

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

CONSULTATION PAPER

Other matters for inclusion in Bill B

Submission from the Pharmacy Board of Victoria

Issued by the Practitioner Regulation Subcommittee
Health Workforce Principal Committee
Australian Health Ministers' Advisory Council
12 November 2008

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.

Support, however delegations should be made to a position not a person – to allow for the occupant of any position from time to time to exercise the delegation without the requirement for a fresh delegation instrument. Eg. when the delegate is on leave

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.

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).

Support, provided that there is clear and unambiguous delegation through appropriate instruments to enable national board appointed committees to fulfil their functions on behalf of the board.

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.

Panels should have access to legal advice particularly as they are required to produce decisions, supported by reasons for decisions, which will be appellable to a Tribunal. The advice of a legal practitioner is particularly important where the health practitioner has a right to legal representation.

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.

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.

Support

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.

Support

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.

Delegations should be made to a position not a person – to allow for the occupant of any position from time to time to exercise the delegation without the requirement for a fresh delegation instrument.

Granting review rights to “persons whose interests are affected” are too wide and rights should be extended only to persons / entities who are the applicant for the specific subject of a decision.

All review provisions should provide initially for an internal, process review before appeals may be escalated for external consideration.

Care needs to be exercised to ensure that these review processes are undertaken in a timely manner.

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.

Support

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.

Support Option 1

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.

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

Prefer option 1 but there needs to be published appointment criteria and the capacity for Boards to appoint persons on a timely basis if the appropriate expertise is not immediately available from the panel which emerges from the transparent public process.

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

There is insufficient analysis provided here to enable useful comments to be made about preferred options. However, the same general principle should apply to all areas of legislation to ensure the national consistency which is the underlying objective of this Scheme. It would not be appropriate for practitioners registered under a national scheme to have different levels of access to documents, different privacy regimes to comply with, different expectations with respect to working with children checks. It would also be inappropriate to rely upon individual state/territory schemes for the issue of warrants which may mean that investigation powers vary from state to state.

Interface	Proposed approach
<i>Freedom of information</i>	<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>

Interface	Proposed approach
Privacy & confidentiality	<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>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>
Ombudsman legislation	<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 Option 1, that is, the Queensland <i>Ombudsman Act</i> applies. However, further work is underway to analyse the implications of Option 1 (one jurisdiction's law applies) and Option 2 (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>Proposal 5.2.4: With respect to ombudsman legislation, it is proposed that the <i>Commonwealth Ombudsman Act 1976</i> apply (Option 1).</p>

Interface	Proposed approach
Financial accountability legislation	<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>
Public sector administration legislation	<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>
Statutory interpretation legislation	<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>
Warrant powers	<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>

Interface	Proposed approach
<p>Working with children checks legislation</p>	<p>It is proposed that Option 2 (all State and Territory laws apply).</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>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>Special events legislation</p>	<p>It is proposed that Option 2 (all State and Territory laws apply).</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>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>

Need to identify clearly within the legislation the time limits for commencement of proceedings for offences.

Also need to consider Oaths Acts (and equivalent) and which will apply.

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.

Support