

Submission by the Health Practitioner Registration Boards¹

on Other Matters for inclusion in Bill B

Introduction

This submission is on behalf of all twelve health practitioner registration Boards except where identified. Where no comment is provided, the proposal as detailed in the consultation paper is endorsed by all Boards. In this regard, the Boards have chosen to submit only on those proposals which they believe require further consideration.

In submitting on the proposed arrangements, the Boards recognise that more detail will be incorporated in the legislation. However, to ensure that such detail is driven by sound policy positions, this submission will address both the broad policy positions proposed and the lower level detail where it is considered necessary to inform the policy position.

Section 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.*

Submission of the Boards

The Boards fully endorse the proposals for more flexible committee and delegation arrangements than initially proposed as this is consistent with the submissions in response to the initial consultation papers on registration matters and on complaint matters. The Boards further rely on their submission in response to the proposed registration arrangements about delegations to staff. This was as follows:

The Boards support the inclusion of a delegations power as this will be a core element necessary for successful implementation of the scheme. However, given the nature of the relationship between the Agency and the Boards, it would be inappropriate for the Boards to delegate to a 'person employed by the National Agency, or a person engaged by the National Agency to provide services to the Board' in the absence of the agreement on an appropriate representative of the agency. This matter is addressed reasonably well in the Queensland legislation which provides that a Board may delegate its power under the legislation to, with the agreement of the Executive Officer, an appropriately qualified member of the office's staff.

Additionally, the delegation should be made to a position in the agency rather than an individual as this could be problematic in managing decision-making during periods of illness or leave of that individual.

¹ Chiropractors Board of Queensland, Dental Board of Queensland, Dental Technicians and Dental Prosthetists Board of Queensland, Medical Radiation Technologists Board of Queensland, Occupational Therapists Board of Queensland, Optometrists Board of Queensland, Osteopaths Board of Queensland, Pharmacists Board of Queensland, Physiotherapists Board of Queensland, Podiatrists Board of Queensland, Psychologists Board of Queensland, and Speech Pathologists Board of Queensland.

It is further submitted that the proposal enabling the national boards to delegate to 'other persons' may be too wide. In this regard, the authority may enable a national board to delegate decision making to individuals outside the legislative scheme. This may be problematic if such individuals are not subject to the same probity requirements as staff employed by the agency or members of boards established under the legislation or members of committees appointed by those boards.

Section 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.*

Submission of the Boards

The Boards generally endorse the proposals as documented but raise a number of matters for consideration to inform drafting of the provisions. These are as follows:

- The proposal that 'a right of review for a person whose interests are affected by a decision made under delegation' appears to extend the right for internal review to individuals who are not eligible to seek an external review. In this regard, if not carefully drafted rights of review could be extended to, for example, employers who believe that their interests are affected by a decision to refuse registration to a potential employee.
- If it is intended to extend the right of review to any person whose interests are affected, it is likely that all who have a decision unfavourable to their interests will seek a review if there are no costs associated with seeking that review. This will impact on cost and may also negatively impact on the time available for national boards to focus on governance and policy issues.
- While the Boards understand the proposal for internal review, it seems to be inconsistent with general administrative law about the power held by the delegate. In this regard, the delegate is discharging the authority as if it were the national board making the decision and the Boards question why internal review rights would be more extensive than the rights to external review.

The Boards consider that these are significant issues that need to be resolved as they may impair the functionality of the scheme. For example, in Queensland during 2007-2008, 327 complaints were assessed, of which 101 were referred for investigation. Under the arrangements proposed and assuming all those dissatisfied seek an internal review, 101 registrants would seek a review of the decision to investigate and 226 notifiers would seek a review of the decision to take no further action. If registrants of the 12 Boards represent 4.5% of the total number of registrants nationally, a significant workload will ensue through the establishment of an internal review process as proposed, being approximately 6,540 internal reviews per annum just for decisions about notifications received.

The Boards submit that establishing a three month statutory review timeframe is excessive and will create a significant workload across the professions, particularly given that the current benchmark for completion of an investigation by most organisations is twelve months. On this basis, the Boards submit that a twelve month timeframe for statutory review would be sufficient if the national boards were not estopped from reviewing the suspension (or conditions or undertakings as will be proposed later in this submission) on their own motion.

There are a number of other matters the Boards submit should be considered in providing for a suspension power. These are as follows:

- *The threshold for taking action under the suspension power is too high as the national boards will have to be able to demonstrate that the ‘...registrant’s continued practice poses a **significant** risk to public health and safety.’*
- *This increases the threshold for action when compared to the current Queensland legislation which establishes a two part threshold being that: (a) the registrant poses a **serious potential risk** to the wellbeing of vulnerable persons; and (b) immediate action is necessary to protect the vulnerable persons.*
- *The powers available are restrictive as they only allow either a suspension or an undertaking and do not require the national board to take the least onerous action. As such, the balance between public protection and fairness to registrants is not achieved by the proposal.*

Consistent with these matters, the Boards submit that the legislation provide for: (a) a ‘serious potential risk’ threshold for action to be initiated by a national board; (b) an increase in the range of actions available to the board being suspension, imposition of conditions or the acceptance of undertakings (which must be published); and (c) the national boards be required to take the least onerous action given the circumstances before them.

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

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

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

Submission of the Boards

The Boards support Option 1 subject to the 'open and transparent process' providing for the emergent appointment of members where the initial list of nominees does not include members with the knowledge, skill and experience required for a particular matter being dealt with by a board or a panel.

Section 5 Interaction of national scheme with other legislative schemes

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).*

Submission of the Boards

The Boards rely on their submission in response to the proposed arrangements for information sharing and privacy about this proposal. That submission was as follows:

The proposals as documented are supported by the Boards subject to resolution of the following issue:

The proposal to use the private sector national privacy principles does not appear to take into account the proposal that the national agency be subject to the Commonwealth Freedom of Information legislation. In this regard, current Queensland privacy requirements limit access to that existing under the Freedom of Information Act (Qld) 1992. Should access be more extensive than that provided through freedom of information avenues, this may have implications for the conduct of investigations and disciplinary actions, particularly if access is enabled to legal advice. In this regard, it is noted that there is no mechanism under the private sector national privacy principles to exempt release of legal advice on the basis of legal professional privilege.

This issue has the potential to be even more problematic given the wide definition of personal information under the Privacy Act (Cth) 1988 and the potential exclusion of the exemptions available under freedom of information legislation.

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).*

Submission of the Boards

The Boards submit that tailor made provisions of this nature should also include probity arrangements, particularly in relation to standards of public sector administration similar to that provided in Queensland by the *Public Sector Ethics Act 1994*. Such arrangements, of course, should also extend to any delegate of a national board and members of committees of the national board.

Other legislative matter

It is noted that there has not been a approach proposed to deal with electronic transactions under the national registration and accreditation scheme. In this regard, if the national agency and boards are to implement online application functions, legislation in support of capturing electronic signatures will be a necessity. This could be progressed through any of the options detailed under section 5.1 and is a matter which would be best determined by a review of the legislation applying in each state and territory and in the commonwealth. For ease of reference, the relevant act in Queensland is the *Electronic Transactions Act (Qld) 2001*.