

**NATIONAL REGISTRATION AND ACCREDITATION SCHEME
FOR THE HEALTH PROFESSIONS**

**APS Response to the
Consultation Paper on**

Other matters for inclusion in Bill B

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RESPONSE TO CONSULTATION PAPER:

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3 Delegation powers of national boards

3.1 Background

Clause 46 of the *National Law Bill* sets out the powers of delegation of the national boards. For the purposes of establishment of the scheme, and because no registration or disciplinary powers will be exercised during this phase, these provisions have been framed broadly to enable maximum flexibility in delegations during the establishment phase.

Clause 45 of the *National Law Bill* provides powers for a national board to establish committees to develop health profession standards, or to exercise any functions of the board or provide assistance to the board in the exercise of its functions. Clause 45(3) provides that members of a committee are to be selected and appointed in accordance with a procedure approved by the Ministerial Council.

To ensure timely and responsive decision making, it will be important for the second stage legislation to provide the flexibility for decisions to be taken, at the discretion of a national board, at either the national level (by the board itself or a committee of the board) or at a regional or State or Territory level, and by a range of persons. It is also important that the delegation arrangements provide for sufficient transparency and accountability in decision making including the right of review of delegated decisions.

3.2 The national scheme environment

The purpose of the national legislative scheme is to protect the public. Therefore, boards must be empowered to deal efficiently with the substantial administrative demands of the registration process, but also to take responsive action, for example, to deal immediately and swiftly with practitioners whose continued practise presents a risk to public health and safety, via imposition of conditions or immediate suspension of registration.

As discussed in previous consultation papers, it is important to observe the difference between the national scheme and current State and Territory schemes. First, the scale of the scheme is different and in some cases very different from the matters current boards administer. It is unlikely that the new national boards will handle any particular matters themselves. Rather they will be engaged in setting directions, appointments and broader policy and standard-setting matters. The requirements for decision-making below the level of the board will therefore be larger in the new scheme.

Second, the ten professions that will be part of the scheme when it commences differ both in the size and the complexity of their operational requirements. As a result, care is needed not to impose through the national legislation a set of requirements which while suitable for medicine or nursing would be unnecessary and inefficient for much smaller professions.

In order to determine the most suitable delegation arrangements for the national scheme it is useful to understand, first, the types of committees that might operate and the types of key decision making powers that they might exercise.

3.3 Types of committees

There are three types of committees that a board might establish and operate under the national scheme:

- ‘advisory’ committees – such committees might be established from time to time by a board, pursuant to its general powers to establish committees, and would operate in an advisory capacity
- ‘delegated’ committees – such committees might be established by and operate in accordance with a written delegation from a board, and
- ‘statutory’ committees – such committees might be established by a board, but constituted in accordance with the legislation, with powers conferred by legislation to make statutory decisions (such as those outlined below) on their own authority rather than under a delegation.

All State and Territory registration Acts make provision in some form for these three types of committees. With respect to statutory committees, the most common form in legislation is the committees or panels that are established by boards from time to time, to hear disciplinary matters arising from complaints or notifications to the board.

3.4 Key decisions

With respect to the functions that are to be conferred on the national boards in the second stage legislation, for each main function there are a number of types of key decision that will be required. These include but are not limited to:

Registration function:

- Decision to register
- Decision to refuse to register
- Decision to impose conditions on registration
- Decision to refuse to endorse registration or impose conditions on an endorsement

Complaints handling and performance, health and conduct management functions:

- Decision to immediately suspend registration in response to possible risk to public health and safety
- Decision following preliminary assessment of a notification
- Decision to impose conditions on registration or accept undertaking
- Decision following a hearing
- Decision to refer to external tribunal for hearing

Course approval function:

- Decision to approve a course of study for registration purposes
- Decision to refuse to approve a course of study for registration purposes.

In existing State and Territory registration legislation, the extent to which the legislation provides for the key decisions listed above to be delegated beyond the board or a statutory committee of the board varies considerably across jurisdictions (See [Attachment 1](#)), although a trend is apparent, towards statutory provisions that allow a board greater flexibility to delegate, at its discretion, decision-making beyond the board itself, to committees and/or staff of the board. In New Zealand for example, Clauses 17 and 18 of Schedule 3 of the *Health Practitioners Competence Assurance Act 2003* provide for a broad delegation power (that is, any decision of the board can be delegated except for hearings that must be conducted by a statutory panel appointed by the board). There are, however, some checks and balances on the exercise of delegated decision making – the legislation provides a right for a person who is adversely

affected by a decision made under delegation, to seek a review of the decision to the authority within a specified timeframe. The authority can also delegate the conduct of the review.

3.5 More flexible committee arrangements

The consultation papers on registration arrangements and complaints outline a proposed schema for how the decisions outlined above might be made under the national scheme, and the extent of delegation powers available to boards (see section 6.2 of registration arrangements consultation paper and section 5.4 of the complaints consultation paper).

