



## Council of New South Wales

### DECEMBER NEWSLETTER 2014

#### WELCOME

Welcome to another edition of the newsletter from the Physiotherapy Council of New South Wales. This time there is a focus on grounds for notification or complaint against a Physiotherapist and how the Physiotherapy Council handles performance and conduct under *Part 8 of the Health Practitioner Regulation National Law (NSW)*, as well as other Physiotherapy Council updates.

#### FAREWELL

During the past year the Physiotherapy Council farewellled Dr Debra Shirley and Ms Virginia Binns. They were thanked for their committed service to the Physiotherapy Council since its inception and their many years on the former NSW Physiotherapists Registration Board prior to Council. Both Dr Shirley and Ms Binns continue to work on committees of the Physiotherapy Council.

#### PHYSIOTHERAPY COUNCIL NOMINATIONS

As a result of the retirement of Dr Shirley and Ms Binns, there was a call for nominations for appointment to the Physiotherapy Council. The number and quality of those who responded to the call for nominations was impressive and the Physiotherapy Council wishes to thank all applicants.

Later in 2014 there was a further call for nominations from interested parties for Physiotherapy Council membership to commence in July 2015 when a number of current Council members will be due to retire. The recruitment process is well underway.

#### NEW MEMBERS

The Physiotherapy Council officially welcomed new members Professor Darren Rivett (Physiotherapist) and Ms Janene Eagleton (Community Member) at the July 2014 meeting.

Professor Rivett has practised physiotherapy for over 30 years and is presently Head of the School of Health Sciences at the University of Newcastle and is also presently on the Board of Directors of the Australian Physiotherapy Association (APA). Professor Rivett's particular area of interest is in Musculoskeletal Physiotherapy.

Ms Eagleton has had an extensive career working as an administrator of health services, including the Director of Hospital Services at St Vincent's Private Hospital, Executive Director Strategy and Development and Regional Director Western Sydney for Catholic Healthcare Services Ltd and General Manager of Hawkesbury District Health Service. In recent years Ms Eagleton has been involved in the Aged Care sector and is on a number of Boards and Industry Associations.

#### ANNUAL REGISTRATION RENEWAL

The Physiotherapy Council would like to remind all Physiotherapy registrants that their registration renewal date is 30 November each year. Those who do not renew registration are removed from the register within a month of the renewal date.

When removed from the register, Physiotherapy practice is against the law and a notification or complaint can be made against the practitioner. Not only is practising unregistered unlawful, there are other consequences. These include not being covered by Professional Indemnity Insurance and also the possible need to reimburse Health Funds and other third party payment providers for any payments made when a practitioner is not registered. You can check your registration status and re-register at <http://www.physiotherapyboard.gov.au/>.

#### COMPETENCE TO PRACTISE- WHAT IS IT?

Public protection is a primary objective of health professional registration and regulation and it is on the basis of 'competence to practise' that a person can attain initial

registration and maintain registration thereafter.

Under the National Law a person is **competent to practise** a health profession only if the person:

- (a) has sufficient physical capacity, mental capacity, knowledge and skill to practise the profession; and
- (b) has sufficient communication skills for the practice of the profession, including an adequate command of the English language.

Compliance with registration standards, such as the English Language Skills Registration Standard, assist in determining competence. The Physiotherapy Board of Australia website sets out the registration standards for Physiotherapists here: <http://www.physiotherapyboard.gov.au/Registration-Standards.aspx>

## NOTIFICATIONS AND COMPLAINTS

Notifications or complaints may be made about the performance, conduct or health/impairment impacting on the practice of a Physiotherapist.

Anyone may make a **voluntary notification** at any time.

In addition there are provisions for **mandatory notification**.

Mandatory Notifications can be made by a Health Practitioner about other Health Practitioners (both from within the profession or from another Health Profession). Employers or Education Providers may also make a mandatory notification about a Health Practitioner.

