

# Submission to Health Workforce Principal Committee

## Practitioner Regulation Subcommittee

National Registration and Accreditation  
Scheme for the Health Professions

Other matters for inclusion in Bill B

23 December 2008



## Introduction

The Australian Physiotherapy Council and the Australian Physiotherapy Association (APA) are pleased to submit comments that reflect the consensus position for physiotherapy on the “Other matters for inclusion in Bill B” Consultation Paper dated 12 November 2008.

Physiotherapy commends the Health Workforce Principal Committee on the further elaboration of matters that have been addressed in previous papers and the clear responsiveness to comments provided in previous submissions and at meetings with the National Registration and Accreditation Implementation Project team. The timeframes for consideration of the consultation papers during this stage of implementation have been challenging for the professions that are involved. As this is the final submission for the year, physiotherapy wishes to note the extraordinary efforts of the Project Team, particularly Dr Louise Morauta and Mr Chris Robertson, in ensuring the time imperatives did not compromise consultation with all stakeholders. Physiotherapy has appreciated the many opportunities to participate in meetings and to engage with members of the implementation team at various forums. The Physiotherapy Registration Boards, the Australian Physiotherapy Association and the Council of Physiotherapy Deans, Australia and New Zealand thank the Committee for the opportunity to comment on the various elements of the national scheme which are to be included in Bill B.

This submission responds to the proposals explicitly included in the consultation paper. The profession has considered the content of the consultation paper and herewith submits its position on the issues. For ease of translation by the Project Implementation Team, the responses are set out using the same numbering system as the Consultation Paper and relevant text from the Consultation Paper is included in the original blue highlighted boxes. The physiotherapy responses are boxed. Physiotherapy would be pleased to provide further background and justification for the comments and recommendations within this response.

As noted in the submission regarding Registration Arrangements, 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. Please contact the Australian Physiotherapy Council Chief

Executive Officer, Margaret Grant, [margaret.grant@physiocouncil.com.au](mailto:margaret.grant@physiocouncil.com.au) for further information or clarification of any aspect of this submission.

### 3 Delegation powers of national boards

#### 3.5 More flexible committee arrangements

**Proposal 3.5.1:** It is proposed that the second stage legislation provide a broad delegation power (as in Clause 46 of the National Law Bill), that would allow a national board to delegate any of its functions, including all of the key decisions listed above, to committees of the board or to staff or other persons, other than the power of delegation. Under such an arrangement, a board would have the discretion to determine the constraints or boundaries placed on any delegation, as well as the number and make up of any committees it requires in order to make key decisions listed above.

##### Comment

Physiotherapy supports the intent of this proposal but notes that the proposal raises the potential for conflict of interest associated with payment. This risk may need to be addressed in conditions of employment. Physiotherapy suggests that approval of courses that have been accredited should not be delegated.

**Proposal 3.5.2:** It is proposed that the only statutory committees in the new scheme would be panels convened for the purposes of hearing individual matters (health, performance or conduct).

##### Comment

Physiotherapy supports this proposal

**Proposal 3.5.3:** It is proposed that the legislation require a minimum of three members on a panel for the purposes of statutory decision-making with at least 50 per cent and no more than two thirds of the members being registrants from the profession concerned and at last one member being a community member.

##### Comment

Physiotherapy recommends the inclusion of a member from the legal profession, a community representative and at least two registrants from the profession concerned. The increase in the proposed minimum size of a panel is acknowledged, with recognition that identifying members to fill panels such as this might be difficult in small professions, and/or small states. The importance of including a member of the legal profession on a panel is seen as outweighing this potential disadvantage. From experience, there is a critical need for the legal member to ensure that the legislation and associated rules are correctly applied and observed in the panel processes. Where a health practitioner is accompanied by or represented by senior counsel, the panel members are greatly assisted by the directions and advice of senior legal practitioners who are appointed as chairs or members of panels. This role is distinct from the community member who represents the public interest.

**Proposal 3.5.4:** It is proposed that the legislation provide that a panel should not include any person who was a member of the board or committee that took the decision to refer the matter to the panel.

##### Comment

Physiotherapy supports this proposal

**Proposal 3.5.5:** It is proposed that where a board establishes any committee other than a statutory committee or panel that the composition is not prescribed in legislation but rather is a matter for the board to determine in line with any directions from Ministerial Council.

