered health practitioner, and that these include an allegation that:*

- *the person’s registration was improperly obtained, or*
- *the registrant’s capacity to practise is affected because of:*
 - *physical or mental impairment, or*
 - *habitual misuse of alcohol or other drugs, or*
- *the registrant lacks the competence to practice because of insufficient knowledge and skill, including communication skills (such as competency in the English language), or*
- *the registrant has engaged in unsatisfactory professional conduct or professional misconduct (however termed), or*
- *the registrant is not of good character.*

Comment

Physiotherapy supports this proposal.

Proposal 4.3.2: *It is proposed that the legislation provide for a notification to be made (and accepted by the board and acted upon) in relation to a practitioner who was registered at the time of the conduct in question but has since ceased to be registered under this Act or a previous enactment.*

Comment

Physiotherapy supports this proposal and notes that this is an important provision.

4.4 Mandatory reporting obligations

Options for mandatory reporting

Option 1a: All registrants – limited obligations (treating relationships)

Under this option, the legislation would include provisions that require a registered health practitioner to notify the responsible board where they are in a treating relationship with a registrant from any of the regulated professions whom they reasonably believe to be placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Comment

Physiotherapy does not support this option as it may result in an even greater risk to the public as an impaired health practitioner may not seek necessary treatment for fear of being reported when such treatment would manage the impairment and prevent harm to the public.

Option 1b: All registrants – extended obligations

Under this option, the legislation would include provisions that require, from any of the regulated health professions, a registered health practitioner to notify the responsible board of a registrant whom they reasonably believe is placing the public at risk in their practice:

- due to a physical or mental impairment or health condition, or*
- by practising while intoxicated by drugs or alcohol, or*
- by practising in a manner that constitutes a gross or flagrant departure from accepted professional standards, or*
- by engaging in sexual misconduct in connection with their practice.*

Comment

Physiotherapy supports the intent of this option but recommends that there are clear tests of a “reasonable belief that the public is at risk” to avoid unnecessary notifications. A significant deterioration in the practitioner’s capacity to exercise care, judgement and apply skills at the required level due to impairment, drugs or alcohol, sexual misconduct or disregard for accepted standards should be reported to the Board. Guidance should be provided to the professions and the community on a threshold of “significant deterioration” for each of the areas mentioned.

Option 2a: Employers – limited obligations (impairment)

Under this option, the legislation would include provisions that require a registered health practitioner’s employer to notify the responsible board where they reasonably believe that the registrant’s practice is placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Comment

Physiotherapy supports this option with the same recommendations as Option 1b. An employee must also be able to notify where they reasonably believe that the employer's acts are placing the public at risk due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Option 2b: Employers – extended obligations

Under this option, the legislation would include provisions that require an employer to notify the responsible board of a registrant whose conduct may constitute unsatisfactory professional conduct or professional misconduct.

Registrants would only be expected to report major departures from professional standards where it is within their competence to make such a judgement.

Interested parties are invited to advise of their views with respect to the options for imposing mandatory reporting obligations.

Comment

Physiotherapy does not support this option.

Student registrants and mandatory reporting

Interested parties are invited to advise on whether registered practitioners and/or educational institutions should be required to report registered students to their respective boards, and if so, for what types of matters. Advice is also sought on whether any reporting obligations should be placed on student registrants.

Comment

Physiotherapy supports a requirement for self disclosure of impairment in addition to a requirement for the educational institution to report impairment. Whilst self-reporting of impairment is to be encouraged, the Physiotherapy Registration Board of South Australia has found it important that the educational institution has the capacity to report student registrants. In some circumstances this has allowed the Board to identify issues where students have not had sufficient insight for self-reporting. Physiotherapy suggests that student registrants should also be reported for fraudulent activity in relation to examinations as well as the acquisition of qualifications and registration.

4.5 Protection for notifiers and registrants

Proposal 4.5.1: *It is proposed that the legislation provide that a person making a notification is not liable for defamation because of the notification, and the making of a notification does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy. It is proposed that this protection extend to any person who, in good faith, provided the notifier with any information on the basis of which the notification was made, or was otherwise concerned with the making of the notification.*

Comment

Physiotherapy supports this proposal with amendment to the wording on the second line of the proposal to read “the making of a notification in good faith does not constitute a ground for civil proceedings.....”.

4.6 Own motion powers

Proposal 4.6.1: *It is proposed that a board have the power to initiate an investigation into a matter on its own motion, without a notification.*

Comment

Physiotherapy supports this proposal.

4.7 Immediate suspension powers

Proposal 4.7.1: *It is proposed that the legislation include provisions that empower a responsible board or a notifications assessment committee to immediately suspend the registration of a practitioner for a period of up to three months, and to impose a second or subsequent period if it considers the registrant's continued practice poses a significant risk to public health and safety and the proceedings have not yet been finalised.*

Comment

Physiotherapy supports this proposal. There is a need for the Board to have this power to address situations where the risk to the public is not only significant but is imminent or present.

Alternative options: *Alternative options for the length of time a board may immediately suspend a practitioner pending completion of an investigation and/or disciplinary process are:*

- *six months*
- *12 months, or*
- *specify no term at all and leave it to the board's discretion.*

Comment

Physiotherapy does not support this option.

Proposal 4.7.2: *It is proposed that a practitioner whose registration has been suspended pending completion of an investigation and/or disciplinary process have the right to seek a review of this decision by the responsible State or Territory tribunal. However the suspension would continue to apply while the matter is being heard by the tribunal.*

Comment

Physiotherapy supports this proposal.

Proposal 4.7.3: *It is proposed that the legislation include provisions that empower a responsible board (or a notifications assessment committee) to accept an undertaking from a practitioner as an alternative to immediate suspension of the practitioner's registration. Details of any undertaking would be entered on the public register against the practitioner's name.*

Comment

Physiotherapy supports the proposal to include provisions that empower a responsible board (or a notifications assessment committee) to accept an undertaking from a practitioner as an alternative to immediate suspension of the practitioner's registration. However, further clarification is required with respect to the publication of any undertaking. Physiotherapy recommends that the fact there is an undertaking is entered on the public register but that publication of the details of the undertaking would be at the discretion of the national board and only where it was in the public interest for such details to be on the public register.

5. Preliminary assessment of notifications

Comment

Section 5 sets out the assessment of notifications and at this point makes no reference to the option of taking immediate action to suspend or apply conditions where there is an immediate and pressing danger to the public or practitioner. It is acknowledged that this option is reflected elsewhere in the consultation material but this important step should not be omitted from the framework at the appropriate points.

5.1 Powers following receipt of a notification

Proposal 5.1.1: *It is proposed that the legislation provide for boards to receive a notification and determine whether the notification is within its jurisdiction to deal with and if so, what action should be taken.*

The details of how these decisions are proposed to be made under the legislation are set out below.

Comment

Physiotherapy supports this proposal.

5.2 Grounds for a board to refuse to deal with a notification

Proposal 5.2.1: *It is proposed that the legislation provide for boards to decide not to investigate a notification on the following grounds:*

- the board determines the notification to be frivolous, vexatious, misconceived or lacking in substance, or*
- given the amount of time that has elapsed since the matter arose, it is not practicable for the board to investigate or otherwise deal with the matter, or*
- the board determines the notification does not warrant investigation, or*
- the health practitioner is not or is no longer registered by the board and it is not in the public interest to pursue the matter.*

Comment

Physiotherapy supports dot points 1 – 3 of this proposal. Physiotherapy recommends that dot point 4 is amended to “it is not in the public interest to pursue the matter”. Physiotherapy does not consider that current registration status should be a reason not to investigate and recommends that an additional dot point is added specifying ‘lack of jurisdiction to handle the matter’ to cover situations where an investigation is not pursued because of the registration status.

5.3 Liaison with HCCs

Proposal 5.3.1: *In light of the IGA, it is proposed that both the national registration and accreditation legislation and the State and Territory health complaints legislation set out the nature of the relationship between the national boards and the respective State and Territory HCCs and the obligations and powers of the respective bodies, along the following lines:*

National registration legislation

The national registration legislation would provide that on receipt by a board of a notification that falls within the ambit of an HCC under a State or Territory health complaints Act (that is, complaints from consumers), the responsible board would be required to notify the responsible HCC and give a copy of the notification, as soon as

available to the board at this point to be shared with the responsible HCC.

