

In Confidence

Office of the Minister of Health

Chair, Cabinet Social Wellbeing Committee

Regulation of the Chinese medicine profession under the Health Practitioners Competence Assurance Act 2003

Proposal

- 1 I propose that Cabinet agree to regulate the Chinese medicine profession under the Health Practitioners Competence Assurance Act 2003 (the Act), and that a new responsible authority (the Chinese Medicine Council of New Zealand) be established under the Act to regulate the profession.

Relation to government priorities

- 2 This proposal does not relate directly to the government's overall stated priorities but involves significant regulatory considerations and so requires Cabinet approval.

Executive summary

- 3 The Act provides for additional health professions to be regulated in order to protect public health and safety. New professions may be added to an existing responsible authority (regulatory body) or a new authority may be established by Order in Council.
- 4 The Chinese medicine profession (including acupuncturists) has applied to be regulated under the Act.
- 5 Following a preliminary assessment, the Ministry of Health (the Ministry) convened an expert panel to consider the application. The panel assessment concluded that regulating the practice of Chinese medicine was warranted based on risk of harm to the public. Further evidence of the risk of harm to the public derives from Health and Disability Commissioner records, information supplied by the applicants, public submissions, and journal articles.
- 6 A public consultation on the proposal found that the majority of submitters were in general agreement that the Chinese medicine profession should be regulated.
- 7 The Ministry supports regulating the profession under a new responsible authority. The Nursing Council of New Zealand has agreed to provide advice and administrative services to support the new authority, through a memorandum of understanding.
- 8 All costs of regulating the Chinese medicine profession will be borne by the profession through fees charged by the new responsible authority.
- 9 Cabinet agreement is sought to designate Chinese medicine as a health profession under the Act and to establish a new responsible authority, the Chinese Medicine Council of New Zealand, to regulate the profession. If agreed, an Order in Council will be prepared by the Parliamentary Counsel Office for Cabinet consideration and agreement.

Background

- 10 In September 2010, the Ministry received two separate applications from two groups of Chinese medicine practitioners seeking to be regulated under the Act:
- one from a group comprised of the New Zealand Register of Acupuncturists (now known as Acupuncture NZ) and the New Zealand Register of Traditional Chinese Medicine Practitioners;
- and
- one from a group comprised of the New Zealand Acupuncture Standards Authority, the NZ Association of Traditional Chinese Medicine, the New Zealand Chinese and Acupuncture Society Inc, the New Zealand Council of Traditional Chinese Medicine, and the New Zealand Institute of Acupuncture Inc.
- 11 The applications were considered jointly and between them cover acupuncture, Chinese herbal medicine, tui na (a form of massage therapy), and other Chinese medicine techniques.
- 12 The application does not cover other registered health practitioners (such as medical practitioners, midwives, and osteopaths) who use acupuncture or other forms of Chinese medicine as part of their practice. These professions will continue to be regulated by their current responsible authorities, which are required to ensure their ongoing competence and fitness to practise. The Osteopathic Council of New Zealand has a separate scope of practice for acupuncture, which will not be affected by this proposal.
- 13 There are an estimated 1,100 Chinese medicine practitioners in New Zealand, usually operating in sole practices. This figure does not include other health practitioners (such as midwives, osteopaths, and medical practitioners) who use acupuncture or other forms of Chinese medicine as part of their practice. There is evidence that the Chinese medicine profession is growing, alongside the growing Chinese population in New Zealand. Statistics New Zealand projects that the total Chinese population in New Zealand will increase from 263,300 in 2018 to 438,900 in 2038, representing growth of 67 percent.
- 14 Chinese medicine is currently a self-regulating profession. There are several professional organisations involved, each with different (but overlapping) membership and criteria. These include the New Zealand Acupuncture Standards Authority (NZASA), Acupuncture New Zealand (AcNZ, previously the New Zealand Register of Acupuncturists), the New Zealand Register of Traditional Chinese Medicine Practitioners Inc (NZRCMP), and the New Zealand Chinese Medicine and Acupuncture Society (NZCMAS).
- 15 The Accident Compensation Corporation (ACC) recognises acupuncturists as treatment providers, but only if they are registered with Acupuncture New Zealand or the New Zealand Acupuncture Standards Authority. ACC's acupuncture costs have been increasing markedly each year, along with the number of acupuncture service providers.
- 16 ACC has advised that there were 941 active providers of acupuncture over the 2018/19 financial year. A total of 789,157 acupuncture treatments were funded in 2018/19, for 83,486 clients. Total expenditure from ACC in 2019/20 was \$40.6 million. 2018/19 was \$44 million, an increase from \$39 million spent in 2017/18, \$33.3 million in 2016/17, \$30