##### Comment

Physiotherapy supports this proposal

### 3.6 Further safeguards around delegations

**Proposal 3.6.1:** It is proposed that the legislation provide for safeguards relating to the delegation of board powers as follows:

- a delegation must be in writing and specify the person or persons to whom the delegation made, the decision or decisions that may be taken under delegation, and the period to which the delegation relates, as well as any conditions the board has attached to the exercise of the decision making under delegation, and include the ability to rescind a delegation
- a right of review for a person whose interests are affected by a decision made under delegation similar to the rights of review against decisions of the board itself (with powers for the board to delegate the conduct of such a review)
- a statutory limit on the length of time a practitioner’s registration may be suspended without review by the board (or delegate of the board)
- a right of review for key registration and panel hearing decisions, as outlined in section 10 of the complaints consultation paper, to the relevant State or Territory tribunal for decision
- general and specific provisions with respect to conflicts of interest that require a person to exclude themselves from decision-making in the event of a conflict, including, for example, where a small number of practitioners operate in a single geographical area, and
- general provisions with respect to procedural fairness, such as separation of powers between original decision making and review of decisions.

Comment

Dot point 1 – support

Dot point 2 – suggest that the term ‘are affected’ is broad, and requires re-defining. It is likely that all decisions are likely to ‘affect interests’.

Dot point 3 – it is suggested that a properly constructed order would explicitly describe the duration of a suspension, based on the circumstances.

Dot point 4 - support

Dot point 5 - the importance of exclusion for reasons of conflict of interest is acknowledged. This may be challenging in small professions/states, and costly to remedy by bringing personnel from other states. The importance of respect of conflict of interest over cost is recognised and supported. Although outside the scope of legislation, physiotherapy recommends that guidelines regarding criteria for conflict of interest are published for use within the new scheme to resolve ambiguity, and ensure consistency. Physiotherapy suggests that pecuniary interests must also be referred to in the disclosure requirements.

Dot point 6 - support

#### 4 Appointments to board (non-statutory) committees or (statutory) panels

**Proposal 4.1.1:** With respect to advisory committees, it is proposed that the legislation, while providing powers for boards to establish such committees, would be silent on the process through which a board might select members of its advisory committees. This would afford a board maximum flexibility to determine their terms of appointment.

Comment

Physiotherapy supports this proposal.

With respect to committees established by boards for the purposes of decision making under delegation from the boards, there are three options:

**Option 1:** The legislation empowers boards to appoint persons to such committees in accordance with a process approved by the Ministerial Council. The Ministerial Council process requires:

- an open and transparent process where nominations are sought publicly from individuals and professional bodies
- minimum membership requirements for any committee delegated decision making, to ensure a balance of registrant and non-registrant members, and
- appointments for periods of up to three years.

**Option 2:** As for Option 1, except that the Ministerial Council's approved process would include a nominee of the Ministerial Council on selection panels, with that nominee not having a right of veto.

**Option 3:** The legislation makes provision for any person appointed by a board to a committee delegated key decision making to be drawn from a list of persons approved by the Ministerial Council.

**Proposal 4.1.2:** The stakeholders are asked to advise of their preferred option for appointments to committees to which board powers are delegated.

**Comment**

While physiotherapy supports the principle of an 'open and transparent process', it is important that there is provision for establishment of committees in a timely manner. The process alluded to in Option 1 must allow Boards to nominate suitable members (i.e. advise Ministerial Council). It would appear that Options 1 and 3 would meet the standards required for transparency and would ensure that appointments are made via an appropriate process. The practical application might be based on the responsible board holding a list of potential members who have been selected and previously approved by the Ministerial Council. Panels and committees could be drawn from the list by the responsible board.

With respect to statutory panels established by boards for the purposes of conducting hearings arising from conduct, performance or health matters, while the legislation would specify procedural matters, there are three options with respect to the appointment process:

**Option 1:** The legislation empowers boards to appoint persons to such committees in accordance with a process approved by the Ministerial Council. The Ministerial Council process requires:

- an open and transparent process where nominations are sought publicly
- minimum membership requirements for any committee delegated decision making, to ensure a balance of registrant and non-registrant members, and
- appointments for periods of up to three years.

**Option 2:** As for Option 1, except that the Ministerial Council approved process would include a nominee of the Ministerial Council on selection panels, with that nominee not having a right of veto, and would provide for persons to be appointed to a list. Persons on the list would then be eligible for appointment by a board to sit on a hearing panel arising from a conduct, performance or health matter.

**Option 3:** The legislation makes provision for any person appointed by a board to a statutory committee or hearing panel to be drawn from a list of persons approved by the Ministerial Council.

**Proposal 4.1.3:** Stakeholders are requested to advise of their preferred option for appointments to statutory hearing panels.

**Comment**

Physiotherapy supports an identical approach to that described in the comment related to Proposal 4.1.2.

