A submission to the Australian Health Practitioner Regulation Agency on the

Public Consultation Paper on International Criminal History Checks

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Introduction

The Australian Psychological Society (APS) thanks the Australian Health Practitioner Regulation Agency (AHPRA) for the opportunity to comment on the public consultation paper on international criminal history checking. The APS acknowledges the extreme complexity and practical difficulties evident in formulating a workable policy in this area. The variability among criminal codes outside Australia, as well as the varied judicial processes, make the task of finding a workable and balanced option exceptionally difficult.

The APS made a submission to the 2012 AHPRA consultation paper on international criminal history check. In that submission, the APS favoured a hybrid of Options 2 and 4. In the current consultation paper, an additional fifth option was identified. In this submission, the APS will evaluate the merits of Option 5 against its previous recommendation of a hybrid of Options 2 and 4.

Previous APS Position

The current position paper stated that feedback to the 2012 consultation paper generated a range of responses to the proposed options, Option 2 of criminal clearance certificates (CCC) and Option 4 requiring an applicant declaration and conducting audits were most preferred. This is consistent with the APS 2012 submission that supported a hybrid of Options 2 and 4. In short, the APS proposed that all applicants from countries that meet the 'certificate available' criteria be required to provide it with their application. For applicants from countries where there are complexities or barriers to obtaining certification, then applicants should be required to make declarations with random audits in place as a deterrent mechanism. The APS believed such an approach would have the following advantages:

- Avoids the rigidity of one-process-for-all in the face of considerable variability between applicant circumstances;
- Processes the majority of applicants using a process that is low cost to the AHPRA and therefore to its registrant funders;
- Should the majority of applicants be processed via Option 2, it leaves a potentially small number of applicants to be managed by Option 4; this reduces the costs associated with auditing and can support a sizeable audit process;
- Allows for a flexible process that could be further simplified by identifying countries that provide ease of access for applicants; applicants from these countries must apply via the Option 2

route. This process should also facilitate the processing of one-off cases with exceptional circumstances.

Option 5

Option 5, as outlined in the current Paper, posits the use of external providers to conduct international criminal history checks for applicants. The APS does not support Option 5 in its current form. The APS developed this view on the basis of the following:

1. Option 5 does not adequately recognise the complexity of the international criminal justice system;
2. The rigid one-size-fits-all approach of Option 5 will have limitations and unintended consequences;
3. The proposed risk-benefit analysis of Option 5 requires further consideration;
4. Option 5 is not consistent with the objectives of the National Law.

A rationale for each of these statements is provided below.

1. Complexities of international criminal justice system

The APS has had long-standing concerns regarding the National Law's definition of criminal history. In particular, the APS strongly rejects the notion that relevant "spent conviction" Acts are ignored in the criminal history checking process and that "every charge made against the person for an offence" must be declared by applicants. The APS appreciates and understands the rationale for the AHPRA to cast a wide net in order to protect the public safety. However, such collection of information would not be admissible in a court of law but is made available to the AHPRA officials. The APS continues to express its concerns about this issue to the AHPRA.

The mandatory requirement of declaration of spent convictions and charges violates the principle of natural justice but continues to appear under Option 5. While the consultation paper acknowledges that there are "questionable" international criminal convictions (and therefore charges), it nevertheless asserts that the "*National Boards' criminal history registration standards explains how the Boards will take these issues into account when considering an applicant's criminal history*" and that "*any evidence seeking an international criminal history will lead to persecution of the applicant or their relatives, will be presented to a National Board for their consideration before the check is requested*" (p.8).

These statements place great responsibility on the National Boards not only to understand the complexities of the international criminal justice system, but also to possess the expertise to discharge their duties with sensitivity and due diligence. Although the essence of Option 5 is for the international criminal history checks to be outsourced to external providers, the APS has concerns that the National Boards may not have sufficient expertise to manage and provide guidance to external providers in their operations.