Health Practitioners are to make a notification if they form a reasonable belief that:

- (a) Another registered health practitioner has:
  - practised the practitioner's profession while intoxicated by alcohol or drugs; or
  - engaged in sexual misconduct in connection with the practice of the practitioner's profession; or

- placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or
- placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

- (b) A student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm.

If a Physiotherapist has any concerns regarding either another Physiotherapist or other registered health practitioner they should make a notification as soon as possible. Although it is not an offence to not report a mandatory notification, failure to do so could constitute behaviour for which action may be taken (for instance if failure to report results in

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harm to a patient that could potentially have been avoided had a notification been made).

The making of a notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, nor is any liability for defamation incurred and there is a provision of protection from civil, criminal and administrative liability for persons when done in good faith. There are limited exemptions to the requirement to make mandatory notifications such as practitioners working for a professional indemnity insurance company providing advice to the practitioner about the notifiable conduct.

## GROUNDS FOR NOTIFICATION/COMPLAINT ABOUT REGISTERED HEALTH PRACTITIONERS

The main reasons for making a notification or complaint about a registered health practitioner include the following:

- (a) **Criminal conviction or criminal finding** - the practitioner has, either in this jurisdiction or elsewhere, been convicted of or made the subject of a criminal finding for an offence.
- (b) **Unsatisfactory professional conduct or professional misconduct** - the practitioner has been guilty of unsatisfactory professional conduct or professional misconduct.
- (c) **Lack of competence** - the practitioner is not competent to practise the practitioner's profession.
- (d) **Impairment** - the practitioner has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects, or is likely to detrimentally affect the practitioner's capacity to practise.
- (e) **Suitable person** - the practitioner is otherwise not a suitable person to hold registration in the practitioner's profession.

## PERFORMANCE AND CONDUCT

*Part 8 of the Health Practitioner Regulation National Law (NSW) provides guidance to regulators about how they can manage notifications relating to the performance or conduct of a Physiotherapist.*

*Notifications regarding Impairment are also addressed in Part 8 of the Law and will be covered in a future Physiotherapy Council newsletter.*

Notifications or complaints about **Professional Performance** of a registered Physiotherapist refers to the knowledge, skill or judgment possessed and applied by the practitioner in their practice of physiotherapy.

Notifications or complaints about **Professional Conduct** may relate to **Unsatisfactory**

**Professional Conduct** or **Professional Misconduct**. Both terms are given meaning in the National Law.

The meaning of **Unsatisfactory Professional Conduct** is as follows:

- (a) Conduct significantly below reasonable standard - conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.
- (b) Contravention of the Law or Regulations - a contravention by the practitioner (whether by act or omission) of a provision of the Law, or the regulations.
- (c) Contravention of conditions of registration or undertaking.
- (d) Failure to comply with decision or order of Committee or the Tribunal.
- (e) Contravention of requirement under [Health Care Complaints Act 1993](#).
- (f) Accepting benefit for referral or recommendation to health service provider.
- (g) Accepting benefit for recommendation of health product.
- (h) Offering a benefit for a referral or recommendation.
- (i) Failure to disclose pecuniary interest in giving referral or recommendation.
- (j) Engaging in over servicing
- (k) Supervision of assistants - permitting an assistant employed by the practitioner (in connection with the practitioner's professional practice) who is not a registered health practitioner to attend, treat or perform operations on patients in respect of matters requiring professional discretion or skill.
- (l) Other improper or unethical conduct.

The meaning of **Professional Misconduct** is as follows:

- (a) Unsatisfactory professional conduct of a sufficiently serious nature to justify 'suspension or cancellation of the practitioner's registration' (sic); or
- (b) More than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify 'suspension or cancellation of the practitioner's registration' (sic).