The legislation would then require the board to consult with the responsible HCC, in order to determine whether or not the notification is to be dealt with by the responsible board (as a notification), or by the commissioner (that is, dealt with as a complaint under the relevant health complaints legislation).

The legislation would empower a responsible board to deal with the matter, if, after consultation with the HCC, the board considers the matter raises questions of possible unsatisfactory professional conduct or professional misconduct. However, the board would be empowered to refer a matter, or part of a matter, to the responsible HCC, if the board and the HCC consider the matter suitable for conciliation.

The legislation would also provide for a board, subsequent to this initial consultation with the HCC, to refer a matter, or part of a matter to the HCC at any time, including following a panel hearing, if conciliation is considered appropriate in the circumstances.

State and Territory health complaints legislation

Under local State and Territory health complaints legislation, complementary provisions would empower an HCC to receive and deal with complaints from consumers that relate to registered health practitioners. The primary role of the HCC in this context would be to assess the complaint, and if appropriate, conduct conciliation or other processes between the complainant and the registered health practitioner, with a view to achieving a conciliated settlement or other resolution of the matter.

An HCC might also continue to carry out any other roles conferred under its legislation, such as to investigate and report to the relevant Health Minister on health system failures.

On receipt by an HCC of a complaint against a registered practitioner (or a person who was a registered health practitioner at the time that the conduct complained of took place), the responsible HCC would be required to notify the responsible board and give it a copy of the complaint as soon as practicable after the HCC has received it. The legislation would provide for all information available to the HCC at this point to be shared with the responsible board.

Following consultation with the responsible board, the HCC would be required to refer the matter to the board if the board considers that the matter raises questions of possible unsatisfactory professional conduct or professional misconduct by the practitioner.

In effect, the legislation would encourage the responsible board and HCC to agree on who is best placed to deal with the matter, but that if there are questions about the professional competence of the practitioner or their capacity or suitability to practise, then the board would keep and deal with the matter, or the HCC would relinquish and refer it. The board would retain powers to refer part of a matter to the HCC for conciliation, while continuing to deal with the professional standards elements.

It is expected that the boards, in consultation with the respective HCCs, would agree a protocol to support these liaison and referral arrangements with the broad parameters set out in the legislation.

In order to give effect to this arrangement, consequential amendments will be required to the respective State and Territory HCC legislation, to complement the provisions in the national legislation.

Comment

Physiotherapy strongly supports the proposal that both the national registration and accreditation legislation and the State and Territory health complaints legislation set out the nature of the relationship between the national boards and the respective State and Territory HCCs and the obligations and powers of the respective bodies. Physiotherapy does not support the proposed separation of obligations and responsibilities that is described. As discussed under the introduction section of this submission, physiotherapy supports the referral of notifications that require investigation to an external agency with appropriate expertise, such as the HCC. Physiotherapy also supports the use of the full scope of alternative dispute resolution methods, not just conciliation.

5.4 Who conducts the preliminary assessment of a notification

Proposal 5.4.1: *It is proposed that the legislation contain powers for a responsible board to establish any number of 'notification assessment committees' to oversee the preliminary assessment of notifications and make decisions on what actions to take. It is proposed that, when duly constituted under the legislation, a notifications assessment committee would be empowered to make all the initial decisions that the responsible board would otherwise be empowered to make, as to how a matter should be dealt with. In order to achieve this, the legislation would require provisions that:*

- a. *empower a responsible board to:*
 - i. *appoint one or a number of notifications assessment committees, and*
 - ii. *appoint persons to sit on a notifications assessment committee, from a list of persons who have been approved by the Ministerial Council*
- b. *allow a notifications assessment committee to regulate its own proceedings, while requiring it to observe the principles of natural justice and procedural fairness, and*
- c. *allow members appointed to notifications assessment committees to be paid the sitting fees and allowances approved the Ministerial Council.*

Comment

Physiotherapy supports the intent of this proposal but recommends that these provisions are not drafted until the purpose of the preliminary assessment stage is further refined. The consultation paper proposes delegation of board powers to deal with notifications to any number of committees established to assess notifications. While this may enable efficient and timely processing of notifications, it may have ramifications in relation to consistency of approach, the authorisation of investigations and thus board expenditure and fees.

Whilst the issues themselves are beyond the scope of the legislative provisions, the following issues require further consultation and consideration before the provisions in relation to this proposal are drafted:

- the need for clear lines of communication with the national board and processes to ensure consistency in the way the committees in different locations handle similar matters;
- the composition of the notifications assessment committee;
- a requirement for the notifications assessment committee to report to the responsible board on a regular basis.

5.5 Powers following preliminary assessment of a notification

Proposal 5.5.1: *It is proposed that, following preliminary assessment of a notification, the board or a notifications assessment committee would be empowered, to take one or a number of the following actions:*

- *decide that the matter is a performance management matter and, where appropriate, refer the matter to a performance management committee or directly seek a performance assessment (performance matters)*
- *decide that the matter is a health management matter and, where appropriate, refer the matter to a health management committee or directly seek a health assessment (impairment matters)*
- *decide that the matter is a conduct management matter and, where appropriate, refer the matter to a conduct management committee or directly authorise investigation (disciplinary matters)*
- *refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)*
- *refer the matter for investigation or prosecution by another body (such as for example, the police or Medicare Australia)*
- *require the practitioner to give an enforceable undertaking to the board, which might include, for example, the placement of conditions on registration*
- *immediately suspend the practitioner's registration pending investigation and hearing*
- *refer the matter, or part of the matter to the responsible HCC for conciliation, and*
- *take no further action.*

Comment

The approach preferred by physiotherapy is detailed in the introduction. Physiotherapy recommends that the primary determination of the preliminary assessment is the seriousness of the matter and its consequences. Assessment of the nature of the matter would be secondary - it is often very difficult, particularly initially, to separate the issues as conduct, health and/or disciplinary.

More importantly there must be provision for the full scope of alternative dispute resolution mechanisms, not only conciliation. As many complaints arise from communication issues, there is a real need to have access to timely, effective and efficient actions through a variety of alternative dispute resolution mechanisms.

Proposal 5.5.2: *It is proposed that the legislation require a board (or committee of the board) to refer a matter to the responsible tribunal for hearing if the board or committee forms the view that:*

- *the practitioner is not of good character, or*
- *the practitioner may have engaged in professional misconduct, or*
- *the practitioner's capacity to practise is affected to such an extent that cancellation of registration may be warranted (health matters).*

Comment

Physiotherapy does not support this proposal. A requirement for the board to refer a matter to the responsible tribunal should be made following investigation by an external agency, not on the basis of a view formed by the board. If practitioner's capacity to practise is affected to such an extent that cancellation of registration may be warranted, it is more appropriate for the responsible board to have the power to cancel the registration of impaired practitioners where there is a present or imminent risk to the public.

Proposal 5.5.3: *It is proposed that the legislation require the responsible board to:*

- *give to the notifier notice of the decision, the reasons for the decision and rights of review (if any), and*
- *give to the practitioner notice of the decision and, in the case of referral to a tribunal or committee of the board, the reasons for the decision.*

Comment

Physiotherapy recommends that the legislation require the responsible board to give the notifier and the practitioner notice of the decision and the reasons for the decision and any rights of review. Such an approach is consistent with natural justice principles.

5.6 Notifiers' rights of review of preliminary assessment decisions

There are two options with respect to review rights for notifiers arising from board or committee decisions at the stage of preliminary assessment:

Option 1: *No right of review of preliminary assessment decisions for notifiers.*

Comment

Physiotherapy supports this option.

Option 2: *A right of review of preliminary assessment decisions for notifiers – along the lines of the model outlined above, that is, a review panel established internal to the board, with or without a level of independent input from, for example, a nominee of the responsible HCC. Reviewable decisions would be the decision to take no further action following preliminary assessment, and the decision to refer a matter to a conduct management committee or performance management committee of the board rather than to an external tribunal for hearing. The notifier would have no right of review with respect to matters being dealt with by the board under the health stream.*

Comment

Physiotherapy does not support this option.

6. Performance matters

6.1 Overview of management of performance related matters

Proposal 6.1.1: *It is proposed that the legislation make provision for boards to deal with practitioners whose performance is unsatisfactory (though not sufficiently serious to amount to professional misconduct or unsatisfactory professional conduct) through a cooperative and educative process, rather than through a disciplinary process. The legislation would include powers for a board:*

- *at the time of annual renewal of a practitioner's registration (in response to data generated through application of continuing competence requirements), or through receipt and investigation of a notification, to request a practitioner undergo a performance assessment, and*
- *to provide guidance and/or direction to the practitioner designed to address any deficits identified in their skills or knowledge, via further education or supervised practice or other matter, which could include conditions on the practitioner's registration.*

Comment

Physiotherapy supports this proposal, particularly the principle of a cooperative and educative approach. However, there may be times when referral to a tribunal is necessary in order to appropriately deal with a matter and the legislation must not proscribe or remove this power for a board when it is necessary.