2. Limitations and unintended consequences

The one-size-fits-all approach adopted by the AHPRA in the criminal history checking process, for both domestic and overseas applicants, ignores the intricacies of legislation in Australian jurisdictions as well as internationally. For example, refugees who have settled in Australia and subsequently obtained their AHPRA-related qualifications would have their criminal histories reviewed upon application. As such, they must declare any convictions and charges in all countries that they have spent 3-6 months or more since they were 18 years of age (depending on the final agreed time period under Option 5). Issues may arise if the applicant was not officially recognised as resident in transit countries or even transiting there illegally according to relevant local laws. These scenarios require subjective consideration by either the National Boards, or by the external provider, as it is unclear in the consultation paper the extent of the obligations and limitations of each party's role under Option 5.

Whilst the AHPRA has recognised in the consultation paper that there will be "questionable" convictions which will need to be considered on an individual basis by the Boards, questions still remain as to the feasibility of this proposed policy in relation to some applicants. In addition to the example above, other potential issues to consider may include the potential impact on applicants of revisiting their past history. Such reflection may trigger unpleasant memories or even be retraumatising, particularly since the review will require listing of all convictions including laws that have been repealed in Australia such as those relating to homosexuality, religious practices and abortion.

The AHPRA and the National Boards will be charged with deciding what to do with applicants with significant gaps in their criminal history, or charges and convictions that are either lawful or those that have been decriminalized in Australia. Moreover, once a criminal history is discovered, it can never be "undiscovered". The use of external providers in the process only heightens concerns such as personal records being misplaced or used in a malicious manner by others. These unintended consequences and their risks were not explored in the consultation paper.

The need to achieve flexibility with regard to individual situations and to ensure consistency between case-by-case determinations places a significant burden on the Boards to understand the legal complexities and make a determination of what is a "questionable" charge and conviction. Undertaking this process in the absence of clear guidelines is potentially highly problematic.

3. Risk-benefit of Option 5
As the APS noted in its 2012 submission (see Appendix), while the small number of applicant declarations that led to action is encouraging it is also a source of concern that a lot of inconvenience and cost is being generated because of an identified small risk. In addition to this, there are opportunity costs to the community through delays in available workforce and the consequence for health services.

While the focus of the AHPRA to date has been one of risk minimisation, the APS is concerned that the AHPRA has not examined or quantified the risks of easing restrictions and its impact on the cost and benefit of the national registration system. In other words, the AHPRA should acknowledge that there are benefits to both the community and the applicants in easing of some restrictions, and that these benefits must be quantified against the foreseeable risks and provide both the community and the health workforce with some of these options in order to fully meet its objectives (see below).

4. Relationship between the AHPRA and "external agency"
It is not clear in the consultation paper the governance relationship between the AHPRA and the "external agency". This has particular implications on obtained criminal history records of applicants. As highlighted above, the sensitive nature of such records demands the highest level of privacy and confidentiality. It is concerning that the AHPRA made no reference in the consultation paper in relation to how it would provide oversight with regard to how the "external agency" would receive, transmit, archive and destroy applicants' records. The cumulative impact of this and the other issues identified above presents more questions than answers in relation to Option 5.

The nature of the governance arrangements between the AHPRA and the "external agency" also has ramifications in relation to the costs associated with the checking process. These costs would ultimately have to be borne by the applicant, which can act as a deterrent.

5. Inconsistency with objectives of the National Law
Option 5 appears to be inconsistent with the following objectives of the National Law under Part 1 s3 (2) (bold emphases added):

*(d) to facilitate the rigorous **and responsive** assessment of overseas-trained health practitioners;*
*(e) to **facilitate access to services** provided by health practitioners in accordance with the public interest; and*
*(f) to enable the continuous development of a **flexible, responsive and sustainable Australian health workforce** and to enable innovation in the education of, and service delivery by, health practitioners.*

While there is no doubt that the AHPRA is proposing a rigorous process of assessing health practitioners who have lived overseas or were overseas-trained, it may be doing so at the risk of producing a less responsive health service. The APS contends that while the registration standards provide some guidance regarding assessment of "questionable" international charges and convictions, the proposed AHPRA "no exceptions" rule appears to lack flexibility. When the checking process is undertaken by external providers, there is a reasonable assumption that such providers would operate the process by the letter. Such an unresponsive process is not consistent with the National Law.