## 5 Interaction of national scheme with other legislative schemes

### 5.1 Options

There are six main options for determining suitable arrangements with respect to the interface between the national scheme and each of the legislative schemes listed. These are:

**Option 1:** One jurisdiction's law applies (for example Queensland or Commonwealth)

**Option 2:** All applicable State and Territory laws apply

**Option 3:** No jurisdiction's laws apply (for example the Bill and/or consequential amendments to other legislation specifically remove the scheme from coverage)

**Option 4:** Tailor made provisions are included within the legislative scheme itself

**Option 5:** Consequential amendments to another legislative scheme to recognise the national registration scheme (technically different to option 1, but has the same effect), or

**Option 6:** Interface is dealt with administratively rather than legislatively.

#### Comment

Physiotherapy notes that the arrangements with respect to the interface between the national scheme and each of the legislative schemes listed must provide maximum consistency and only apply differing State and Territory laws when no other option exists.

### 5.2 Criteria

There are a number of criteria that can be used to guide these policy deliberations:

- efficiency of operation – for example, the need to avoid unnecessary duplication of effort and minimise costs to boards of administering the scheme
- transparency of decision making – for example, the same rules should apply, no matter where a consumer, complainant or registrant are located
- accountability of decision makers – for example, the legislation should provide clarity as to who makes decisions under the scheme and what avenues of review are available
- consistency and/or uniformity of application across Australia – for example, wherever possible, given the objective is to establish a national scheme, national laws should apply, rather than multiple State and Territory laws.

Table 1 below lists each legislative area for which policy decisions are required and the proposed treatment of each with reference to the six options set out above.

**TABLE 1: State and Territory laws that will interface with the national registration scheme**

Interface	Proposed approach
<p><b><i>Freedom of information</i></b></p>	<p>In order to ensure transparency and accountability in the operation of the national scheme, it is considered desirable that it be subject to a single freedom of information regime rather than multiple regimes, and that there be clarity for any person making an FOI application as to which legislative scheme applies.</p> <p>The National Law Bill gives effect to <b>Option 1</b>, that is, the Queensland <i>Freedom of Information Act</i> applies during the establishment phase of the scheme. However, in framing the second stage legislation, it is possible that either the Commonwealth or the Queensland FOI legislation might apply.</p> <p><b>Proposal 5.2.1:</b> With respect to freedom of information, it is proposed that the Commonwealth <i>Freedom of Information Act</i> apply (<b>Option 1</b>).</p>
	<p>Comment Physiotherapy supports this proposal</p>

Interface	Proposed approach
<b>Privacy &amp; confidentiality</b>	<p>With respect to confidentiality and lawful disclosure provisions, the National Law Bill gives effect to <b>Option 4 (tailor made provisions)</b>. It is expected that the second stage legislation will contain similar provisions imposing obligations on those administering the scheme (such as board members, committee members and staff) to keep confidential any information they obtain in the course of carrying out their responsibilities.</p>
	<p><b>Proposal 5.2.2:</b> With respect to confidentiality and lawful disclosure, it is proposed that tailor made provisions along the lines of Clause 53 of the National Law Bill be included in the second stage legislation (<b>Option 4</b>).</p>
	<p>Comment Physiotherapy supports this proposal</p>
	<p>With respect to privacy law, the question of which privacy regime should apply to the national scheme has been addressed in a separate consultation paper titled 'Privacy and Information Sharing' with various options proposed. The Australian Law Reform Commission's report on Australian Privacy Law and Practice has found Australia's privacy laws to be multilayered, fragmented and inconsistent, causing complexity, significant compliance burdens and costs, as well as impeding projects in the public interest.</p> <p>Changes are expected in privacy regimes as a result of the report. Flexibility to adjust to future changes can be included in the national legislation.</p> <p><b>Proposal 5.2.3:</b> With respect to the application of a privacy regime, it is proposed that the existing Commonwealth private sector privacy regime and the National Privacy Principles apply, and are incorporated by reference into the national scheme legislation (<b>Option 1</b>).</p>
	<p>Comment Physiotherapy supports this proposal (although risks recognised associated with appropriateness, should the law or principles as they stand now be altered).</p>