## OTHER OBLIGATIONS UNDER THE NATIONAL LAW THAT CAN BE CAUSE OF COMPLAINT

It should be noted that under another section of the National Law (Part 7) there are obligations on registered practitioners and students where failure to comply does not constitute an offence, but may constitute behaviour for which health, conduct or performance action may be taken. These circumstances include the following:

1. A registered health professional not undertaking the required Continuing Professional Development (see the [Physiotherapy Board of Australia Registration Standard on Continuing Professional Development](#)).
2. A registered health professional not having the required Professional Indemnity Insurance (see [Physiotherapy Board of Australia Registration Standard on Professional Indemnity Insurance Standard](#)).
3. A registered health practitioner or student must, within 7 days after becoming aware that a relevant event has occurred in relation to the practitioner or student, give the Physiotherapy Board of Australia written notice of the event. A relevant event includes the following:

### ***In relation to a registered Health Professional:***

- the practitioner is charged, whether in a participating jurisdiction or elsewhere, with an offence punishable by 12 months imprisonment or more; or
- the practitioner is convicted of or the subject of a finding of guilt for an offence, whether in a participating jurisdiction or elsewhere, punishable by imprisonment; or
- appropriate professional indemnity insurance arrangements are no longer in place in relation to the practitioner's practice of the profession; or
- the practitioner's right to practise at a hospital or another facility at which health services are provided is withdrawn or restricted because of the

- practitioner's conduct, professional performance or health; or
- the practitioner's billing privileges are withdrawn or restricted under the *Medicare Australia Act 1973* of the Commonwealth because of the practitioner's conduct, professional performance or health; or
- where there is a complaint made about the practitioner in relation to the Medicare Australia Act (1973), Health Insurance Act (1973), National Health Act 1953, Migration Act 1958 or any other Commonwealth, State or Territory entity having functions relating to professional services provided by health practitioners or the regulation of health practitioners
- the practitioner's registration under the law of another country that provides for the registration of health practitioners is suspended or cancelled or made subject to a condition or another restriction; or



### ***In relation to a student:***

- the student is charged with an offence punishable by 12 months imprisonment or more; or
- the student is convicted of or the subject of a finding of guilt for an offence punishable by imprisonment; or
- the student's registration under the law of another country that provides for the registration of students has been suspended or cancelled
- Failure to provide the Physiotherapy Board of Australia with details regarding changes to the Principal Place of Practice, Address or Name within 30 days.



## HOW COMPLAINTS ARE DEALT WITH IN NSW

Notifications or complaints about physiotherapists with a primary place of practice in NSW may be made through the Australian Health Practitioner Regulation Agency (AHPRA), the Health Professional Councils Authority (HPCA) or the NSW Health Care Complaints Commission (HCCC).

Apart from voluntary notifications made by anyone and mandatory notifications made by health practitioners, employers and educators, a notification or complaint can be made against a physiotherapist or student by the Physiotherapy Council or the Director General of NSW Health.

## JOINT CONSIDERATION OF NOTIFICATIONS/COMPLAINTS BY THE PHYSIOTHERAPY COUNCIL AND HCCC

The Physiotherapy Council and the Health Care Complaints Commission (HCCC) are required to consult on all notifications/complaints against physiotherapists. Before any action is taken on a notification/complaint, the Physiotherapy Council and the HCCC must consult to see if agreement can be reached as to the course of action to be taken. There is a separate Health Care Complaints Act (1993) that gives guidance on how the consultation takes place.

The Physiotherapy Council works closely with the HCCC and all notifications/complaints are reviewed by the Complaints and Notifications Committee (CNC) made up of representatives from both the Physiotherapy Council and HCCC. Under the Health Care Complaints Act 1993 if either party is of the opinion that a notification/complaint should be investigated, then the HCCC will investigate. Additionally, if

both parties agree that the notification/complaint should not be investigated by the HCCC but one of the parties believes that the notification/complaint should be referred to the Physiotherapy Council for consideration, then the complaint is dealt with by the Physiotherapy Council.