An over-restrictive criminal history checking process could impede workforce mobility and hinder access to health care services by the community. The APS believes that Option 5 does not achieve the appropriate balance between community safety and community access to health care services as required by the National Law. Furthermore, by adopting a seemingly rigid process of criminal history checks, the AHPRA appears to have ignored the intent of the National Law in relation to developing a flexible, responsive and sustainable health workforce. Option 5 would appear to deter skilled overseas-trained health care providers from practising in Australia, with consequences for the health workforce and consumers alike.

Conclusion

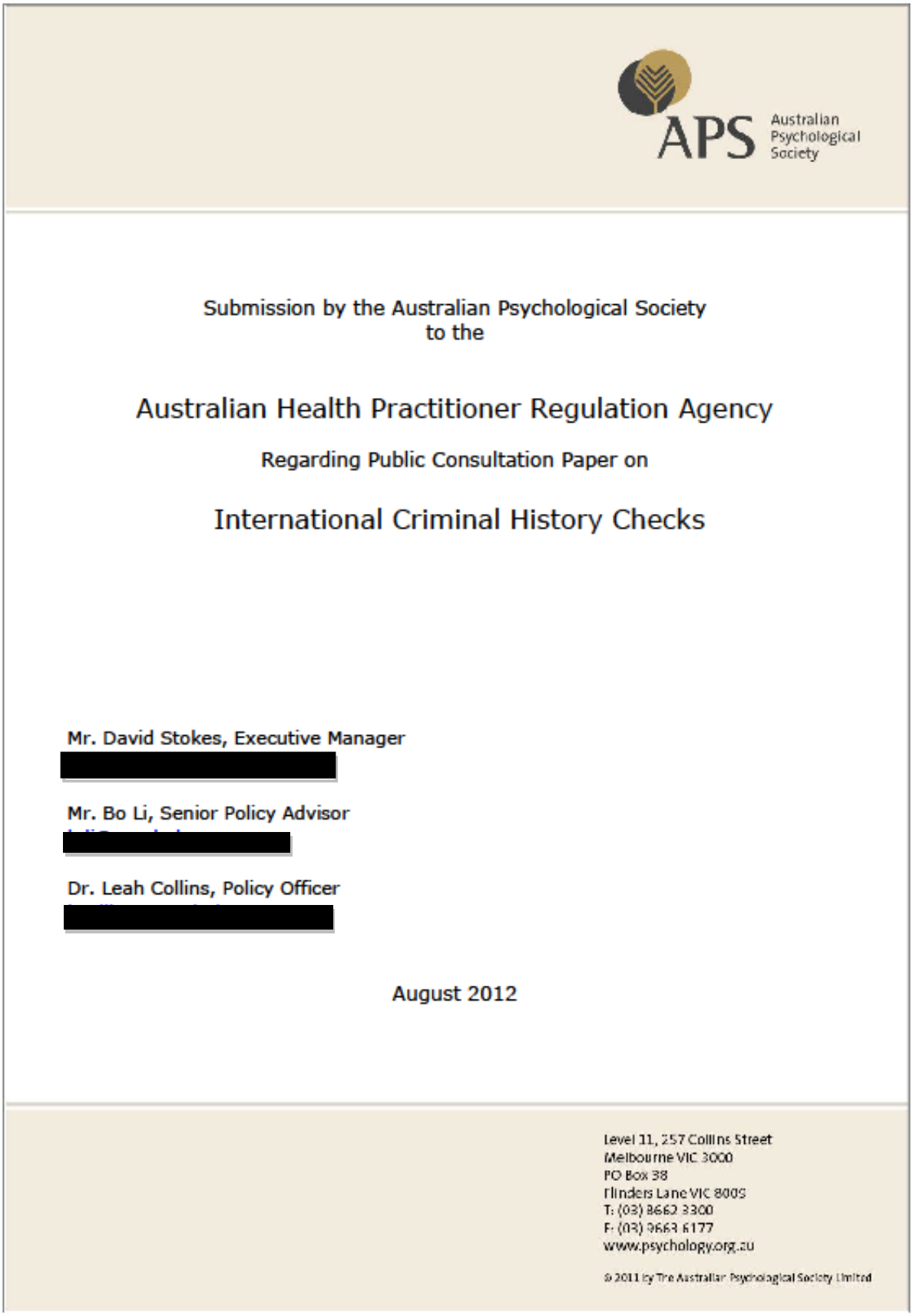
The APS remains supportive of a hybrid of Option 2 and Option 4 as identified by the 2012 AHPRA discussion paper. Such an approach avoids the rigidity of one-process-for-all, recognises the variability between applicant circumstances, is low cost, flexible and provides for exceptional circumstances where needed. Moreover, the checking process would be consistent with the stated objectives of the National Law.