Initial feedback on these papers suggests some concern about the complexities of proposed arrangements, with multiple statutory committees established under legislation to make various types of decisions. Some submissions have advocated more flexibility for national boards to have discretion to delegate decision-making, in effect to 'delegated' committees, rather than establishing a series of statutory committees under the legislation.

In response to this feedback and in order to further gauge views, this paper proposes a revised model of committee and delegation arrangements under the new scheme. Given the need for flexibility and responsiveness of decision making, and for certain decisions to be taken at the local State and Territory level, it may be preferable for the legislation to make provision for more flexible delegation powers than those proposed in the consultation papers on registration arrangements and complaints, but which provide sufficient safeguards and accountability.

In this context, it is proposed that the second stage legislation include more flexible delegation arrangements along the following lines:

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.

The only exception to this arrangement would be the conduct of a hearing (of a health, performance or conduct matter), where the legislation would contain specific provisions that limit the discretion of boards in the way such matters are conducted.

Hearing panels would be convened at the discretion of the board as a matter indicates, but once appointed, would act under their own statutory powers in making decisions. They would be 'statutory committees' in the sense that the legislation would set out, amongst other things:

- the minimum requirements concerning the constitution of a hearing panel
- any procedural requirements
- the findings and determinations or orders available to the panel following a hearing and
- review rights.

The APS endorses this proposal

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).

The APS endorses 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 least one member being a community member.

As a safeguard against prejudging matters before a panel, 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.

The APS endorses this proposal. It is worth stressing here in acknowledgement of complexity and variation within the profession of psychology and on the basis of the peer review principle that where the notified registrant is from an identifiable subset of the profession then the majority of the professionals on the panel should have the same or equivalent affiliation/specialisation. This process would be familiar to the medical boards who would need to do this for their specialist colleges.

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.

The APS endorses 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.

The APS endorses this proposal

3.6 Further safeguards around delegations

If more flexible delegation arrangements are included in the legislation, then it would be desirable for the legislation also to include some checks and balances on the operation of delegated decision making. The next section considers the constraints that should be imposed in relation to the appointments of committees. Other provisions are set out below.

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.

The APS endorses this proposal and reiterates the crucial nature of the right of review. The proposed statute of limitations on reviews and the rights of the notified registrant to initiate a review within that statutory period for any reason should be fully enunciated.

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

The IGA provides (Clause 1.26 of the attachment) that committee members will be drawn from a process approved by the Ministerial Council. Clause 6.10 of the IGA states *'To further ensure a smooth transition to the scheme, all existing members of jurisdictional boards and supporting hearing panels for the nine professions will, if they agree, be appointed to a list of persons from which national boards may form committees for a period of two years from commencement of the operation of the scheme'*. These transitional provisions will be included in the national legislation.

While the IGA has provided a method for appointment at the commencement of the scheme, consideration now needs to be given as to what type of process the Ministerial Council might approve for the appointment of members of committees and panels not covered by the transition arrangement. Boards will need an efficient mechanism for accessing such persons, sometimes at short notice, particularly for panels.

The process of selection and appointment of members who sit on 'statutory' committees or panels (and how this is reflected in legislation) may be different to the process for other committees that exercise powers under delegation or committees which are advisory only.

While the APS endorses the principle in Paragraph 1, and would wish to have such people available, for reasons expressed previously, the transition to National Boards must assist the creation of a new perspective so it may be worth considering adding after 'scheme': 'Where necessary to ensure that the skills needed are included in the committees, the national boards may draw more widely from within the relevant profession.'

In general for all points below, the APS reiterates the point made at 3.5.3 regarding peer review.

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.

The APS endorses 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.

The APS endorses Option 1 but with the balance in favour (2/3rds) of registrant members.

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.

The APS endorses Option 1 but with the balance in favour (2/3rds) of registrant members.

5 Interaction of national scheme with other legislative schemes

The national scheme is to operate in concert with, and complementary to, a range of other State and Territory laws. Policy decisions are required in order to determine the nature of the interfaces between the national scheme and these other legislative schemes.

In some instances, the IGA has specified how the interface is to be dealt with, for example the following will continue to remain with all State and Territory laws applying.

- tribunal arrangements
- Health Care Complaints Commission arrangements, and
- drugs and poisons legislation.

In a number of other cases, there are alternative options available for consideration.

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.

