Osteopathy Australia
Suite 4, 11 Railway St, Chatswood NSW 2067
PO Box 5044, Chatswood NSW 1515
Ph (61) 02 9410 0099
www.osteopathy.org.au

About Osteopathy and Osteopathy Australia

Osteopaths in Australia are university-qualified allied health practitioners registered with the Australian Health Practitioner Regulation Agency (Ahpra). Osteopaths complete either a dual bachelor's or bachelor's and master's qualification covering functions of anatomy, biomechanics, human movement, the musculoskeletal and neurological systems, as well as clinical intervention approaches, biomedical science including pharmacology which are all underpinned by a biopsychosocial management approach.

Osteopathy Australia is the peak body representing the interests of osteopaths, osteopathy as a profession, and consumer's rights to access osteopathic services. Our core work is liaising with state and federal government and all other statutory agencies, professional bodies, and private industry regarding professional, educational, legislative, and regulatory issues. Most registered osteopaths are members of Osteopathy Australia.

Summary of our submission

Osteopathy Australia would like to thank the Ministry of Health for this opportunity to provide feedback on the review of Part 8 of the Health Practitioner Regulation National Law (NSW).

Osteopathy Australia supports the strong and transparent regulation of healthcare practitioners to ensure public health and safety.

Many elements of Part 8 of the Health Practitioner Regulation National Law (NSW) need to be reviewed to ensure processes for dealing with practitioner complaints and notifications are fair and timelier for resolution while maintaining transparency and natural justice, with outcomes equitable to the issues being addressed while maintaining practitioner well-being. As such, our submission will present recommendations aligned with these aims, including increasing clarity on the definition of 'public interest', increasing transparency and procedural fairness, and ways in which practitioners can be more adequately supported while maintaining a comprehensive regulatory system.

Although not raised in this consultation, the regulation of osteopaths under Health Practitioner Regulation National Law (NSW) comes with a greater cost burden to osteopaths than in any other jurisdiction. As successive NSW Governments have maintained a co-regulatory model with its own conduct, performance, and health processes, Government should cover some of that additional cost burden, or greater efficiencies are needed within the Health Care Complaints Commission (HCCC) and the Health Professional Councils bureaucracy. NSW should abolish the higher cost co-regulatory model if that is not achievable.

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Issues for consideration

1. **Is the threshold test for action under section 150(1) still appropriate? If not, what changes should be made?**

The power to immediately suspend a practitioner's registration without a full hearing can be problematic, especially if crucial information is not readily available. It can significantly disrupt a practitioner's practice and income and potentially harm the practitioner's reputation, mental health and ability to practice before a proper investigation is completed, even if the allegations against them are ultimately not substantiated.

A major flaw of section 150 is its potential for causing unfair immediate suspensions or practice restrictions on a practitioner based on limited information, potentially impacting their livelihood without a full and fair hearing, particularly when determining what constitutes "public interest" can be subjective and open to interpretation, potentially leading to inconsistent application across different jurisdictions.

While we recognise and strongly agree that it is important to protect the public as described in both limbs of the threshold test, we are concerned that the term 'public interest' has not been statutorily defined and is open to interpretation. The "public interest" criteria used to justify immediate action can be vague and open to different interpretations by different regulatory bodies, leading to inconsistencies in decision-making. To help address this issue, we suggest providing more specific criteria defining what constitutes a "public interest" situation that warrants immediate action under Section 150, to ensure consistent application across different health professions.

2. **Should the Councils have a discretionary power, rather than a mandatory power, to take action under the second limb in section 150(1) when it is considered appropriate in the public interest and unconnected to health or safety of the public?**

We support the proposal for Councils to hold discretionary power under the second limb in section 150(1) rather than a mandatory power. This change will help to ensure that well-rounded decisions are made once adequate information and evidence is made available.

Additional provisions should be incorporated to consider a practitioner's past performance and disciplinary record when deciding on immediate action to avoid disproportionate penalties for minor incidents and only impose conditions to the minimum extent necessary to achieve public safety. This will help to increase fairness and transparency with equitable and natural justice in the process for practitioners. Good regulation is clear, transparent, protects the public and maintains quality and standards within the profession.

3. **Are any changes required to section 150 to protect the health and safety of the public while maintaining practitioner well-being throughout the section 150 process?**

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Yes, changes and more mechanisms need to be implemented within section 150 to help protect the public's health and safety while increasing practitioner well-being. Potential changes could include increased transparency in decision-making processes, clearer guidelines for when immediate action is necessary, a stronger emphasis on due process for practitioners, and provisions for expedited review mechanisms for practitioners facing suspension or conditions imposed under Section 150; aiming to balance public protection with fair treatment of healthcare professionals.

