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Submission to the Australian Health Practitioner Regulation Authority

Consultation on international criminal history checking

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This submission

The Australian Osteopathic Association (AOA) appreciates this opportunity to comment on the public consultation paper.

The AOA has no objection to the publication of this submission in toto and no part of it is confidential.

The Australian Osteopathic Association

The AOA is the national professional body representing over 85% of osteopaths across Australia. This gives us a unique voice for representing the profession and lobbying to ensure high industry standards are established and maintained. Our core work is liaising with state and federal governments, regulatory or other statutory bodies, and key stakeholders throughout the healthcare landscape. We always welcome opportunities for input or collaboration, such as this.

Background

The AOA supports accurate criminal history checking within Australia and outside of Australia as part of AHPRA's role in protecting the public.

Preliminary observation

The AOA submits that, while overseas criminal history is important, overseas professional conduct is normally more directly relevant to the consideration of an overseas applicant's application.

Detailed Response

The AOA supports Option 5, "External provider conducts international criminal history checks," with the following provisos.

1. The cost of this option should be borne by the applicants, not by currently registered practitioners.
2. The cost should be as low as possible consistent with the high degree of accuracy and trustworthiness required. This does mean that applicants who have lived in many countries will face higher costs.
3. Measures should be taken to expedite the process to avoid delay wherever possible (for instance, relying on electronic communication and not requiring paper documents). Measures should be taken to notify prospective applicants, before they

apply, about the requirements and likely cost and timeframe pertaining to their criminal record checking requirements.

4. Bureaucratic duplication should be avoided. Criminal record checks and penal clearance certificates are a mandatory part of the migration process. The “character requirement” of the Migration Act 1958 excludes people found guilty of an offence punishable by imprisonment of 12 months or longer. While health practitioners should be held to a higher standard than the immigration requirement, the AOA is of the opinion that separate Commonwealth agencies separately requiring the same information is an avoidable duplication of functions and an undesirable cost imposed on applicants.
5. As the consultation paper acknowledges, Option 5 comes with a risk that an applicant will be registered on the basis of a false declaration, with an adverse criminal history check arising down the track. This undermines the system in obvious ways.
6. Health practitioners who have fled to avoid persecution, whether granted asylum or regular immigrants, may face impossible hurdles under this system.

Defects, disadvantages, and uncertainties of Option 5

1. The system still relies, at least for a time, on the veracity of declarations. Moreover, the system probably rests on the veracity of declarations for applicants from countries with non-functioning governments (Somalia, for example, or governments with very dispersed/devolved judicial systems).
2. The need for overseas background checks is only triggered by a declaration that an applicant has lived overseas, not by the fact of having lived overseas. Falsely declaring that one has not lived overseas (or not in as many locations as the applicant has really lived) is an unavoidable deficiency of the system. No amount of auditing conceivable can repair this.

Put another way, international criminal record checks will only catch people who don't mind being caught. This may not be a problem for minor misdemeanours and convictions that don't rise to the level a Board considers problematic. The system should be designed to catch the serious criminals, yet this system seems likely to catch only the petty criminals.

3. The proposed system does not seem to permit applicants seeking to migrate from countries to which they have previously migrated to use information previously gathered to pass a criminal record check again. If said applicants have lived exclusively in their most recent location since arriving there, no aspect of their previous criminal record could have changed.
4. A deportation for reasons that might be very concerning, in circumstances where a foreign nation decided to deport rather than prosecute, would never be discovered.

5. Using punishment as a measure of seriousness is problematic. Some nations have severe punishments for things that Australia wouldn't consider the slightest barrier to practising a health profession (apostasy, for example).
6. What happens if no external provider responds to the call for tenders, or if AHPRA and a tenderer cannot agree on terms or remuneration?

Other considerations

1. Because of (5) above, and out of transparency and for fairness, AHPRA should publish its criteria and rationale for considering criminal records in addition to the system of obtaining criminal records.
2. Is AHPRA, within Option 5, proposing to extend provisional registration to applicants whose overseas criminal records have not yet arrived? Will any conditions, such as practising only under supervision, apply? Or are these practitioners indistinguishable (from the public's perspective) from registered practitioners with established and accepted criminal histories?
3. How is AHPRA, within Option 5, proposing to deal with a situation in which the tender winner contacts a foreign government and never receives a response? How long in an applicant held in limbo—and ultimately does the system revert to a declaration?
4. How is AHPRA, within Option 5, proposing to deal with a situation in which a response from a foreign government is received but contains no useable information (for example, "due to privacy your inquiry cannot be considered" or "we only respond to inquiries statutory offices from foreign nations, not for-profit companies conducting private background checks.")
5. AHPRA should clearly inform prospective applicants that receipt of information about an adverse finding or charge does not necessarily constitute grounds for refusing to register.
6. The National Law obliges Boards to consider historical criminal charges, even when they resulted in not guilty findings. For this reason the AOA understands why disproved charges must form part of a criminal history, but we put on record that this is a defect of the National Law and that natural justice requires findings of not guilty to have no adverse consequences.
7. AHPRA should state clearly that the functions put to tender do not involve making recommendations or decisions. The AOA understands Option 5 to involve an external provider given authority to gather criminal records, not to assess their contents.

8. In general, the AOA submits that professional conduct history is more relevant than criminal background. For this reason, it is odd that an applicant's entire criminal history must be investigated when the certificate of good standing that an applicant must provide for every jurisdiction in which they have practiced needs to cover only five or ten years (depending on the Board).
9. The AOA does not have a position on whether the period of time abroad that triggers the need for a check should be 3 or 6 months

Summary

The AOA thanks AHPRA for this opportunity to comment on the proposed process for international criminal record checking.

For further information or clarification, please contact Samuel Dettmann, policy advisor, on [REDACTED].