6.2 Performance management

Proposal 6.2.1: *It is proposed that the role of the board or a performance management committee be to oversee the assessment and management of registrants whose performance may be unsatisfactory. A board or a performance management committee would have the power to appoint an assessor or assessors to undertake a performance assessment of the practitioner. Following completion of the performance assessment and receipt and consideration of the report of the assessor, the board or the committee would decide whether a formal performance panel hearing is required, or what other action is necessary to address the performance issues identified (if any).*

Comment

Physiotherapy supports this proposal to the extent that it is the responsibility of the Board to oversee the assessment and management of a registrant whose performance may be unsatisfactory. The board would have the power to delegate this responsibility to a committee but the board would appoint the assessors (see response to proposal 6.3.1). If an educative approach was initially negotiated and agreed upon but the practitioner did not accept or act in accordance with such an approach, an alternative means such as a formal panel hearing may be required and would be provided by proposal 6.3.3.

Proposal 6.2.2: *It is proposed that a board or a performance management committee have powers, following receipt of a performance assessment report to:*

- *request the practitioner to undertake further education and/or supervised practice*
- *counsel the practitioner*
- *request the practitioner give an undertaking to the board, which might include, for example, the placement of conditions on registration*
- *refer the matter for hearing by a performance panel (performance matters)*
- *refer the matter to be handled as a health management matter (impairment matters)*
- *refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)*
- *refer the matter, or part of the matter to the responsible HCC for conciliation, and*
- *take no further action.*

Comment

Physiotherapy recommends that the board can delegate power for dot points 1 and 2 to a committee but that the powers of dot points 3 – 8 cannot be delegated to the committee but the committee can recommend such outcomes to the board.

6.3 Performance assessments

Proposal 6.3.1: *It is proposed that the legislation would empower a board (or performance management committee of a board) to appoint one or a number of assessors, who are not members of the responsible board (or committee of the board), to conduct a performance assessment of the practitioner, and that the board would pay for the assessment.*

Comment

Physiotherapy recommends that only the national board can appoint assessors – this may be on the basis of recommendations of the performance management committee but the committee itself should not have the power to appoint. Physiotherapy recommends that each board appoints assessors who are placed on a list and who can conduct performance assessments as required.

Proposal 6.3.2: *It is proposed that the legislation would require the performance assessors to provide a report of the assessment to the board or performance management committee, and, within 7 days to the practitioner. The chair or nominee of the board or committee would be required under the legislation to discuss the report with the practitioner, and in the case of an adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to alter the way they practise.*

Comment

Physiotherapy notes that from prior experience a timeframe of 7 days is unlikely to be practicable and that within 21 days may be more appropriate.

Proposal 6.3.3: *It is proposed that the legislation would provide a process for dealing with circumstances where a practitioner:*

- *does not agree to a performance assessment, or*
- *does not abide by an agreement to undergo a performance assessment.*

Comment

Physiotherapy supports this proposal.

6.4 Performance panel hearings

Proposal 6.4.1: *It is proposed that following referral of a matter for consideration as a performance matter, the legislation provide:*

- *for the committee (or the board) to appoint, if it considers necessary, a performance panel, to hear a matter relating to the professional performance of a registrant with that panel to contain no members of the board or committee referring the matter to the panel*
- *that a panel must:*
 - *have at least one registrant member from the same profession as the practitioner*
 - *have at least one member who is not and has never been a registrant in a regulated health profession, and*
 - *have no more than half of the members being registrants from the profession concerned*
- *for notice of the hearing to be issued to the registrant*
- *for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence*
- *for a panel to be empowered to consider, amongst other things the report/s of performance assessment, and*
- *for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if, at any time, the panel identifies a pattern of poor performance sufficiently serious to warrant suspension or cancellation of the practitioner's registration.*

Comment

As previously noted, physiotherapy does not consider a formal hearing by a board appointed panel to be appropriate for performance matters. Physiotherapy supports the performance management committee recommending to the national board that the matter be referred to the responsible tribunal for hearing.

6.5 Decisions available to performance panel following a hearing

Proposal 6.5.1: *It is proposed that, following a hearing, a performance panel be empowered to take the following actions:*

- *require the practitioner to undertake further education and/or supervised practice*
- *counsel the practitioner*
- *require the practitioner to give an undertaking to the board*
- *place conditions on the practitioner's registration*
- *refer the matter to the board or health management committee for health assessment (impairment matters)*
- *refer the matter to the board or conduct management committee for investigation (disciplinary matters)*
- *refer the matter, or part of the matter to the responsible HCC for conciliation*
- *refer the matter an external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, and*
- *take no further action.*

Comment

Physiotherapy supports the listed actions but does not support these following a hearing and recommends that the board/committee uses its existing powers to take the listed actions following recommendations from the Panel.

Proposal 6.5.2: *It is proposed that the legislation provide for a panel to consider reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.*

Comment

Physiotherapy recommends that the performance management panel refers the matter to the responsible board with a recommendation regarding referral of the matter for hearing by the responsible State or Territory tribunal but the panel itself should not have these powers.

Proposal 6.5.3: *It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.*

Comment

Physiotherapy recommends that the legislation require the responsible board (not the panel) to give the notifier and the practitioner notice of the decision and the reasons for the decision and any rights of review.

7. Health or impairment matters**7.1 Overview of management of health related matters**

Proposal 7.1.1: *It is proposed that the legislation make provision for boards to deal flexibly with practitioners who have a health condition, or whose habitual use of alcohol or other drugs, is compromising or may compromise their capacity to practise. Such provisions would enable a board to:*

- *accept a self-referral from a practitioner who is unwell, and enter into an agreement with the practitioner (or their representative if they have arranged for power of attorney) to:*
 - *suspend their registration for an agreed period, or*
 - *limit their practice via the imposition of conditions on their registration, and/or*
 - *accept an undertaking or enter into some other form of agreement*
- *refer the practitioner to a range of support programs designed to assist with resolution of their health issues and successful return to unrestricted practice if possible, and*
- *monitor compliance of the registrant with any agreement reached or conditions placed on registration.*

Comment

Physiotherapy supports this proposal. Physiotherapy recommends the legislation enables an educative and rehabilitative process and a flexible approach to management of health related matters. Such an approach must achieve protection of the public interest through addressing the particular circumstances of the individual practitioner who has a health condition or whose habitual use of alcohol or other drugs, is compromising or may compromise their capacity to practise.

Proposal 7.1.2: *In addition to boards having the powers to conduct health assessments, deal cooperatively and flexibly with impaired registrants (rather than through the disciplinary stream) and monitor their compliance with conditions (if any) on their registration, it is proposed that the legislation provide for boards, at their discretion, to offer health programs for impaired registrants nationally.*

There are two options for funding such programs:

Option 1: *Health programs, if provided for by a board, are funded by the board through a component of all registrants' fees for their respective profession.*

Comment

Physiotherapy supports this option.

Option 2: *Health programs, if provided for by a board, will be funded by the board through charges to the registrants receiving health programs in addition to a component of all registrant fees from the profession.*

Comment

Physiotherapy does not support this option.

7.2 Health management

Proposal 7.2.1: *It is proposed that the role of a board or a health management committee in relation to a health matter be to oversee the assessment and management of registrants whose capacity to practise may be affected by physical or mental impairment, or habitual use of alcohol or other drugs. A board or a health management committee would have the power to appoint an assessor or assessors to undertake a health assessment of the practitioner. Following completion of the health assessment and receipt and consideration of the report of the assessor, the board or the committee*

would decide whether a formal health panel hearing is required, or what other action is necessary to address the health issues identified (if any).

Comment

Physiotherapy supports this proposal if there is sufficient flexibility to enable the board or its committee to use reasonable discretion in exercising the powers available. Such an approach must achieve protection of the public interest through addressing the particular circumstances of the individual practitioner who has a health condition or whose habitual use of alcohol or other drugs, is compromising or may compromise their capacity to practise.