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><i>Freedom of information</i></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 Option 1, 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>Proposal 5.2.1: With respect to freedom of information, it is proposed that the Commonwealth <i>Freedom of Information Act</i> apply (Option 1).</p> <p><i>APS agrees with Option 1</i></p>
<p><i>Privacy & confidentiality</i></p>	<p>With respect to confidentiality and lawful disclosure provisions, the National Law Bill gives effect to Option 4 (tailor made provisions). 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>Proposal 5.2.2: 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 (Option 4).</p> <p><i>APS Opinion is as follows:</i> <i>Reference to clause 53 of the National Law Bill appears to be quite restrictive and does not make reference to the publication of any information at all. There needs to be provision for the publication of such information as:</i></p> <ul style="list-style-type: none"> <i>• registration (this is included in the 2008 Bill), conditional registration, suspension, expulsion</i> <i>• matters under investigation where practitioners have not been suspended (this may be an opportunity to address some of the concerns about damage to a practitioner's reputation and work as mentioned above)</i> <i>• sharing of information between states and or within the different bodies within the scheme – eg Ministerial Council, Advisory Council, National Agency and National Boards</i> <i>• accreditation of courses, conditional accreditation, cancellation of accreditation etc</i>

	<ul style="list-style-type: none"> • <i>consideration should also be given to sharing of information with overseas bodies where registered practitioners seek to practice in another country</i> <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>Proposal 5.2.3: 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 (Option 1).</p> <p><i>The APS endorses Option 1</i></p>
<p>Financial accountability legislation</p>	<p>The National Law Bill gives effect to Option 4 (tailor made provisions). 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>Proposal 5.2.5: With respect to financial accountability, it is proposed that tailor made provisions be included in the second stage legislation (Option 4).</p> <p><i>APS agrees with Option 4 as the best possible under the circumstances where there is only State jurisdictional responsibility.</i></p>
<p>Public sector administration legislation</p>	<p>The National Law Bill gives effect to Option 4 (tailor made provisions). 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>Proposal 5.2.6: 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 (Option 4).</p>

	<p><i>APS considers Option 1 preferable. The reason for this is that the Commonwealth Law has the benefit of providing coverage across all jurisdictions rather than tailor made provisions that may be jurisdiction bound. Since there is Commonwealth legislation, it should adopted.</i></p>
<p>Statutory interpretation legislation</p>	<p>The National Law Bill gives effect to Option 4 (tailor made provisions). 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>Proposal 5.2.7: With respect to statutory interpretation, it is proposed that tailor made provisions be included in the second stage legislation (Option 4).</p> <p><i>A combined Option 1 and Option 4 preferred. Commonwealth rules should apply where possible, and tailor made provisions for the balance. This is preferable over Option 5 because all definitions will be included in one place and consistent across all jurisdictions. Amendments to definitions will only need to be made in one Act and they will be easier to find.</i></p>
<p>Warrant powers</p>	<p>The consultation paper on complaints proposes Option 2 (all State and Territory laws apply). 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>Proposal 5.2.8: 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 (Option 2).</p> <p><i>APS supports Option 2. There is no need to amend any legislation if the existing legislation is adopted. Makes sense to adopt court rules relevant to each jurisdiction rather than trying to create a unique set of court rules for this scheme alone.</i></p>

<p>Working with children checks legislation</p>	<p>It is proposed that Option 2 (all State and Territory laws apply). 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>Proposal 5.2.9: With respect to working with children legislation, it is proposed that existing State and Territory legislation, where it exists, continues to apply (Option 2).</p> <p><i>APS accepts Option 4 as only workable one. Preferable that more explicit rules and or mutual recognition is incorporated in the legislation. Practitioners should not be required to meet different sets of rules in each jurisdiction. There needs to be a mechanism whereby recognition of eligibility to work with children in one state should mean eligibility in all states. Careful comparison needs to be made with the requirements for privacy and confidentiality and these provisions.</i></p>
<p>Special events legislation</p>	<p>It is proposed that Option 2 (all State and Territory laws apply). 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>Proposal 5.2.10: With respect to special events legislation, it is proposed that existing State and Territory legislation, where it exists, continues to apply (Option 2).</p> <p><i>This section needs some clarification as to what is meant by 'special events' legislation. Provisions should be nationally consistent to accommodate those completing lecturing/ teaching or demonstration tours across a variety of jurisdictions. Should fit with registration provisions. Option 5 means too many Acts to amend. Option 4 is preferable. To encourage overseas participation, provisions should be consistent across all jurisdictions and the ability to meet one set of rules should automatically translate to all sets to facilitate ease of access.</i></p>

6 Trans-Tasman Mutual Recognition and the national scheme

It is important that the national scheme is implemented in a way that implements the Trans-Tasman Mutual Recognition Principle with respect to the regulated health professions, that is, that a practitioner registered in an equivalent occupation in New Zealand is automatically eligible for registration in that occupation in Australia and vice versa. It is intended that existing linkages, for example, between national accreditation bodies and the equivalent registering authorities in New Zealand be maintained and strengthened, and that existing joint standard setting and assessment processes continue.

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.

The APS endorses this proposal