million in 2015/16, and \$26 million in 2014/15. (An average increase of 11 percent per year.)

Chinese medicine

- 17 Chinese medicine practitioners treat imbalances of energy flows through the body by assessing the whole person and using techniques and methods such as acupuncture, Chinese herbal medicine, massage, diet, exercise, and breathing therapy. Chinese medicine practitioners usually operate in sole practices.
- 18 Chinese medicine is currently a self-regulating profession, with an estimated 1,000 - 1,200 practitioners in New Zealand. The profession is growing. There are a number of professional organisations involved, each with different membership criteria.
- 19 ACC recognises acupuncturists as treatment providers, provided they are registered with the New Zealand Acupuncture Standards Authority or Acupuncture New Zealand. Around 940 acupuncturists in New Zealand provide ACC-funded treatment, with a total expenditure from ACC in 2019/20 of \$40.6 million.

Health Practitioners Competence Assurance Act 2003

- 20 The Act protects the health and safety of members of the public by providing mechanisms to ensure the ongoing competence of health practitioners. Only health practitioners who are registered with the relevant responsible authority can claim to be practising a profession that is regulated by the Act.
- 21 Under the Act, the Governor-General has the power, on my recommendation as Minister of Health, to designate particular health services as a health profession and to add that profession to an existing authority or to establish a new authority to regulate the profession.
- 22 Before making such a recommendation the Minister of Health must be satisfied that the requirements of s 116 of the Act have been met.
- 23 Statutory regulation under the Act is only used if other forms of regulation (such as working under the supervision of a regulated profession, specific employment arrangements that determine practice, or self-regulation) are not sufficient to mitigate the risk of harm to the public.

Criteria for regulation

- 24 The principal purpose of the Act is *to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions* (s 3(1)).
- 25 The current criteria for regulation are included in Appendix 1.

Process for regulation

- 26 The process for regulating a health profession is included in Appendix 2. It includes assessment of the proposal by an expert panel and – subject to the Minister's agreement – a consultation process.

- 27 Following receipt of the applications, the Ministry undertook a preliminary assessment and concluded that, on the information provided, there was a robust case to continue progressing the application to be regulated under the Act.
- 28 The Ministry convened an expert panel in January 2011 to independently consider and assess the evidence provided in the applications against the criteria for regulation under the Act. This included consideration of whether the public is at risk of harm and/or whether it would be in the interest of the public to regulate this health service. The panel also investigated overseas experience and evidence and drew on Ministry clinical expertise and independent clinical advisors for advice.
- 29 With the then Minister of Health's agreement, the Ministry undertook a consultation process with organisations (including district health boards, responsible authorities, and Chinese medicine organisations) that have an interest in the proposal.
- 30 If Cabinet agrees, the Parliamentary Counsel Office will prepare an Order in Council designating Chinese medicine as a profession under the Act and establishing the Chinese Medical Council of New Zealand to regulate the profession.