Proposal 7.2.2: *It is proposed that a board or a health management committee have powers, following receipt of a health assessment report, to:*

- *request the practitioner to undertake further education and/or supervised practice*
- *counsel the practitioner*
- *request the practitioner to give an undertaking to the board, which might include, for example, the placement of conditions on registration*
- *refer the matter for hearing by a health panel for hearing (health matters)*
- *refer the matter to be handled as a performance management matter for performance assessment (performance matters)*
- *refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)*
- *refer the matter, or part of the matter to the responsible HCC for conciliation*
- *refer the matter to an external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or*
- *take no further action.*

Comment

Physiotherapy recommends that where there is a health management committee, the committee must refer the matter to the responsible board with a recommendation regarding dot points 3 – 7 but that the committee only has powers in relation to dot points 1 and 2.

7.3 Health assessments

Proposal 7.3.1: *It is proposed that the legislation would empower a board or a health management committee of a board to appoint one or a number of assessors, who are not members of the responsible board or committee and who are agreed upon by the board and the practitioner, to conduct a health assessment. It is proposed that the legislation would require the board to pay for the assessment.*

Comment

Physiotherapy recommends that only the national board can appoint assessors – this may be on the basis of recommendations of the health management committee but the committee itself should not have the power to appoint. Physiotherapy recommends that each board appoints assessors who are placed on a list and who can conduct health assessments as required.

Proposal 7.3.2: *It is proposed that the legislation would require the assessor/s to provide a report of the assessment to the health management committee, and, within seven days to the practitioner. The chair or a nominee of the committee would be required under the legislation to discuss the report with the practitioner, and in the case of an adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to address the matters identified in the report.*

Comment

Physiotherapy supports the proposal but does not consider 7 days to be practicable. As previously noted, a statutory period of within 21 days would be more realistic.

Proposal 7.3.3: It is proposed that the legislation would provide for circumstances where a report of a health assessment contains information of a medical or psychiatric nature which the committee considers, if disclosed to the practitioner, might be prejudicial to their physical or mental health or wellbeing. In such cases, the board or committee would be empowered to decide not to give the report directly to the practitioner, but rather, to give it to a registered practitioner nominated by the health practitioner.

Comment

Physiotherapy recommends that the provisions in relation to this proposal must be carefully worded to avoid unwarranted withholding of information from the practitioner who has been assessed. Physiotherapy suggests that the board may defer to a medical opinion, where through the exercise of therapeutic privilege the Board can be guided as to if and in what circumstances the report might be released to the registered practitioner.

Proposal 7.3.4: *It is proposed that the legislation would provide a process for dealing with circumstances where a practitioner:*

- *does not agree to a health assessment, or*
- *does not abide by an agreement to undergo a health assessment.*

Comment

Physiotherapy supports the intent of this proposal but seeks further detail regarding the process that will be described in the legislation.

In such circumstances, the board or committee would be empowered to refer the matter for hearing by a health panel, or to a tribunal.

7.4 Health panel hearings

Proposal 7.4.1: *It is proposed that following a decision to handle a matter as a health management matter, the legislation provide:*

- *for the board or committee to appoint, if it considers necessary, a panel and refer to it for hearing a matter relating to the capacity of the registrant to practise with that panel to contain no members of the board or committee referring the matter to the panel*
- *that a panel must have:*
 - *at least one registrant member from the same profession as the practitioner*
 - *a member who is a registered medical practitioner with relevant expertise*
 - *at least one member who is not and has never been a registrant in a regulated health profession, and*
 - *have no more than half of the members being registrants from the profession concerned (excluding the registered medical practitioner with relevant expertise in the case of a medical registrant)*
- *for notice of the hearing to be issued to the registrant*
- *for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence*

- for a panel to be empowered to consider a report of the board or health management committee including the results of health assessments, and
- for a panel to be required to refer the matter, at any time, to the responsible tribunal for hearing if the practitioner requests, or if the panel forms the view that the practitioner's capacity to practise is affected to such an extent by physical or mental impairment or habitual use of alcohol or other drugs, that suspension or cancellation of the practitioner's registration may be warranted.

Comment

Physiotherapy supports an approach that is clearly not punitive. As previously noted, physiotherapy recognises that a formal hearing by a board appointed panel may be necessary for certain health management matters and so must be available in the legislation when necessary. Physiotherapy supports the health management committee recommending to the national board that the matter be referred to the responsible tribunal for hearing.

7.5 Decisions available to a health panel following a hearing

Proposal 7.5.1: *It is proposed that, following a hearing, a health panel have the power, to take the following actions:*

- require the practitioner to undertake treatment and/or supervised practice
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter for investigation by an external body, or
- take no further action.

Comment

Physiotherapy recommends that in the event that there is a panel hearing, the panel decision regarding dot points 3 – 9 is referred to the board to act but that the panel itself does not have the power to take action except in relation to dot points 1 and 2.

Proposal 7.5.2: *It is proposed that the legislation provide for a panel to consider reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.*

Comment

Physiotherapy recommends that in the event that where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, the panel makes a recommendation to the board to refer the matter to the responsible tribunal.

Proposal 7.5.3: *It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.*

Comment

Physiotherapy recommends that the legislation require the responsible board (not the panel) to give the notifier and the practitioner notice of the decision and the reasons for the decision and any rights of review. Such an approach is consistent with natural justice principles

8. Conduct matters**8.1 Overview of management of conduct related matters**

Proposal 8.1.1: *It is proposed that the legislation make provision for boards to accept a notification that a practitioner has engaged in unsatisfactory professional conduct, to refer the matter to a conduct management committee for investigation, and if necessary, conduct hearing into the matter.*

Where the conduct is so serious that it might constitute professional misconduct, the board would be required to refer the matter for a tribunal hearing.

Comment

Physiotherapy recommends that all investigations are conducted by an agency that is separate to the national board and/or its committees and panels. Under the model described in the introduction to this submission, serious matters would be referred to the external agency at the preliminary assessment stage.

8.2 Conduct management

Proposal 8.2.1: *It is proposed that the role of the board or a conduct management committee in relation to a conduct matter be to oversee the investigation of a registrant who may have engaged in unsatisfactory professional conduct. A board or a conduct management committee would have the power to appoint an investigator to undertake an investigation. Following completion of the investigation and receipt and consideration of the report of the investigator, the board or the committee would decide whether a panel hearing is required, or what other action is necessary to address the conduct issues identified.*

Comment

Physiotherapy recommends that all investigations are conducted by an agency that is separate to the national board and/or its committees and panels.

Proposal 8.2.2: *It is proposed that a board or a conduct management committee have powers, following receipt of a report of an investigation, to:*

- *request the practitioner to undertake further education and/or supervised practice or alter the way they practise*
- *counsel the practitioner*
- *refer the matter to be handled as a performance management matter (performance matters)*
- *refer the matter to be handled as a health management matter (impairment matters)*
- *refer the matter for hearing by a conduct panel (unsatisfactory professional conduct matters)*
- *refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)*
- *refer the matter, or part of the matter to the responsible HCC for conciliation*
- *refer the matter to another external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or*
- *take no further action.*

Comment

Physiotherapy recommends that the conduct management committee powers in relation to dot points 3 – 9 are limited to referring the matter with a recommendation to the board to act but that the panel itself only has the power to take action in relation to dot points 1 and 2.

8.3 Investigations**Appointment of investigators**

Proposal 8.3.1: *It is proposed that the legislation empower a board or notifications committee to appoint, in writing, a person or persons to investigate a notification.*

Comment

As previously indicated, it is strongly recommended that investigations are conducted by an agency that is separate to the Board and understands the environment in which health professionals operate and the relevant legislation. The state or territory HCC would be an appropriate body if the resources and framework could be established to support this function. It is noted in the paper that the IGA calls for a structural separation of the assessment, investigation, prosecution and determination of serious misconduct matters. It is suggested that the body providing the investigative services for Tribunal matters could also assist with other matters such as where an investigation is required. Physiotherapy recommends that the legislation provide for nationally consistent legislation for HCCs and other relevant agencies so that cross-jurisdictional inconsistencies and differences are removed.

Proposal 8.3.2: *As outlined above, it is proposed that the legislation empower a responsible board to initiate an investigation without a notification, and to proceed to refer a matter to a conduct management committee or tribunal without an investigation.*

Comment

Physiotherapy supports this proposal but recommends that the legislation qualify the conditions required for a board to act in this way to ensure such investigations are undertaken – if the board bears the cost of the investigations there may be a disincentive to initiate one unless required in the legislation. Physiotherapy suggests that the conditions require the board to initiate an investigation where there is evidence from a reliable source that there is a present or imminent risk to the public. Natural justice principles must apply.