In contrast, the APS holds concerns regarding Option 5, particularly in relation to its limitations and risks. The process of international criminal history checks conducted by an external agency fails to

recognise the complexity and variability of the international criminal justice system and the need for the individual cases to be considered beyond the rigid application of a single process. Moreover, the lack of discussion and clarification regarding “questionable” charges and convictions and the governance arrangement between the AHPRA and the external provider, particularly in relation to management of records, leave many unanswered questions.

The APS does not support Option 5 in its current form and recommends the AHPRA further evaluate the risks, benefits and costs associated with a hybrid of Options 2 and 4.

Appendix



Submission by the Australian Psychological Society
to the

Australian Health Practitioner Regulation Agency

Regarding Public Consultation Paper on

International Criminal History Checks

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The Australian Psychological Society (APS) would like to thank the Australian Health Practitioner Regulation Agency (AHPRA) for the opportunity to comment on this Consultation Paper (henceforth referred to as the Paper). The APS would like to comment on the quality of the summary, background and clear options provided and also acknowledge the extreme complexity and difficulties evident in formulating a workable policy in this area. The extent of the variability both between jurisdiction within, and among countries outside, Australia, as well as the variety of considerations that have to be taken encompassed, make the task of finding a workable and balanced option exceptionally difficult.

The APS would like to make some general comments about the whole issue of criminal history checks and then will address the specific issues and options identified in the Paper.

General Issues

1 The APS has had a long-standing concern regarding how the national law defines criminal history and even with the way in which people who have experienced a conviction or lodged a plea of guilty have been treated within the system. In an earlier submission[1] the APS repeated earlier objections to the definition of criminal history and proposed that:

'Criminal history law ("spent convictions" Acts) should apply to all criminal history checks by Boards and that access to "charges" should also be removed. Moreover, the Bill should be explicit in instructing the Boards in assessing applicants' criminal histories to only consider those that pose "inherent risks to their work".'

It is strongly felt by the Society that the principles of natural justice seem violated by the way in which the national law includes Item C as part of the definition of criminal history and also in the way it includes spent convictions. The APS has heard and understood the level of concern that the drafters of legislation were guided by but still feel that, despite the rationale about behavioural trends and patterns, this collection of information would never be admissible in a court of law. Yet it is made available to Board officials in a manner that the Courts would not endorse for alleged criminals. The APS's objections and concerns remain and have never changed or been satisfactorily answered.

2 The data in the *AHPRA and National Board's Annual Report (2010/2011)* is certainly helpful in understanding the importance and extent of the concerns regarding criminal history checks for overseas applicants. What would be helpful in further understanding of the nature of those cases that led to action would be a further breakdown of the data – even at the potential level – against the aspects (a), (b) and (c) of the national law definition of criminal history as set out on page 3 of the Paper. Knowing

[1] APS Response to the Consultation Paper on the National Registration and Accreditation Scheme for the Health Professions: Exposure Draft Bill B, July 2009, page 3.

that, for instance, 30 out of 40 of these cases might have involved charges only or even spent convictions would be very informative as to the assessment of risk presented by these applicants; or the criteria by which the 'disclosable' became 'potential' and 'potential' became 'led to action'.