We recommended the following areas be considered:

Increase clarity on the definition of 'public interest':

More specific criteria defining what constitutes a "public interest" situation that warrants immediate action under Section 150 should be provided to ensure consistent application across different health professions.

Increase transparency:

The decision-making process under Section 150 may not be sufficiently transparent, potentially causing uncertainty for practitioners facing immediate action. Increasing transparency by providing clear reasons for imposing suspensions under Section 150 will help to promote accountability and understanding.

The Ministry of Health should also consider creating an awareness campaign based on lessons learned and the outcomes of complaints so that practitioners can learn about the complaints handling process and the implications for their practice. This should be a deidentified educational resource that aims to increase transparency and best practices.

Detailed notification requirements:

More comprehensive notification should be given to practitioners regarding the reasons for potential immediate action, including specific allegations and evidence considered, to allow for better preparation and response.

Enhanced procedural fairness:

Establishing a clearer process for practitioners to access relevant information and present their case during Section 150 proceedings, including the opportunity to cross-examine witnesses or provide rebuttal evidence.

Procedures should be implemented to ensure practitioners have adequate opportunity to respond to allegations before a suspension is imposed, including access to legal representation.

Potential for bias:

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Depending on the circumstances, a regulatory body might be influenced by public perception or media attention when deciding under Section 150, potentially impacting the fairness of the process.

Support for practitioners:

Exploring mechanisms to provide practitioners facing Section 150 proceedings with access to legal advice or support services to navigate the process effectively. Immediate suspension or conditions imposed under section 150 could significantly impact a practitioner's reputation even before a full investigation is completed.

Furthermore, when immediate action is taken some natural justice principles are overridden. When a later investigation finds the practitioner was not at fault, compensation should be available for the reputational and financial damage that has unnecessarily occurred to the practitioner.

Timely review process:

Implementing a faster review mechanism for practitioners facing immediate suspension or conditions, potentially with a dedicated review panel to expedite decisions and minimise disruption to practice. If immediate action is taken, any attached investigation must be fast-tracked to ensure natural justice, transparency and fairness is undertaken as quickly as possible to remove inappropriate or incorrect restrictions on practitioners.

4. Should any changes be made to the health stream?

Generally, the health stream appears to be working well as the focus is on rehabilitating the practitioner in a supportive way.

5. Should critical performance conditions be introduced in the performance pathway?

If critical performance conditions are to be introduced into the performance pathway, procedures must be implemented to ensure that the practitioner is given adequate notification that they are approaching having critical performance conditions imposed. The practitioner should have the ability to advocate for themselves before any harsh reprimands are imposed.

Best practice regulation demonstrates a commitment to educating those who they regulate. Adequate clarity and definition of what may constitute critical performance conditions should be communicated to all practitioners to help raise awareness and promote compliance. It is incumbent on the Government to develop and provide suitable education resources to registrants on what this means and the implications for practice.

6. If critical performance conditions are introduced, should a breach of the conditions result in automatic referral to the HCCC (similar to critical impairment conditions) or, if the breach is proven, result in cancellation of the practitioner's registration by NCAT (similar to critical compliance conditions)?

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If introduced, referral to the HCCC would depend on both the conditions and the aspect of practice that performance failure has occurred. Breach of the critical performance conditions should only result in referral to the HCCC for proper investigation in the most significant of matters. Education, training and mentoring should always be the first step to improve performance.

Failing that a proper investigation may assist in determining the severity of the breach and if conditions required to be placed on the practitioner's registration; however, timelines for completion of such HCCC investigations need to vastly improve to reduce unnecessary delays, stress mental health burden on the practitioners.

The recommendations we have proposed in question 3 should also be taken into consideration when developing a critical performance conditions process.

7. **Are there any other changes that should be made to the performance pathway to improve the approach for dealing with practitioners with persistent performance issues?**

We support the need to escalate matters when a practitioner has persistent performance issues, however, mechanisms must be put into place to ensure that practitioners are supported and educated appropriately at the beginning of the process to help limit persistent performance issues. As highlighted in question 3, issues around transparency, clarity and natural justice need to be addressed to ensure all practitioners are treated equitably and conflicts of interest are avoided.

8. **Should there remain two separate processes for dealing with conduct related complaints, PSCs and council inquiries, that differ depending on the profession?**

No, most professions must adhere to the same conduct of conduct and the same core registration standards so they should be assessed in the same way and manner to promote equity and fairness. Maintaining two models is inefficient and costly to both the practitioners who fund the system and the individual boards maintaining the process.

