

4 August 2011

Physiotherapy Board  
PO Box 10734  
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### **Consultation Paper: Proposed revised Code of Ethics and Professional Conduct**

Thank you for the opportunity to comment on the New Zealand Physiotherapy Code of Ethics and Professional Conduct (Code of Ethics).

I have discussed the proposed Code of Ethics with the Commissioner, and provide his comments as follows. The Commissioner commends the Physiotherapy Board and Physiotherapy New Zealand for jointly developing this comprehensive document.

#### **Role of the Health and Disability Commissioner**

Under the Health and Disability Commissioner Act 1994 (HDC Act), the Commissioner is charged with the role of promoting and protecting the rights of health and disability services consumers, as set out in the Code of Health and Disability Services Consumers' Rights (the Code of Rights). Under section 14(1)(d) of the HDC Act, one of his functions is to make public statements in relation to any matter affecting the rights of health or disability services consumers.

Right 4(2) of the Code of Rights provides that every consumer has the right to have services provided that comply with legal, professional, ethical and other relevant standards. In accordance with Right 4(2), the proposed Code of Ethics is an ethical standard the Commissioner may refer to as a guiding standard when assessing complaints against physiotherapists.

#### **Comments on the proposed Code of Ethics**

I trust that you find the following comments on the principles and commentary in the proposed Code of Ethics of assistance. Please note that I have not commented on all sections of the proposed Code of Ethics, just those that I consider to be of particular relevance to the Code of Rights.

##### *Section A: Interactions with patients/clients and their family and whānau*

Principle one provides that physiotherapists must respect the dignity of the patient/client, and also act in a respectful manner. I suggest that the commentary to principle one be amended to include reference to Right 3 of the Code of Rights, which is the right to dignity and independence.

Principle two provides that physiotherapists must act to promote the health and wellbeing of the patient/client, while acknowledging, respecting and facilitating patient/client autonomy. Principle 2.2 requires physiotherapists to "respect the rights,

autonomy and freedom of choice of the patient/client”. In my view, the reference to “rights” here is too vague. In light of the commentary that follows, it is not clear whether it is intended to require the physiotherapist to respect all patient rights generally (as outlined in the Code of Rights) or only those specifically relating to informed consent. I recommend that this sub-principle be clarified.

I also note that in the commentary to principle 2.2 it is stated, “Physiotherapists must *accept* that autonomy of the patient/client remains *important* throughout the lifespan including times of illness, disability and end of life.” (My emphasis.) Autonomy is usually considered to be a paramount ethical principle, and using the word “accept” implies that there is an element of resistance to the paramountcy of autonomy. It is also not clear what the reference to life stage adds to this principle. I recommend you consider rewording this commentary as follows:

“The autonomy of the patient/client is paramount. Physiotherapists must respect the freedom of the patient/client to choose their physiotherapist (where practicable), or to refuse physiotherapy treatment (even if doing so would harm them). Patients/clients are also entitled to seek a second opinion, and physiotherapists should assist in this.”

I also note that Right 5 of the Code of Rights should be added to the commentary of principles 2.2 and 2.3, as relevant law.

The commentary to principle 2.4 lists information that a patient/client is entitled to. As currently worded, the list is exhaustive. I note that in accordance with the Code of Rights, the list of information a consumer is entitled to receive is not exhaustive. Right 6(1) of the Code of Rights provides that every consumer has the right to the information that a reasonable consumer, in that consumer’s circumstances, would expect to receive, which includes, but is not limited to, those items listed in Right 6(1)(a) to (g). It should be made clear that the list in the commentary is not exhaustive.

The commentary to principle 2.5 likewise provides what appears to be an exhaustive list of when written consent is required. I draw your attention to Right 7(6) of the Code of Rights and recommend that the commentary to principle 2.5 be reworded so as to be consistent with the legal obligations under the Code of Rights.