Comment

Risk of harm

- 31 The Health and Disability Commissioner received eighteen complaints against Chinese medicine practitioners over the past five years (2015 – 2019). The complaints focussed on treatment (eg punctured lung), communication, documentation, and professional conduct (boundary violation) issues. Two treatment complaints resulted in findings that there had been a breach of the Code of Health and Disability Services Consumers' Rights. The Commissioner is of the view that Chinese medicine should be a regulated profession under the HPCA as the risks of harm to the public posed by the practice of Chinese medicine is such that regulation is in the public interest.
- 32 A key part of the Ministry's expert panel assessment process (refer paragraph 4) was determining the degree of potential risk of harm to the public from the practice of the profession and a rating system was developed to guide that assessment. The panel assessed the Chinese medicine profession's score as 27 points out of a possible 35 and noted that the strongest body of evidence of risk of harm relates to acupuncture.
- 33 The risks identified include tissue damage, vital organ injuries, spinal injury, serious infections, burns, and toxic reactions.
- 34 Across the public submissions, there was strong agreement (26 submitters, or 74 percent) that the practise of traditional Chinese medicine carries a risk of harm to the public.
- 35 On balance, I consider that the assessment of the risk of harm is sufficient to warrant regulation of the profession under the Act.

Qualifications, standards, and competencies

- 36 The two applicant groups agree that a Bachelor's degree (NZQA Level 7) or equivalent in traditional Chinese medicine or acupuncture should be the entry-level requirement for registration. In general, this level equates to the requirements set by the Chinese Medicine Board of Australia.

- 37 There are different standards relating to conduct, performance, and ethics among the various traditional Chinese medicine organisations represented in the application for regulation. The applicants have suggested using the competencies developed by Australia and Canada as a reference point for developing competencies.

Governance

- 38 I have carefully considered whether the profession should be regulated by an existing responsible authority or by establishing a new authority. I have considered the relative costs, the size of the profession, its difference in ethos and practice from other regulated professions, the willingness of existing responsible authorities to regulate the profession, and other options for minimising costs.
- 39 I consider that the profession is sufficiently different from other health professions and is of a sufficient size to make the establishment of a new responsible authority the most desirable and cost-effective option. Costs will be minimised by the profession entering into an arrangement with the Nursing Council of New Zealand which will be contracted to provide shared office space, certain operational services, and advice to support the establishment of the new Council.
- 40 The costs of establishing a new responsible authority are, in fact, likely to be lower than joining the profession to an existing responsible authority. This is primarily because the size of a conjoint Board would be larger than a new Board and would need to meet for longer, in order to consider matters relating to both professions. The cost efficiencies that result from joining a small profession to an existing responsible authority do not apply in the case of a profession the size of Chinese medicine. In addition, the responsible authority is more likely to draw from and align standards with other international regulators of Chinese medicine.

International professional alignment

- 41 Chinese medicine is regulated in a number of jurisdictions that are similar to New Zealand. Australia regulated Chinese medicine in 2012 and has 4,593 registered practitioners. In Canada, Chinese medicine (acupuncture and/or herbalists) is regulated in five provinces. In the United States, most states require national board certification for Chinese medicine practitioners. In the United Kingdom, the acupuncture profession has an accredited Register under the Professional Standards Authority.
- 42 Because the Act operates by preventing non-registered practitioners from holding themselves out to be a member of a health profession, rather than by licensing activities, regulation will not prevent non-registered practitioners or practitioners registered with other responsible authorities from practising traditional Chinese medicine. For example, a general practitioner who practises acupuncture will not be prevented from continuing to do so.
- 43 The Act's requirement for English-language competency may prove a barrier for some practitioners becoming regulated. Similarly, some practitioners may not meet whatever training standard the new responsible authority prescribes. The authority could mitigate these issues by establishing grandparenting arrangements for registration that require practitioners to remediate identified shortcomings within a set period of time.

Financial implications

- 44 Establishment and ongoing costs will be met by the Chinese medicine profession. The profession has estimated these to be \$452 per practitioner for establishment, and \$708 for an annual practising certificate. These costs are comparable to those paid by other regulated professions, and to what Chinese medicine practitioners are currently paying for voluntary registration organisations.
- 45 Any costs to the Crown will be met through baselines. ACC advises that regulation of Chinese medicine will likely result in increased costs for ACC.