Notice of an investigation

Proposal 8.3.3: *It is proposed that the legislation require the board to give notice of an investigation to the registrant, and that the notice must:*

- *be in writing*
- *be provided to the practitioner within 28 days of the decision to conduct an investigation, and*
- *advise the practitioner of the nature of the matter being investigated.*

Comment

Physiotherapy supports this proposal.

Proposal 8.3.4: *It is proposed that the legislation empower the board or an investigator to decide not to give notice to the practitioner of the investigation if such notice might prejudice an investigation or place at risk a person's health and safety, or place a person at risk of intimidation or harassment.*

Comment

Physiotherapy supports this proposal but recommends that the legislation clearly prescribes when a board is empowered to act in this way to prevent inadvertent abuse/misuse of power. Physiotherapy suggests that such a decision should be on the basis of medical opinion in the case of risk to a person's health and safety, and legal opinion where there is a risk of intimidation or harassment or prejudice to an investigation.

Timelines for the conduct of investigations

Proposal 8.3.5: *It is proposed that the legislation require an investigation to be conducted as quickly as practicable having regard to the nature of the matter, and that at least the following timelines be included in legislation:*

- *provide notice of a decision on the outcome of an investigation (with reasons if required) to the registrant and notifier – within 14 days of the decision*
- *provide progress reports to notifier and registrant – at least three monthly, and*
- *require the responsible board to keep both the notifier and the registrant informed of progress with the investigation, at a minimum of three monthly intervals.*

Comment

Physiotherapy supports the inclusion of timelines in the legislation however there needs to be the capacity to deal with periods such as Easter and Christmas, or extenuating circumstances that delay the notice on the outcome of an investigation. It may be more realistic to state within 28 days or to provide the capacity to extend the period in certain situations.

8.4 Powers of investigators – search, entry, seizure

Proposal 8.4.1: *It is proposed that the legislation provide for investigators to exercise the following powers:*

- *by written notice, require a person to:*
 - *provide information, and*
 - *attend the investigator to answer questions or produce documents*
- *enter the premises of a registrant's practice (unless it is also their private residence), during ordinary business hours and, with the consent of the occupier, inspect and search premises generally and request the production of documents or other items and the provision of information, and*
- *obtain a warrant to enter and search premises and seize evidence (see below).*

Comment

Physiotherapy supports the intent of this proposal and notes that the second item under first dot point should read '*meet with the investigator to answer questions or produce documents*' rather than '*attend the investigator to answer questions or produce documents*'. The powers should be the same as investigators in other regulatory regimes such as taxation and securities and investments.

Proposal 8.4.2: *It is proposed that the legislation empower investigators or other persons authorised by a board to obtain and execute a warrant to enter and search premises and seize documents or other items. The legislation would provide for, amongst other things:*

- *in general terms, where a warrant may be obtained (via local State or Territory Magistrates Court or similar authority)*
- *what a warrant may authorise (subject to the applicable State/Territory law), that is, powers to:*
 - *enter premises*
 - *require information including name and address*
 - *require production of documents and other items, and*
 - *seize evidence*
- *how seized evidence is to be handled, for example, receipts, storage, damage, compensation, etc*
- *safeguards on the exercise of enforcement powers*
- *evidentiary requirements, and*
- *various offences for failure to comply, obstruction of an authorised inspector, etc.*

Comment

The provisions should be the same as investigators in other regulatory regimes such as taxation and securities and investments.

8.5 Conduct panel hearings

Proposal 8.5.1: *It is proposed that following referral of a matter to a conduct management committee, the legislation provide:*

- *for the board or committee to appoint, if it considers necessary, a panel and refer to it for hearing a matter relating to the professional conduct of the registrant with that panel to contain no members of the board or committee referring the matter to the panel*
- *that a panel must:*
 - *have at least one registrant member from the same profession as the practitioner*
 - *have at least one member who is not and has never been a registrant in a regulated health profession, and*
 - *have no more than half of the members being registrants from the profession concerned*
- *for notice of the hearing to be issued to the registrant*
- *for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence*
- *for a panel to be empowered to consider the report of the conduct management committee including the results of any investigations, and*
- *for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if the panel forms the view that the practitioner's capacity to practise is affected to such an extent by physical or mental impairment or habitual use of alcohol or other drugs, that suspension or cancellation of the practitioner's registration may be warranted.*

Comment

Physiotherapy supports this proposal

8.6 Decisions available to a conduct panel following a hearing

Proposal 8.6.1: *It is proposed that, following a hearing, a panel have the power to take the following actions:*

- require the practitioner to undertake further education, supervised practice or alter the way they practise
- caution the practitioner
- reprimand the practitioner
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a health management matter (health matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter for investigation by an external body (for example, the police, Medicare, or a State or Territory drugs and poisons unit), or
- take no further action.

Comment

Physiotherapy recommends that the conduct panel powers in relation to dot points 5 – 11 are limited to referring the matter with a recommendation to the board to act but that the panel itself only has the power to take action in relation to dot points 1 - 4.

Proposal 8.6.2: *It is proposed that the legislation provide for a panel to consider, amongst other things, reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.*

Comment

Physiotherapy recommends that in the event that where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, the panel makes a recommendation to the board to refer the matter to the responsible tribunal

Proposal 8.6.3: *It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.*

Comment

Physiotherapy recommends that the legislation require the responsible board (not the panel) to give the notifier and the practitioner notice of the decision and the reasons for the decision and any rights of review. Such an approach is consistent with natural justice principles

9. Ensuring accountability, transparency and procedural fairness

9.1 Achieving separation of functions

Proposal 9.1.1: *The following options are suggested relating to the procedural fairness and public interest mechanisms in the scheme:*

Option 1: *No additional provisions are required beyond the review, appeal and other mechanisms already described in this paper.*

Comment

This option is not supported by physiotherapy. As discussed in the introduction, physiotherapy recommends that the mechanisms described in the paper are revised.

Option 2: Provisions that establish a statutory office, possibly within the national agency, to assess prosecution decisions, along the lines of the ‘director of proceedings’ in the Health Care Complaints Act 1993 (NSW) and Health and Disability Commissioner Act 1984 (NZ). The director of proceedings not the boards would make the decisions on referrals to tribunals.

Comment

Physiotherapy supports this option and notes that this would apply to several of the previous proposals. Such an office may also receive the notifications assessed as serious at the preliminary assessment stage described in the introduction to this submission.

Option 3: Provisions that establish a mechanism for automatic review of all board decisions on conduct matters in relation to whether or not they should be brought to a tribunal, with processes for resolution of disagreement between a board and the reviewer.

Comment

Physiotherapy does not support this option as it may not be necessary for all board decisions to be reviewed. Provisions that mandate an automatic review are not necessary to the scheme.

Proposal 9.1.2: It is proposed that the legislation establish public interest criteria on which any decision to prosecute a matter before a State or Territory tribunal should be based.

Relevant criteria could for example include:

- the protection of the health and safety of the public
- the seriousness of the alleged conduct, and
- the likelihood of proving the alleged conduct.

Comment

Physiotherapy supports the intent of this proposal but recommends that the criteria are incorporated into the preliminary assessment stage described in the introduction to this submission, as well as at any other time that a decision is being made to refer a matter to a responsible tribunal.

Physiotherapy recommends that the public interest criteria on which any decision to refer to a tribunal is made should also include the risk of recurrence or recidivism and the registrant’s current standards of practice including the rehabilitative steps that may have been taken since the conduct occurred.

9.2 Matters involving registrants from different professions

Proposal 9.2.1: It is proposed that the legislation include provisions that allow boards to deal jointly with matters that relate to two or more practitioners who are registered by different boards. This would allow boards to conduct joint investigations of several practitioners arising from a single notification, and any other registrants identified during the investigation as involved in the same events that led to the notification.

Comment

Physiotherapy supports this proposal

9.3 Legal representation for registrants at panel hearings

There are a number of options with respect to legal representation:

Option 1: *The legislation is silent on the matter of a registrant's right to legal representation at a board hearing.*

Comment

Physiotherapy does not support this option and notes this options refers to a board hearing.