Also in the commentary to principle 2.5, reference is made to the “process of informed consent”. I recommend a definition of the “process” of informed consent be included. Informed consent is a process consisting of three essential elements: effective communication, provision of full information, and the giving of consent. These elements are reflected in Rights 5, 6 and 7 of the Code of Rights.

In the commentary to principle 2.6 you discuss the actions the physiotherapist must take before providing treatment to an incompetent adult who has no welfare guardian or enduring power of attorney. Relevant to this issue is whether the patient/client has an advance directive. Right 7(5) of the Code of Rights provides that every consumer may use an advance directive in accordance with the common law. If a consumer has an advance directive the wishes stated therein will also be relevant to the physiotherapist’s determination as to whether to provide treatment.

The relevant law for principle 2.9 also includes Right 4 of the Code of Rights, in particular, Rights 4(4) and 4(5).

Principle 2.10 provides that physiotherapists should, “consider and attend to the health needs of the community within which they practice”. You may wish to reconsider the wording of this obligation as it is somewhat unclear and could be criticised as being overly onerous.

Principle 4.1 provides that physiotherapists must not deny access to physiotherapist services on a number of grounds. The grounds of discrimination listed do not appear to match those set out in the Human Rights Act 1993. I recommend amending the principle to more closely reflect the provisions of that Act.

Principle 4.5 provides that physiotherapists “should remember” that they may refuse to treat a patient. The standard is that physiotherapists may refuse to treat a patient if the conditions in principle 4.5 are met, not that they “should remember” that they may do so. I suggest you consider rewording this sub-principle.

*Section B: Maintenance of Professional Standards*

Principle 6.1 requires further clarification. In particular, it should say to whom truthful, accurate and relevant information should be provided.

Rights 5 and 6 of the Code of Rights are relevant to principle 6.7, and should be noted as relevant law in the commentary.

Principle 7.5 requires physiotherapists to ensure that financial remuneration for participating as an “investigator” is commensurate with the work performed. I recommend you clarify what you mean by “investigator” in this sub-principle.

Principle 7.6 states that physiotherapists must, “when developing or using innovative therapies carry out research to ensure patient/client safety, and a sound evidence base to treatments”. In my view this principle confuses two different concepts. The first is *developing* innovative therapies and the second is *using* innovative therapies. Using innovative therapies may be permissible if there is a sound evidence base for doing so and the consumer provides fully informed consent. However, physiotherapists should carefully consider whether such therapies should be subject to formal research protocols before they are developed or used. I recommend that this principle be redrafted to ensure the two concepts are distinctly provided for. In addition, Rights 9 and 7(6) of the Code of Rights are relevant to this principle and should be included in the commentary.

*Section C: Relationships with colleagues, other health professionals and agencies*

I recommend that you include a commentary of relevant law in respect of principle 8 that includes reference to Right 4(5) of the Code of Rights.

**Additional considerations**

The lists of “relevant law” in the commentary to the Code of Ethics are currently worded as if they are exhaustive. However, a number of rights in the Code of Rights may apply to any one principle, and other legislation or case law beyond that

specifically referenced may be relevant. For this reason, I recommend that in each instance you change the heading from “relevant law” to “relevant law includes”.

A matter that is not addressed in the Code of Ethics that you may consider including is the principle of open disclosure. This principle requires physiotherapists to ensure that patients/clients are properly informed of any adverse event or error that occurs during their physiotherapy care. Patients have a right to know what has happened to them, and this is affirmed in Right 6 of the Code of Rights. Not only does open disclosure affirm a consumer’s rights, but it fosters open and honest professional relationships.

In addition, internationally there is a move towards the development of standards and organisational policies to promote open disclosure. In New Zealand, provider organisations have a legal duty to take steps to ensure that open disclosure is practised by staff and supported by management. I refer you to guidance on open disclosure on the HDC website: <http://www.hdc.org.nz/decisions--case-notes/open-disclosure>.