If both the HCCC and the Physiotherapy Council agree, a notification/complaint can be terminated, or in certain instances the complaint can be sent for conciliation between the complainant and the practitioner. The HCCC can also make comments to a practitioner regarding their practice.

## ACTIONS SPECIFIC TO THE PHYSIOTHERAPY COUNCIL

When a notification/complaint is referred to the Physiotherapy Council for further action, the courses of action available to the Physiotherapy Council are as follows.

The Physiotherapy Council may:

1. Make any inquiries about the complaint the Physiotherapy Council thinks appropriate.
2. Deal with the complaint by Inquiry at a meeting of the Physiotherapy Council.
3. Refer the notification/complaint to:
  - o Committee (known as the Assessment Committee)
  - o Tribunal
  - o Impaired Registrants Panel
  - o Another entity e.g. a National Board
4. Refer the practitioner for:
  - o Performance assessment
  - o Health assessment
5. Refer the notification/complaint to the HCCC for investigation - this can occur even if the original consensus between the Physiotherapy Council and HCCC was for the Physiotherapy Council to take further action and can happen after inquires by the Physiotherapy Council.
6. Direct the practitioner concerned to attend Counselling.
7. Determine that no further action should be taken in respect of the notification/complaint.

## INQUIRY

An Inquiry by the Physiotherapy Council can occur if there is sufficient concern about the conduct of the practitioner that may lead to conditions being placed on the practitioner, but not lead to suspension or cancellation of a

registrant (these will be dealt with by a Tribunal). The Inquiry is before members of the Physiotherapy Council. The registrant is able to have a legal practitioner as a support. The Council may do any one or more of the following in relation to the health practitioner who is subject of the inquiry:

- (a) caution or reprimand the practitioner;
- (b) make an order for the withholding or refunding of part or all of the payment with respect to the fees to be charged or paid for the services that are the subject of the complaint;
- (c) direct that specified conditions relating to the practitioner's practice of the health profession be imposed on the practitioner's registration;
- (d) order that the practitioner seek and undergo medical or psychiatric treatment or counselling (including, but not limited to, psychological counselling);
- (e) order that the practitioner complete an educational course specified by the Council;
- (f) order that the practitioner report on his or her practice at the times, in the way and to the persons specified by the Council;
- (g) order that the practitioner seek and take advice, in relation to the management of his or her practice, from persons specified by the Council;
- (h) fine the practitioner in certain circumstances;
- (i) recommend suspension or cancellation of registration to the Tribunal.

Any conditions (except for those that deal with Health or Impairment) can be placed on the National Health Practitioner Register available for the general public to view.

### COMMITTEE (ASSESSMENT COMMITTEE)

The Physiotherapy Council can refer practitioners to an independent committee known as the Assessment Committee.

The Assessment Committee:

- Must investigate a complaint that has been referred to it.
- Must encourage the complainant and the relevant health practitioner to settle the complaint by consent.
- Can require a practitioner to undergo a skills test.

The Assessment Committee provides reports to the Physiotherapy Council and it is the Council that must decide what further action needs to be taken. The report includes advice as to whether settlement by consent has been obtained. The report cannot be used in civil proceedings in any court.

A complainant and the relevant physiotherapist who is subject of the notification/complaint are not entitled to be legally represented at an appearance before the Assessment Committee. The Assessment Committee cannot place conditions on a practitioner.

### TRIBUNAL

Both the Physiotherapy Council and the HCCC are under a duty to refer a notification/complaint to the Tribunal if, at any time, either forms the opinion that it may, if substantiated, provide grounds for the suspension or cancellation of a registered health practitioner's or student's registration. Exceptions to this are when the complaint relates solely or principally to a mental or

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physical impairment.

### COUNSELLING

The Physiotherapy Council has the ability to direct a registrant to have counselling. In cases considered to be serious, this can be formal counselling over a period of time, often involving a mentor and requiring reports to be prepared for the Physiotherapy Council at certain intervals, all of which is at the cost of the registrant.