Option 2: *The legislation specifies that the registrant has the right to be legally represented at a board hearing.*

Comment

Physiotherapy supports this option but recommends that the legislation specifies that the registrant has the right to legal representation, and can have a person accompany them, who may or may not be an Australian legal practitioner, and that person may speak on their behalf with the leave of the panel or the board

Option 3a: *The legislation specifies that the registrant has no right to be legally represented at a board hearing.*

Comment

Physiotherapy strongly opposes this option.

Option 3b: *The legislation specifies that the registrant has no right to legal representation except with the leave of the panel.*

Comment

Physiotherapy does not support this option.

Option 4a: *The legislation specifies that the registrant has no right to legal representation, but can have a person who is not an Australian legal practitioner accompany them and, with the leave of the panel, that person may speak on their behalf.*

Comment

Physiotherapy does not support this option

Option 4b: *The legislation specifies that the registrant has no right to legal representation, but can have a person accompany them, who may or may not be an Australian legal practitioner, and that person may speak on their behalf with the leave of the panel. **Option 4b** is preferred.*

Comment

Physiotherapy does not support this option as the registrant should have the right to legal representation and the right to have a person accompany them. To deny a registrant the right to legal representation is counterproductive to procedural fairness when the board or panel will most likely include a legal practitioner. Appearances before a panel hearing, even though informal, could be very intimidating and overwhelming for the registrant.

9.4 Confidentiality of panel hearings

Proposal 9.4.1: *It is proposed that the legislation make provision for the proceedings of a panel hearing to be closed to the public, and for it to be an offence for any person to publish the name of a notifier, witness or the practitioner concerned. With respect to conduct hearings, it is proposed that the legislation enable a notifier, with the leave of the panel, to make a submission to the panel if the notifier is not called as a witness.*

Comment

Physiotherapy supports this proposal

9.5 Status of notifiers at panel hearings

Proposal 9.5.1: *It is proposed that the legislation provide for the notifier to be present at a hearing to give evidence (if required by the board), and to speak with the leave of the panel. It is not proposed that the notifier would have a right under legislation to seek a review of a decision of a hearing panel.*

Comment

Physiotherapy supports this proposal

9.6 Review rights for registrants

Proposal 9.6.1: *It is proposed that the legislation provide for a practitioner to seek a review of a hearing panel decision, to the responsible State or Territory tribunal, and for this to be a review of the matter on the merits.*

Comment

Physiotherapy supports this proposal

9.7 Notice of decisions of hearing panels

Proposal 9.7.1: *It is proposed that the legislation require a responsible board to give notice of its decision in relation to a conduct hearing to the registrant, their employer and the notifier, and provide discretion for the board to provide notice to a range of other persons or organisations including an equivalent registration authority overseas, a government agency or regulatory body.*

Comment

Physiotherapy supports this proposal

9.8 Role of Commonwealth, State and Territory ombudsmen

There are two options for dealing with the scope and application of ombudsman legislation with respect to the national registration scheme:

Option 1: *Apply the Commonwealth Ombudsman Act 1976 to the national registration scheme.*

Comment

Physiotherapy supports this option

Option 2: *Apply existing State and Territory Ombudsman legislation to administrative decisions made by the boards and National Agency. This would require clarity about which Ombudsman Act would apply in individual circumstances, and if not carefully handled, might provide multiple avenues of review for an individual matter.*

Comment

Physiotherapy does not support this option

10. Tribunal hearings

10.2 Criteria for State and Territory tribunals

Proposal 10.2.1: *It is proposed that the national legislation (as opposed to legislation in each State and Territory) make provision for the following:*

- *the definition of a ‘responsible tribunal’*
- *the grounds on which a responsible board may refer a matter to the responsible tribunal*
- *the grounds on which a responsible board must refer a matter to the responsible tribunal (for example professional misconduct matters)*
- *what matters a tribunal may hear in its review jurisdiction*
- *what matters a tribunal may hear in its original jurisdiction*
- *who may make an application with respect to the tribunal’s original and review jurisdictions, and*
- *which bodies must be notified of a decision of the tribunal, for example, the registrant, the notifier, the responsible HCC (where relevant), any employer, Medicare, the Professional Services Review Scheme, etc.*

Comment

Physiotherapy supports this proposal

Proposal 10.2.2: *It is proposed that with respect to other matters, the respective State and Territory legislation specify the detailed procedure of the tribunal, such as application processes, powers to close hearings and suppression of the identity of persons appearing, etc. It is proposed that State and Territory legislation make provision for at least the following:*

- *hearings to be open to the public but with power for the panel to close the hearing under certain circumstances*
- *powers for a hearing panel to suppress the identity of any party or witness to the proceedings, and*
- *decisions and reasons to be published.*

Comment

Physiotherapy supports this proposal

10.3 Original jurisdiction of tribunal

Proposal 10.3.1: *It is proposed that with respect to the original jurisdiction of a responsible tribunal, the national legislation specify that the responsible board or the practitioner may make application to the responsible tribunal for a hearing under its original jurisdiction.*

Such provisions should cover circumstances where the board or panel, at any time during an investigation or panel hearing, is required to, or considers it necessary to refer a matter to the tribunal for hearing – where the board forms the view that the practitioner has engaged or may have engaged in professional misconduct, or where suspension or cancellation of registration may be required. It may also cover fraudulent registration and matters which call into question the practitioner’s character.

Alternative option: *The legislation which confers original jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.*

Comment

Physiotherapy supports the alternative option. Physiotherapy recommends that the composition of the tribunal should have the option to include at least two practitioner members and a lay person and a legal practitioner. In the context of these hearings, legal questions will arise and it is appropriate to have access to a legal practitioner to deal with these issues and procedural issues.

The Tribunal should publish detailed reasons for its decision in a publicly accessible fashion. There is strong public interest in doing so. Publication of reasons will also send a message to the profession and the community about standards of conduct in the profession.

10.4 Review jurisdiction of tribunal

Proposal 10.4.1: *It is proposed that with respect to the tribunal's review jurisdiction, the national legislation specify that a practitioner who is subject to the decision or the responsible board (or a panel or committee of the board) be empowered to make application for a review of a decision.*

Alternative option: *The legislation which confers review jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.*

Comment

Physiotherapy supports the alternative option.

Proposal 10.4.2: *It is proposed that with respect to the exercise by the responsible tribunal of its review jurisdiction, the national legislation specify the following as reviewable decisions:*

- *refusal to register (including failure to make a registration decision within the specified period, for example three months)*
- *refusal to endorse registration*
- *refusal to renew registration*
- *refusal to renew an endorsement on registration*
- *imposition of conditions on a practitioner's registration or endorsement of registration*
- *refusal to lift or vary conditions on a registration or endorsement of registration*
- *cancellation of registration because the practitioner is no longer eligible for registration*
- *a finding or determination by a performance panel, health panel or conduct panel (see [sections 6.5, 7.5, and 8.6](#) of this paper)*
- *a decision to suspend the practitioner's registration if the responsible board has not instituted an investigation in relation to the practitioner within a reasonable period, and*
- *a decision to continue a suspension beyond the period specified under the Act (see [section 4.7](#) of this paper on immediate suspension powers).*

Comment

Physiotherapy supports this proposal.

10.5 Findings and determinations of a tribunal

Original jurisdiction

Proposal 10.5.1: *With respect to matters referred by the board for tribunal hearing, or where the practitioner has requested the matter be referred, it is proposed that the responsible tribunal would be empowered to make any of the following findings:*

- *the practitioner is not of good character*
- *the practitioner's registration was obtained by fraud*
- *the practitioner has engaged in professional misconduct*
- *the practitioner's performance has been unsatisfactory, or*
- *the practitioner's capacity to practise is affected by habitual misuse of alcohol or other drugs or physical or mental impairment.*

Comment

Physiotherapy supports dot points 2 – 4 but as previously noted, recommends objective tests for dot point 1 are defined in the legislation.