Further analysis of the data presented identifies some interesting facts. When the percentages reported for the 2010/2011 year are applied to the projected data, some very small numbers emerge. For instance, the 'led to action' group were 40 (0.08%) for that period and when this is projected on a maximum figure of 10,000 applicants over a year, the 0.08% becomes 8 cases of 'led to action'. While it is acknowledged that you only need one case of a 'Dr Patil' to foul the whole health system, there has to be a balance of risk against costs and delays in allowing community access to workforce that is already in short supply.

Specific Issues

1 **The Source Countries.** This concept was both useful as a discriminating category as well as a sound foundation for processing applications. It would have been helpful to know, by profession, what percentage of applications the top five source countries accounted for. The top five source countries and the percentage of applicants that they represent is a way of understanding the extent of demand that this task presents and provides capacity to predict the work demand that is likely.

2 **Criminal Clearance Certificates (CCCs)**. The complexities surrounding the acquiring of CCCs and the international processes and variations that this unearths are extensive and even bewildering. Considerable sympathy must be felt for either applicants or AHPRA in working through these complexities. In interests of public safety, they must be considered a safeguard and desirable where they can be obtained and even when they have to be supplied to the individual applicant. Clearly the latter opens up the possibility of fraudulent behaviour. The veracity of documentation is fraught whatever the process but for the CCC, it is improved where the CCC is directly accessible by AHPRA. However, even where it is obtained via the applicant it is some form of constraint in itself, as there is existing legislation against making false and misleading statements and other fraudulent behaviours. For those reasons, the APS feels that the requirement that a CCC be obtained does seem to be a desirable strategy.

3 '**Costs' versus risk.** As noted above, the small number of 'led to action' is encouraging in one sense but reflective of a concern that a lot of inconvenience and cost is being generated because of small risk. The frustration is that to maintain that risk as a small item, all applicants need to be checked fairly thoroughly and undoubtedly easing requirements would increase risks, even seriously.

The other side of costs is the impact on workforce and the consequence of significant delays on service arrangements. Given the state of many sections of the health workforce, delays are not only costly for applicants but

poor reflection on AHPRA's obligations to the community and the health workforce.

The APS Position

While Option 2 is attractive from a 'safe' point of view and the predicted number of only 8 'led to action' cases appealingly small, to identify that '8' would still require that the whole 10,000 have to be looked at. The process would probably be minimally arduous for the top 5 country sources for each profession, if not for more than 5, but more exhaustive, if not impossible, where the countries of origin have complex systems or significant barriers to information access.

Option 4 appears more reasonable even though not as rigorous or sufficiently safe as Option 2. The simplicity and respectfulness of a signed statement associated with a well-declared random audit system, which has the full disciplinary powers of the Act available for those who falsely declare, seems a good balance. However, the risk of 'led to action' cases remains and probably grows significantly.

What the APS suggests is that the Options be merged. For all applicants from the top 5 – or more than 5 countries if other countries meet the 'certificate available' standard in an easily achievable way – they should be required to provide it. For those countries where complexities, barriers or impossibilities are significant, then an applicant declaration would be acceptable but with random audits in place and very clearly promoted.

The two-component proposal has the following advantages:

- avoids the rigidity of one-process-for-all in the face of considerable variability of applicant circumstances;
- processes the majority by a sequence that is low cost to AHPRA and therefore to its registrant funders;
- if the majority of applicants are processed via Option 2, it leaves a small minority (presumably) to be managed differently by Option 4 and ensures the random audit is much less costly and could have a larger random sample (even 10 or 20 %) as a further deterrent to fraudulent behaviour;
- allows for a differentiated process that could be made simpler by merely identifying officially for each profession those countries that provide ease of access for applicants and therefore must apply by the Option 2 route (Top 5 plus others). That would provide a clear distinction for those countries from which applicants can apply through the Option 4 route. One-off cases with exceptional circumstances could be allowed for.