Legislative implications

- 46 The proposals in this paper require an Order in Council under the Health Practitioners Competence Assurance Act 2003. It is expected that the Accident Compensation (Definitions) Regulations 2019 will need to be amended to reflect these changes.

Impact analysis

- 47 A Quality Assurance Panel with representatives from the Ministry of Health and the Regulatory Quality Team at the Treasury has reviewed the Regulatory Impact Assessment (RIA) titled "Regulation of the Chinese medicine profession under the Health Practitioners Competence Assurance Act", produced by the Ministry of Health in March 2020.
- 48 The panel considers that the Impact Statement **meets** the Cabinet requirements to support its decision.
- 49 A range of options has been assessed using well-developed criteria. Establishing a new responsible authority meets the objective of reducing risks of harm to the public by ensuring practitioners are competent and fit to practise Chinese medicine while minimising costs to the profession. It is preferred by the Chinese medicine profession and the Ministry of Health.

Climate implications of policy assessment (CIPA)

- 50 The Ministry for the Environment has been consulted and confirm that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 51 Those members of New Zealand's Chinese communities who do not speak English or for whom English is a second language may be impacted if access to Chinese medicine practitioners who speak their language is reduced by regulation of the profession. The Act's requirement for English-language competency may prove a barrier to registration for some practitioners, and organisations such as ACC may decline to fund treatment provided by non-regulated practitioners. This risk could be mitigated in part by the new responsible authority considering such impacts in determining its language standard and by utilising other mechanisms available under the Act (such as conditions on scope of practice) to facilitate registration. Australia effectively utilised such mechanisms in regulating Chinese medicine recently, and could serve as a useful exemplar.

Human rights

52 There are no human rights implications arising from this proposal.

Consultation

- 53 A broad consultation was conducted in 2011. Organisations consulted included the Accident Compensation Corporation, the Ministry of Business, Innovation and Employment, the Treasury, district health boards, responsible authorities, health professional bodies, and health services consumer associations. Most submissions (25 of 35) were supportive of regulating the practice of Chinese medicine under the Act. Six submissions expressed reservations because either they thought the criteria for regulation should be revised to include effectiveness or they were concerned that regulating Chinese medicine practitioners would change how the public viewed their professional status because it would grant formal recognition.
- 54 The application subsequently languished for some years, due to delays in completion of the 2012 review of the Act and competing priorities within the Ministry. The process was recently picked up again, and as Minister I agreed to recommend that the profession be regulated under the Act. An agency consultation has recently been completed to refresh the information to be relied on. The agencies consulted were: ACC, the Department of Internal Affairs, the Department of the Prime Minister and Cabinet, the Health and Disability Commissioner, the Ministry of Business, Innovation & Employment, the New Zealand Qualifications Authority, the Parliamentary Counsel Office, the State Services Commission, Te Puni Kōkiri, the Tertiary Education Commission, and Treasury.

Communications

55 A proactive media release, distributed to health stakeholders, is intended in relation to this proposal.

Proactive release

56 I propose to proactively release this Cabinet paper and related Impact Summary, and the submissions from the targeted stakeholder consultation process.

Recommendations

57 I recommend that the Committee:

1. **note** that the purpose of the Health Practitioners Competence Assurance Act 2003 is to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise.
2. **note** that the profession of Chinese medicine poses a risk of harm to the public and that this risk can be mitigated through regulation under the Health Practitioners Competence Assurance Act 2003.
3. **note** that regulating the Chinese medicine profession under the Health Practitioners Competence Assurance Act 2003 will better protect the public by providing mechanisms to ensure that Chinese medicine practitioners are competent and fit to practise, and the profession are supportive of regulation.