The Physiotherapy Council also has the ability to counsel registrants for a low level notification/complaint where disciplinary action would not be in the best interests of the physiotherapist, but investigation identified some issues for resolution. In this instance a single counselling session may be sufficient to provide advice to the registrant to ensure no further occurrences.

The counselling session is often the final aspect of the notification/complaints handling process and this method of counselling has been reported by practitioners to be positive and helpful. Any direction to attend counselling is mandatory but the process is designed to be constructive and non-punitive.

### **IMMEDIATE SUSPENSION/CONDITIONS**

Under Section 150 of the National Law the Physiotherapy Council must, if at any time it is satisfied it is appropriate to do so for the protection of the health or safety of any person or persons, or if satisfied the action is otherwise in the public interest:

1. By order suspend a registered health practitioner's or student's registration; or
2. By order impose on a registered health practitioner's registration the conditions relating to the practitioner's practising the health profession the Physiotherapy Council considers appropriate; or
3. By order impose on a student's registration the conditions the Physiotherapy Council considers appropriate.

### **NOTIFICATIONS/COMPLAINTS ABOUT PHYSIOTHERAPISTS IN THE LAST YEAR**

Similar to previous years, the majority of notifications/complaints lodged with the Physiotherapy Council in the past year can be categorised under the following headings:

1. Inappropriate boundary issues (inappropriate touching of patients).
2. Poor documentation.
3. Poor billing practices.

4. Practitioner reluctance to listen to complainants and acknowledging their grievances.

#### *Inappropriate Boundary Issues*

So far this year there have been three instances of Physiotherapy Council action on Section 150 of the National Law resulting in suspension of two practitioners from the register and conditions placed on a third practitioner. These complaints related to boundary issues involving inappropriate touching or photographing of patients. The Physiotherapy Council reminds practitioners that it is imperative to gain consent when touching patients and that this should be documented in the medical record for each treatment. If a patient asks the practitioner to stop the practitioner should cease that particular treatment straight away.

#### *Documentation*

In a number of cases that have been brought before the Physiotherapy Council it is clear that although treatments may be appropriate and effective, the documentation is of poor quality. The Physiotherapy Council would like to remind all practitioners that they should review the [Physiotherapy Board of Australia's Code of Conduct](#), particularly section 8.4a – Health Records

#### *Billing Practices*

The Physiotherapy Council continues to receive notifications/complaints from both clients and insurance companies about billing practices. It is important when dealing with patients who are required to pay that there is sufficient information presented prior to the treatment regarding out of pocket expenses. The Physiotherapy Council would also like to remind practitioners that health insurance companies do make complaints about what appears to be over-servicing and in a number of these complaints formal disciplinary action has been taken.

### Complaints Handling

For almost all of the notifications/complaints made by patients, the most noticeable aspect is the often poor communication between practitioner and patient. During investigation of notifications/complaints, it is the practitioners who respond appropriately to the complainant that achieve much better outcomes and often the notification/complaint is resolved early or even terminated.

The Physiotherapy Council acknowledges that sometimes, no matter how good the complaints handling procedures, some complainants will still write to the Physiotherapy Council to complain. Where there are no other issues this type of notification/complaint is discontinued at an early stage.

As noted in the Ombudsman's (NSW) Fact Sheet ['Am I dealing with a public interest disclosure?'](#) when things go wrong, many complainants demand no more than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology. Under the Civil Liability Act (2002) an apology does not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability of any kind. It is current best practice to view a complaint as a way to review one's own practice and see if improvements can be made. The Physiotherapy Council receives very few complaints that are vexatious or from serial complainers. Although the Fact sheet deals with the public sector, it is still very relevant to private practice and the Physiotherapy Council would encourage practitioners to review this factsheet and consider an appropriate complaints handling process for their practice.