9. **Should NSW instead move to a panel model for dealing with low-level conduct complaints?**

Yes, *a panel model would ensure faster resolution and reduce complexity* when dealing with low-level conduct complaints, providing more consistency between professions and result in quicker determinations.

10. **If NSW moves to a panel model for low-level conduct complaints for all professions**
    a. **Should practitioners be entitled to legal representation?**

If a panel model is used and the panel does not have any power to action regulatory decisions, including imposing conditions or consequences against the practitioner, then yes legal

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representation may not be necessary; however, if the panel does hold this power then natural justice principles must apply to ensure both parties are supported equitably.

Practitioners should be entitled to natural justice and therefore the right to legal representation for any level of complaints. It is highly unlikely that the HPCA, nor the Council will be without legal advice, including when a council member is a lawyer or even legal representation present.

b. **Should the panel hearings be open the public?**

No, this may cause undue stress and potential reputational damage for the practitioner if information is made public before a verdict is made.

Additionally, public hearings may result in a regulatory body being influenced by public perception or media attention when making a decision, potentially impacting the fairness of the process.

c. **If the panel hearings should not be open to the public, what other transparency measures should be put in place?**

Panel hearings and reasons for decisions should be documented and published after the finalisation of the hearing. This will promote transparency and education while helping to maintain the practitioner's well-being.

Further, the HCCC, HPCA and the Councils should be producing user-friendly summaries of matters that highlight breaches, consequences and the lessons learned that would help protect the public by educating and preventing other practitioners from similar behaviours or breaches.

11. If NSW moves to a panel model for low-level conduct complaints for all professions, what powers would the panel and/or the Council need to appropriate hear matters?

The Panel should be provided with powers to inquire appropriately into the matter, similar to those currently held within council inquiries. The Panel should have enough powers to obtain the information necessary to make an informed decision. The Panel should also have a range of decision powers to formulate recommendations that would then be considered and decided by Council.

12. Are there any other changes that should be made to the conduct stream to improve the complaints management processes?

Recommendations made in question 3 regarding transparency, appropriate notification requirements, procedural fairness, practitioner support and a timely process should all be considered to improve the conduct stream.

13. Should the health, conduct, and performance streams be merged to move to a 'fitness to practice' model?

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No, the health stream should remain separate from the conduct and performance streams as the nature of the issue/complaint can be significantly different and likewise needs to be handled in a way that reflects this. Health issues can often be out of the control of the practitioner, so they should not feel like they are being punished for this and should instead be supported through the process.

14. Should the health stream be maintained separately, and the conduct and performance streams combined to create a single panel?

Yes, we support merging the conduct and performance streams together while maintaining a separate stream for health-related issues. As highlighted in the discussion paper, often matters may cross over the conduct and performance streams, so merging the two streams will help to capture matters such as this and make the process more streamlined for both practitioners and panel members.

15. If the three separate streams are maintained, are there improvements that can be made to the management of practitioners who have issues that cross over between the health, conduct and performance streams?

Increased communication and collaboration between streams may help improve the management of practitioners who have cross-stream issues. When an issue has cross-stream elements, the stream within which the issue has been chosen to be reviewed should seek advice from the other streams on how to deal with their respective elements to ensure a comprehensive approach is taken.

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16. Should Assessment Committees be retained under the NSW National Law?

As highlighted in the discussion paper, Assessment Committees are becoming less and less utilised. As such, we support the removal of Assessment committees from the complaints process as there are mechanisms and processes in place that will fill any gaps left from the Committee's removal. Osteopathy Australia supports any changes that streamline processes and reduce cost and time burdens on practitioners.

17. Should NSW allow the Councils to accept undertakings from health practitioners to resolve a complaint or issue?

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Yes, as stated in the discussion paper, allowing Councils to accept undertakings will recognise practitioners who proactively wish to rectify an issue. Allowing the acceptance of undertakings will likely result in better practitioner compliance and limited relapse as the practitioner is actively attempting to resolve the issue and choosing the pathway in which this is done.

General recommendations:

We suggest that lessons learned about complaints are made publicly available so other practitioners can learn from these mistakes. The regulator needs to provide education about what practitioners can and can't do. Professional associations like Osteopathy Australia will support the regulator and ensure ample training and educational material are developed in collaboration with Ahpra.

Osteopathy Australia would again like to thank the NSW Government for the opportunity for consultation. For any additional information or comments, please get in touch with us by phone at 02 9410 0099 or by email at clinicalpolicy@osteopathy.org.au.