Proposal 10.5.2: *It is proposed that the responsible board would be empowered to make one or more of the following determinations in such matters:*

- *require the practitioner undergo counselling*
- *caution the practitioner*
- *reprimand the practitioner*
- *require the practitioner to undertake and complete specified further education or training within a specified period*
- *impose a fine on the practitioner recoverable by the board (with the maximum fine available to be set by legislation, for example, \$50,000)*
- *suspend the registration of the practitioner for a specified period*
- *cancel the registration of the practitioner*
- *order the practitioner undertake a specified period of supervised practice*
- *order the practitioner do or refrain from doing something in connection with their practice*
- *order the practitioner manage their practice in a specified way or subject to specified condition*
- *order the practitioner to report on their practice to a specified person at specific intervals*
- *order the practitioner not to employ or engage or recommend a specified person or class of persons*
- *disqualify the practitioner from applying for registration under the Act for a specified period, if their registration has been cancelled by the tribunal or by an equivalent competent registration authority in another country*
- *make a prohibition order preventing a practitioner whose registration has been cancelled or suspended from continuing to practise or provide health services, or using specified professional titles or operating a business that provides health services, and/or*
- *publish the findings of and determinations or orders made with respect to matters heard within the limits of privacy considerations.*

Comment

Physiotherapy supports this proposal

Review jurisdiction – registration matters

Proposal 10.5.3: *With respect to registration decisions, it is proposed that the responsible tribunal would have the power to uphold or confirm the board’s original decision, or to substitute its own decision from the range of decisions that were available to the board (see Registration consultation paper).*

Comment

Physiotherapy supports this proposal but recommends that the tribunal also has the power to refer the matter back to the board for reconsideration where the tribunal determines that the conditions imposed by the board were unjust, onerous or inadequate, and/or the board erred in making its findings.

Review jurisdiction – performance, health or conduct matters

Proposal 10.5.4: *With respect to performance, health, or conduct panel decisions referred for review, it is proposed that the responsible tribunal would have the power to either confirm the original decision of the panel, or substitute its own finding and/or determination from the list that were available to the panel. The tribunal would be empowered to find any of the following:*

- *the practitioner is not of good character*
- *the practitioner’s registration was obtained by fraud*
- *the practitioner has engaged in professional misconduct*
- *the practitioner’s performance has been unsatisfactory*
- *the practitioner’s capacity to practise is affected by drug or alcohol dependency or physical or mental impairment*
- *the conditions imposed by the board were unjust, onerous or inadequate, and/or*
- *the board erred in making its findings*

and on this basis make an order to suspend or cancel the practitioner’s registration or vary or place conditions on a practitioner’s registration, in addition to any of the determinations listed above under its original jurisdiction.

Comment

Physiotherapy supports this proposal but recommends that the tribunal also has the power to refer the matter back to the board for reconsideration where the tribunal determines that the conditions imposed by the board were unjust, onerous or inadequate, and/or the board erred in making its findings.

Proposal 10.5.5: *It is proposed that the tribunal would have powers to make an order for costs against any party to the proceedings.*

Comment

Physiotherapy supports this proposal

10.6 Constitution and appointment of tribunal hearing panels

Proposal 10.6.1: *It is proposed that the legislation make provision for a tribunal hearing panel to be constituted with a minimum of three members, at least two must be from same profession as the practitioner who is a party to the proceedings.*

Comment

Physiotherapy supports the intent of this provision but recommends that a consumer representative and a legal practitioner are included on the tribunal in addition to at least two members from the same profession as the practitioner who is a party to the

proceedings. The legal practitioner must be a person who is able to ensure procedural and legal requirements are observed.

10.7 Procedure for conduct of tribunal hearings

Proposal 10.7.1: *It is proposed that State and Territory legislation concerning the responsible tribunal would also make provision for the procedure of the tribunal, in accordance with national criteria agreed by AHMC (Clause 2.2 Attachment A of the IGA), and taking into account existing tribunal arrangements (if any). Matters to be addressed include:*

- *appointment of members, presiding members, acting members*
- *application processes for appointment, remuneration, disclosure of interests, etc*
- *application fees and processes for hearing of matters, including notification of hearings, withdrawal of matters*
- *administration of the tribunal and its health professions list*
- *compulsory conferences, mediations and settlement*
- *service of documents*
- *use of experts*
- *conduct of hearings*
- *taking of evidence and witness summons*
- *reasons for decisions*
- *powers to award costs*
- *orders, injunctions, declarations, enforcement of orders*
- *offences, such as non-compliance with order, failure to comply with summons, failure to give evidence, false or misleading information, contempt, etc*
- *immunities, and*
- *appeals from tribunal decisions.*

Comment

Physiotherapy supports this proposal.

10.8 Status of notifiers

Proposal 10.8.1: *It is proposed that the parties to a tribunal hearing would be the responsible board, and the registrant. It is not intended that a notifier have a right to make application for a hearing with respect to a registration or disciplinary decision of a board, or with respect to allegations of professional misconduct against a practitioner. The notifier may be called as a witness in the board's case before the tribunal.*

Comment

Physiotherapy supports this proposal.

10.9 Powers in relation to deregistered practitioners

Proposal 10.9.1: *In accordance with the proposed determinations of a responsible tribunal listed in [section 10.5](#) above, it is proposed that a responsible tribunal would have the power to issue a prohibition order at the time that it cancels the registration of a practitioner. A prohibition order might prevent the practitioner from providing health services or owning or operating a business that provides health services, or might attach conditions to their practice. Breach of a prohibition order would be an offence under the legislation, with breaches prosecuted through the courts in the relevant State or Territory.*

Comment

Physiotherapy supports this proposal.

10.10 Review rights from tribunal decisions

Proposal 10.10.1: *It is proposed that a party to a proceeding before a responsible tribunal would have the right to appeal a decision of the tribunal on points of law only. It is proposed that the appeal would be to the responsible State or Territory Supreme Court (or other body as determined by each jurisdiction).*

Comment

Physiotherapy supports this proposal.

10.11 Reasons for decisions

Proposal 10.11.1: *It is proposed that the State and Territory legislation require the responsible tribunal to publish reasons for its decisions.*

Comment

Physiotherapy supports this proposal and assumes that mechanisms will be put in place for this to be gazetted nationally.

10.12 Notice of decisions

Proposal 10.12.1: *It is proposed that the legislation require the responsible board to notify a range of persons and organisations of the outcome of a tribunal hearing, publish details of decisions on its website, and enter on the register (or a separate part of the register) details of any current conditions, suspension or cancellation of registration (except for details of health-related conditions).*

Comment

Physiotherapy supports the intent of this proposal. Comments made by physiotherapy in relation to publication of details on the public register apply.

11. Offences and regulated conduct**11.3 Holding out offences**

Proposal 11.3.1: *It is proposed that the following types of holding out offences be included in the legislation:*

- *offences that prohibit persons who are not duly registered to use the titles listed in Table 2 of Attachment A of the IGA*
- *offences that prohibit persons from using any other title, name, symbol, description, whether in English or other language, which given the circumstances could be reasonably understood to indicate the person is a registered practitioner in a regulated profession*
- *offences that prohibit a person from holding out that they have a type of registration, for example in a profession, in a division, with an endorsement, free of conditions, etc, when they do not*
- *offences that prohibit a person from using the title 'specialist' in a context that could reasonably be understood to indicate the person is endorsed as a specialist in a recognised speciality of a regulated health profession, and*

- offences that prohibit a person from holding out another person as registered, registered in a division, endorsed, a 'specialist', free of conditions, etc.
- Exemptions would apply, as set out in Clause 1.28(d) of Attachment A of the IGA.

Comment

Physiotherapy supports the intent of this proposal. Physiotherapy recommends that the offences prohibit persons from making verbal or written claims which, given the circumstances could be reasonably understood to indicate the person is a registered practitioner in a regulated profession

11.4 Practice offences

Proposal 11.4.1: *It is proposed that the legislation include the following practice offences:*

- *An offence for practising in a restricted practice area of dentistry, along with related exemptions, for example to ensure the practice of other occupational groups such as dental technicians or dental assistants is not unnecessarily restricted. **Note:** Refer to consultation paper on Registration Arrangements for proposed definition.*
- *An offence for practising in a restricted practice area of prescribing optical appliances, along with related exemptions, for example to ensure the practice of other occupational groups such as orthoptists or optical dispensers is not unnecessarily restricted. **Note:** Refer to consultation paper on the Registration Arrangements for proposed definition.*

Comment

Physiotherapy recommends that the legislation includes practice offences that are sufficiently broad to cover the restricted practice areas of all regulated professions. These offences would apply to restricted practices and the restricted practices would be specified in other provisions. There will be restricted practice areas in other professions, not only dentistry and prescribing of optical appliances. It is more consistent with the cross-profession approach of the national law that the legislation provide for practice offences of specified restricted practices, than separate offences for dentistry and optometry.

It has not yet been decided whether there will also be statutory restrictions on the practice of spinal manipulation to which offences might apply.

