

MEDICAL BOARD OF WESTERN AUSTRALIA

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Title:	Other Matters - Bill B
Attn:	Practitioner Regulation Subcommittee
Email:	nraip@dhs.vic.gov.au
From:	Pamela Malcolm CEO/Registrar
Date:	07 January 2009
Re:	National Registration and Accreditation Scheme for the Health Professions - Consultation Paper - Other Matters for Inclusion in Bill B

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.

The Board agrees with 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 Board agrees with 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.

The Board is of the view that a legal member would assist procedural issues and should be considered for conduct panels. It may be appropriate to have panels consist of three or four members (depending on the complexity) which could allow the option of appointing a legal member also.

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 Board strongly agrees with 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 Board agrees with the proposal, with the exception of the requirement to receive any directions from the Ministerial Council on this issue (unless extremely general).

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.

The Board agrees generally with safeguards relating to the delegation of Board powers, however, it should be noted that the delegations will vary in significance. Major decisions (immediate suspension of a practitioner due to imminent risk of injury to patients for example) must be made by a delegated Committee. These decisions need to be made quickly and reverting to the National Board for such decisions would be untenable. They are major decisions and the right of review should be available.

In contrast, some decisions will be delegated to, for example, the CEO or Registrar, or other persons who are not actual Committees or Panels and those delegated decisions will be (should be) of a more minor nature. To encourage review of the more minor decisions (for example, a decision to obtain expert opinion or appoint an investigator) will delay processes and make the expedition management of the Committees and State Offices generally difficult. Therefore, whilst the Board agrees with the delegations under bullet points 1, 3, 4, 5 and 6, the second bullet point needs to be more closely considered.

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.

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.

The Board agrees with Option 1 and does not agree with Options 2 or 3.

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

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.

The Board agrees with Option 1 and does not agree with Options 2 or 3.

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

The Board is of the view that appointments to Statutory Hearing Panels need to include lay representatives, medical representatives and legal representatives. In complex medical cases (medically or procedurally), there should be an ability to increase the panel to four, to enable two medical practitioners to sit and a legal member.

The purpose of having a legal practitioner to sit is to ensure due process is followed and issues such as natural justice and evidence produced issues can be properly managed. This proposal would take into account no legal representation for the complainant or for the practitioner at the Hearings. It is necessary to have some procedural direction to avoid matters being managed without due process.

As an alternative, there could be a choice of no lawyer sitting on the panel, however, engaging Counsel Assisting the Panel to act as a facilitator of a process which would incorporate natural justice and ensure clarity of evidence for both parties. In effect, there would be no solicitor representing either party, and Counsel Assisting would facilitate the process for both parties. Experience indicates that a lack of any legal representative in a conduct hearings can be difficult.

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.

The Board agrees with Option 2 or alternatively, Option 4 could be a possibility.

5.2 Criteria

Proposal 5.2.1: With respect to freedom of information it is proposed that the Commonwealth *Freedom of Information Act* apply (**Option 1**).

The Board agrees with this proposal.

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**).

The Board agrees with this proposal.

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**).

The Board agrees with this proposal.

Proposal 5.2.4: With respect to ombudsman legislation it is proposed that the *Commonwealth Ombudsman Act 1976* apply (**Option 1**).

The Board agrees with this proposal.

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**).

The Board agrees with this approach.

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**).

It is agreed that the provisions be included in the second stage legislation, before this Board can agree with this proposal. More information is necessary.

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**).

This requires clarification.

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**).

The Board agrees with this proposal.

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**).

The Board agrees with this proposal, although this will result in inconsistency in different States.

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**).

The Board agrees with this proposal.

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.

The Board agrees with this proposal.