Interface	Proposed approach
<b><i>Ombudsman legislation</i></b>	<p>All States and Territories and the Commonwealth have enacted ombudsman legislation (see Attachment 5 in complaints consultation paper for summary of laws).</p> <p>The National Law Bill gives effect to <b>Option 1</b>, that is, the Queensland <i>Ombudsman Act</i> applies. However, further work is underway to analyse the implications of <b>Option 1</b> (one jurisdiction's law applies) and <b>Option 2</b> (all applicable State and Territory laws apply) with respect to the full operation of the scheme, in order to determine a preferred position to put to Ministers. Given the need for consistency across Australia, the Commonwealth <i>Ombudsman Act 1976</i> is preferred..</p> <p><b>Proposal 5.2.4:</b> With respect to ombudsman legislation, it is proposed that the <i>Commonwealth Ombudsman Act 1976</i> apply (<b>Option 1</b>).</p> <p>Comment Physiotherapy supports this proposal</p>
<b><i>Financial accountability legislation</i></b>	<p>The National Law Bill gives effect to <b>Option 4 (tailor made provisions)</b>. This approach is considered to provide the necessary financial, auditing and reporting accountabilities. It is possible for additional provisions to be included in the second stage legislation to ensure a suitable financial accountability framework to support the full operation of the scheme, for example, to provide clarity as to the investment powers of the national agency.</p> <p><b>Proposal 5.2.5:</b> With respect to financial accountability, it is proposed that tailor made provisions be included in the second stage legislation (<b>Option 4</b>).</p> <p>Comment Physiotherapy supports this proposal. Suggest that general accounting principles could apply.</p>
<b><i>Public sector administration legislation</i></b>	<p>The National Law Bill gives effect to <b>Option 4 (tailor made provisions)</b>. This approach allows staff to be employed directly by the national agency, under relevant awards, rather than as Queensland public servants.</p> <p>This approach appears to provide the necessary independence and flexibility for the national scheme and is proposed to be carried forward in the second stage of legislation.</p> <p><b>Proposal 5.2.6:</b> With respect to the employment arrangements and accountability of staff and board members under the scheme, it is proposed that tailor made provisions be included in the second stage legislation (<b>Option 4</b>).</p> <p>Comment Physiotherapy supports this proposal. Physiotherapy strongly recommends that the conditions and standards of employment for current permanent employees of boards are not disadvantaged in the transition phase.</p>

Interface	Proposed approach
<p><b>Statutory interpretation legislation</b></p>	<p>The National Law Bill gives effect to <b>Option 4 (tailor made provisions)</b>. The approach taken is to apply the interpretation provisions in Schedule 2 of the <i>Consumer Credit Code</i>, set out in the <i>Consumer Credit (Queensland) Act 1994</i>, to the National Law as if the provisions were a part of the National Law.</p> <p>Tailor made provisions are considered to provide the necessary clarity, certainty and consistency of interpretation of the legislation across jurisdictions (rather than multiple Acts interpretation regimes applying). It is proposed that tailor made provisions be included in a Schedule attached to the National Law in the second stage legislation, rather than adopted by reference from the Consumer Credit Code.</p> <p><b>Proposal 5.2.7:</b> With respect to statutory interpretation, it is proposed that tailor made provisions be included in the second stage legislation (<b>Option 4</b>).</p> <p>Comment Physiotherapy supports this proposal</p>
<p><b>Warrant powers</b></p>	<p>The consultation paper on complaints proposes <b>Option 2 (all State and Territory laws apply)</b>. This would mean that when a national board requires a warrant to enter and search premises, it would make application to the relevant State or Territory Magistrates Court (or equivalent).</p> <p><b>Proposal 5.2.8:</b> With respect to warrant powers, it is proposed that the national scheme legislation require application for a warrant to be made via existing State and Territory legislation (<b>Option 2</b>).</p> <p>Comment Physiotherapy supports this proposal</p>
<p><b>Working with children checks legislation</b></p>	<p>It is proposed that <b>Option 2 (all State and Territory laws apply)</b>.</p> <p>Protocols will be required between the national agency and State and Territory agencies that administer the working with children checks, to deal with how the agencies interact with respect to applications for checks, when matters affecting eligibility status come to the attention of either party, and the obligations on parties to inform each other.</p> <p><b>Proposal 5.2.9:</b> With respect to working with children legislation, it is proposed that existing State and Territory legislation, where it exists, continues to apply (<b>Option 2</b>).</p> <p>Comment Physiotherapy supports this proposal</p>

Interface	Proposed approach
<p><b>Special events legislation</b></p>	<p>It is proposed that <b>Option 2 (all State and Territory laws apply)</b>.</p> <p>Special events legislation will no longer need to apply to practitioners from interstate (since they will be nationally registered). However, jurisdictions may still wish to have capacity to streamline arrangements through which practitioners from overseas visiting for large events are conferred with various authorities and/or exempted from committing holding out and other offences. Consequential amendments in Bills C may be required. Protocols may also be required between those State and Territory government departments responsible for administering special events legislation, and the national boards.</p> <p><b>Proposal 5.2.10:</b> With respect to special events legislation, it is proposed that existing State and Territory legislation, where it exists, continues to apply (<b>Option 2</b>).</p> <p>Comment Physiotherapy supports this proposal</p>

## 6 Trans-Tasman Mutual Recognition and the national scheme

**Proposal 6.1:** It is proposed that the national scheme legislation and any consequential amendments be framed in a way that allows for the Trans-Tasman Mutual Recognition Principle, and preserves the linkages between Australian and New Zealand regulatory authorities and supports joint standard setting and accreditation.

Comment  
Physiotherapy supports this proposal