Comment

Physiotherapy looks forward to further discussion regarding restriction of spinal manipulation. The practice of spinal manipulation is contentious because there is documented evidence of the risk of death and significant injury arising from manipulation of the upper cervical spine. On one hand, it may be argued by some that this risk is best managed by appropriate education and restriction of practice to those who are clinically competent to undertake manipulation of the upper cervical spine. On the other hand, it may be argued that the same clinical results can be achieved using different manual techniques with lower levels of risk and that the clinical outcomes of spinal manipulation do not justify placing members of the community at risk of death and significant injury. Physiotherapy contends that further work must be done before a decision regarding the restriction of spinal manipulation can be made. Physiotherapy would be pleased to contribute, along with other stakeholders, to this further work.

If the intent of restriction on practices is to regulate practices that place members of the community at risk of significant injury and death, physiotherapy contends that the legislation should extend to restrict all such practices. Physiotherapy recommends that a risk assessment of practices other than spinal manipulation is undertaken in order to determine a list of practices associated with risk of significant injury and death. These

practices should then be restricted to the professions that have relevant education demonstrated by the accreditation and professional standards and to other registrants who have demonstrated individual competence through an accredited process of evaluation.

Physiotherapy also notes that, in some jurisdictions, the use of certain electrophysical agents is currently restricted to some of the regulated health professions. Physiotherapy recommends that the national law ensures there is a consistent national approach to the use of electrophysical agents where their use poses a risk to the public.

11.5 Direct or incite offences

Proposal 11.5.1: *It is proposed that the legislation include a series of offences for any person who directs a registered practitioner to act in a manner that might constitute unsatisfactory professional conduct or professional misconduct (however termed). This would include:*

- *powers for a court or tribunal to issue a ‘prohibition order’ on a person found to have directed or incited a registered practitioner in this matter. Such an order might prevent, for example, the person from providing health services or carrying on a business that provides health services*
- *an offence for breach of a prohibition order*
- *differential sanctions for bodies corporate and individuals*
- *provisions that extend liability for an offence to each officer of the body corporate, and*
- *provisions that require the maintenance of a register of prohibitions.*

Comment

Physiotherapy supports the intent of this proposal. Physiotherapy recommends that these provisions cover situations where a registered practitioner is directed to practise in an area where he or she is not currently competent – for example, a registered physiotherapist being directed to treat acute respiratory patients when he or she has practised in the area of musculoskeletal physiotherapy for several years and is not currently competent in the treatment of acute respiratory patients and has not been provided with the opportunity for support and appropriate retraining to achieve such competence.

Alternative option: *This offence could be framed more narrowly, to apply only to persons who employ a registered practitioner.*

Comment

Physiotherapy does not support the more narrow framing of this offence.

11.6 Regulation of advertising

Proposal 11.6.1: *There are a number of options for dealing with advertising offences under the national legislation:*

Option 1: *Include no advertising offences in the national legislative scheme. If a registrant engages in questionable advertising, they can be dealt with under a board’s general disciplinary powers, and by way of guidance, boards can issue guidelines about what might constitute unacceptable advertising. In addition, a State or Territory may legislate, as NSW has done, to provide additional protections, in public health or other legislation to regulate the advertising of health services generally, rather than simply targeting registered practitioners or the bodies corporate that employ them.*

Option 2: *Include narrowly framed advertising offences in the legislation, which just mirror trade practices/fair trading legislation (that is, false and misleading advertising) and a narrow application, only to registrants, and their employing bodies corporate.*

Option 3: *Include broadly framed advertising offences in legislation, that allow boards to deal with both registrants and bodies corporate who, for example, use testimonials, create an unreasonable expectation of beneficial treatment, or encourage the indiscriminate or unnecessary use of regulated health services.*

Comment

Physiotherapy supports the intent of option 1 and option 3 but recommends further consideration is given to refining the advertising offences under national legislation.

Due to the inherent risks to the public interest and wellbeing, the advertising standards that apply to health professionals and related services should be higher than those that apply to ordinary commercial goods and services. Therefore, reliance only on trade practices and fair trading legislation is inappropriate.

The standard of advertising for health services should be in harmony with the standards applied to therapeutic goods. This will set a higher standard than applies to general goods and services.

11.7 Offences related to enforcement activities

Proposal 11.7.1: *It is proposed that the legislation include a series of offences related to the role of authorised officers who investigate matters on behalf of a responsible board and may enter and search premises and seize documents or other things. These might include, for example, offences for:*

- *obstructing an authorised officer/inspector*
- *impersonating an authorised officer*
- *providing false Statements or misleading an authorised officer*
- *failing to comply with a lawful request, or*
- *failing to return identity card (after ceasing employment as an inspector/authorised officer).*

Comment

Physiotherapy supports the intent of this proposal and recommends further consideration is given to refining the offences to be included under national legislation.

11.8 Other offences

Proposal 11.8.1: *It is proposed that the legislation include offences for registrants who fail to return, within 7 days, to the responsible board their certificate of registration when issued with a notice to do so.*

Comment

Physiotherapy supports the intent of this proposal and recommends a period of 28 days as the return of the certificate of registration may require a person to retrieve the certificate from storage or archives. In the circumstance where the person is unable to produce the certificate they can provide a statutory declaration to the effect that the certificate is lost and that if they find it will be returned immediately.

Proposal 11.8.2: *It is proposed that the legislation include offences for breaches of prohibition orders issued by the responsible State or Territory tribunal when a practitioner is deregistered, as referred to in section 10.9 above.*

Comment

Physiotherapy supports the intent of this proposal and recommends further consideration is given to refining this offence under national legislation to ensure it does not conflict with existing offences under State and Territory legislation related to the tribunal.

Proposal 11.8.3: *It is not proposed to include the following types of offences in the national legislation:*

- *offences for breach of conditions on registration – instead, it is proposed that the legislation provide for a panel or tribunal to identify ‘critical compliance conditions’ which, if breached, will allow the responsible board to suspend the practitioner’s registration. This is likely to be a much more immediate and effective sanction than prosecuting a registered practitioner through a magistrate’s court, or*
- *offences for unregistered persons to issue medical certificates or treat patients with certain types of conditions such as HIV or cancer – instead, these matters can be dealt with in State and Territory public health legislation if a jurisdiction considers it necessary.*

Comment

Physiotherapy supports the intent of these proposals and recommends further work is done to ensure any offence under national legislation does not conflict with offences under State and Territory legislation and vice versa.

11.9 Prosecution of offences

Proposal 11.9.1: *It is proposed that the legislation make provision for a responsible board to initiate a prosecution in the relevant State or Territory court for offences under the Act.*

In some cases, the responsible police service will investigate and charge a person under the Act and bring the case to court. In others, it may be appropriate for the responsible board to initiate the action.

Comment

Physiotherapy supports this proposal but recommends that there are appropriate guidelines and support for a responsible board initiating a prosecution. Clearly the legislation must be clear with respect to jurisdiction and extent of the powers of the national boards in this regard.

11.10 Monitoring of registrants

Proposal 11.10.1: *It is proposed that the legislation include powers for a responsible board to monitor compliance of a registrant with:*

- *determinations or orders made by a responsible tribunal*
- *decisions made by a performance, health or conduct panel*
- *conditions placed on registration, at other times, such as at first registration, at renewal, by agreement, and*
- *other undertakings given or agreements entered into between the registrant and the board.*

Comment

Physiotherapy supports this proposal but notes that compliance models of regulation are less constructive than contemporary collaborative and cooperative approaches that promote engagement by the practitioner in changing behaviour.

12. Transition arrangements

Proposal 12.1: *It is proposed that the legislation include transitional provisions that allow the relevant board to complete all matters that originate under the repealed legislation.*

This will include powers to:

- receive and deal with notifications that relate to conduct that occurred prior to 1 July 2010, and to initiate and complete an investigation, and a hearing if necessary, and make findings and determinations (however termed). With respect to such matters, it is likely that the investigator or hearing panel's powers will be limited to those they might have exercised under the repealed legislation*
- complete all investigations that were in train prior to 1 July 2010, with decisions as to course of action constrained by what was available under the repealed legislation*
- complete all disciplinary, impairment and performance processes that were in train prior to 1 July 2010, in accord with the processes, findings and determinations available under the repealed legislation, and*
- complete all tribunal hearings (where applicable) and deal with any appeals as if the relevant State and Territory legislation had not been repealed.*

Comment

Physiotherapy supports this proposal. It is essential that sufficient financial provisions are made for these arrangements.