4. **note** that the Minister of Health was required under the Health Practitioners Competence Assurance Act to consult on the joint proposals to regulate the Chinese medicine profession and there is general support from submitters on the proposal.
5. **agree** that an Order in Council be made under the Health Practitioners Competence Assurance Act 2003 to:
 - 5.1 designate the Chinese medicine profession as a health profession
 - 5.2 establish a new responsible authority under the Health Practitioners Competence Assurance Act 2003, the Chinese Medicine Council of New Zealand, to regulate the Chinese medicine profession, with secretariat support provided (under contract) by the Nursing Council of New Zealand.
6. **note** the costs of regulation will be borne by the Chinese medicine profession (estimated 1100 practitioners) on a cost-recovery basis.
7. **note** that the implementation and ongoing regulation costs will be met by individual Chinese medicine practitioners.
8. **note** that establishing a new responsible authority, the Chinese Medicine Council of New Zealand, with contracted secretariat support from the Nursing Council of New Zealand, is the most cost-effective governance model to regulate the profession.
9. **authorise** the Minister of Health to issue drafting instructions to the Parliamentary Counsel Office to give effect to recommendation 5.

Authorised for lodgement

Hon Andrew Little
Minister of Health

Appendix 1: Criteria for regulation

To determine whether a health profession should be regulated under the Act, primary and secondary criteria were developed and consulted on in 2009. The criteria for applying are based on the consultation and the Minister's agreement. The primary criteria are specific requirements set out in the Act and must therefore be met in order to be regulated under the Act. Applications that meet the primary criteria will then be assessed on the extent to which they meet the secondary criteria. The secondary criteria focus more on the practicalities of a profession being regulated under the Act and whether this is, in fact, the most appropriate means to protect the health and safety of the public.

The primary and secondary criteria are set out below, followed, in Section 5, by guidelines to interpreting and demonstrating each of the criteria.

Primary criteria

The following primary criteria apply to applications from new professions seeking regulation under the Act.

The primary criteria for regulation under the Act are that:

- A. the profession delivers a health service as defined by the Act.
- B. the health services concerned pose a risk of harm to the health and safety of the public.
- C. it is otherwise in the public interest that the health services be regulated as a health profession under the Act.

Secondary criteria

If the primary criteria are met, the Ministry will apply the following second-level criteria to measure the appropriateness of regulation under the Act.

Criterion 1: Existing regulatory or other mechanisms fail to address health and safety issues.

Criterion 2: Regulation is possible to implement for the profession in question.

Criterion 3: Regulation is practical to implement for the profession in question.

Criterion 4: The benefits to the public of regulation clearly outweigh the potential negative impact of such regulation.

The Ministry has developed guidelines on how to interpret the criteria.

Appendix 2: Process of regulation

The process for a profession to become regulated under the Act is as follows:

1. The prospective applicants meet with Health Workforce in the Ministry of Health (the **Ministry**) to discuss issues when considering applying.
2. The Ministry receives an application from the professional body or bodies.
3. The Ministry undertakes a preliminary assessment of the application and seeks further information if required.
4. If the Ministry accepts that the application makes a robust case, it convenes an expert panel to review the application. This includes an independent assessment of whether the public is at risk of harm and whether it would be in the public interest to regulate the health service.
5. If necessary, discussions may be held between the applicants and existing responsible authorities (**RAs**) to seek agreement on whether the profession can be included in an existing RA.
6. Subject to the Minister of Health's agreement, the Ministry undertakes a consultation process and analyses submissions.
7. The Ministry then provides advice to the Minister regarding whether the profession should be regulated and the appropriate authority to regulate it. (Note: If agreement has not been reached regarding an appropriate RA, the Minister may assign the profession to an existing authority.)
8. If in agreement with the advice provided, the Minister seeks agreement from Cabinet.
9. If the policy for the proposal is agreed by Cabinet, an Order in Council is prepared by the Parliamentary Counsel Office. The Order in Council will then be considered by Cabinet and – if agreed – the Minister will recommend to the Governor-General that the profession is designated under the Act.
10. The profession joins (or is established as) a responsible authority.
11. The Minister then appoints members of the RA.