The Australian Psychological Society Ltd

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Supplementary Submission to the

# Senate Committee on Community Affairs: National Registration and Accreditation

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This submission is based upon our earlier submission to the Senate Committee but now also focuses on the content of the draft Health Practitioner Regulation National Law, commonly called Bill B.


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# National Registration and Accreditation Legislation:
# Response to Bill B

## General Concerns

The APS appreciates the extent of the challenge that faces government bodies and the drafters of legislation in attempting to grapple with the complexities of regulating health professional practitioners. It is well understood that legislation that seeks to restrict and contain poor professional or criminal behaviour, as well as to protect community from risk of harm, needs to take account of all the possible avenues for unethical and undisciplined behaviour.

However, it is also recognised that there are inherent dangers in which ever direction legislation moves. There is a danger that if this Bill under-proscribes, then the possibility of exploitation by professionals is increased, as is the potential risk of harm to the public. If it over- proscribes, it will limit the power of professionals and thereby leaves them open to potentially unnecessary and unwarranted exploitation by an empowered public. As with all such legislative attempts, it is a question of getting the balance right. The outcomes need to be viewed from the perspective that the notion of "consumers" is gradually being replaced by the notion of "citizens", which recognises the fact that professionals are also members of the community, and also part of the public interest. Therefore the intent of the Bill is not only to protect consumers - the individual's perspective, but also from a community or citizen's perspective, and be inclusive of professionals.

The best example of the problems which could arise from increased over proscription is provided by recent experiences with the Family Court. It has for some time been an area where litigants have often resorted to reports/complaints to the profession Registration Boards to undermine the contributions of expert witnesses before the Court. Until State and Territory Registration Boards acted to defer processing such complaints until the Court had completed its work, this was a major source of complaints and a serious disruption to professional contributions to the Court. To increase the opportunity for litigants and the broader community to access the complaints process, as well as to broaden the agenda of complainants, increases the possibility of vexatious, time wasting and professionally devastating attacks on professionals. Here, as elsewhere, balance of power is crucial.

The suite of new proposals in the Bill, particularly the increased rigour in qualification checking, mandatory CPD and increased support for complainants access, may be sufficient additions to safety and quality provisions. But some of the specific aspects of the new proposals around mandatory reporting, criminal history checks, the Independent Public Assessor, powers to seize patient files, and the reserve powers of the Ministerial Council over Accreditation may have gone too far. Shifting power, which is what this Bill does, from one group to another is equivalent to shifting the risk of harm from one group to another. The extent of the power shift in this legislation may well reduce the capacity of professionals to resist the threats, demands and vexatious cajoling of aggressive clients and patients and further open the professionals to exploitation.

**Specific Concerns**

## TOR Item B: Patient Care and Safety

Overall the issues of the protection of public are well managed – in fact, if anything the shift in that direction may have gone too far. However, one issue that remains a concern and threatens patient confidentiality and protection of personal information is the nature of the proposals around seizure of patient information by Investigators.

### Seizure of Information and Threats to Privacy

Clauses 217 to 233 deal with the acquisition of information necessary for an investigation by the complaint investigation agents or the investigator. While the APS wishes to support the principle, the access and seizure of confidential patient information (via files etc) needs more careful constraints if not limits. Particularly the following suggestions are made:

- Clauses 218, 219, 222 (2) (c), 225 (2) (d), and 227 explain the processes that allow the investigator to "require, take a copy of, seize under warrant, a document or item that may include a patient's files, if requested". This does not provide the protection of the Court – a provision available to respondents to subpoenas. Practitioners will always respond to such directions if they can protect their client's confidential information (i.e., about themselves and third parties) from non-clinical investigators by seeking the support of a Court to have irrelevant information removed. This is the minimum that should be available here.
- Clauses 230 and 231 deal with the return and management of this material. It is quite unacceptable for material such as a patient's file to be left with the National Agency in the event of a failure to return. One of the additional conditions of seizure and the provision of a receipt should be procedures to be followed if the file cannot be returned to its Owner (for instance, a nominated substitute for the Owner; another nominated Practitioner).

## TOR Item C: Standards of Training and Qualifications

One of the most serious concerns which has emerged during the development of the national registration and accreditation scheme is the danger presented by the proposed Ministerial Council's powers over accreditation standards. It is not the loss of control that may be represented by this process, but the risk that the quality and adequacy of training standards and qualifications may be undermined to the detriment of consumers. The current form of Bill B has done nothing to assuage these concerns.

### Treatment of Accreditation in Bill B

The treatment of accreditation in the draft Bill seems to reflect a retreat from the commitment given in the May 8 Ministerial Communiqué to ensure that decisions of Accreditation Bodies are "independent".

- Of major concern is Clause 10.3 (d) on page 11 which, after confining the Ministerial Council to giving policy directions, allows the freedom to give directions regarding "a

particular accreditation standard for a health profession". The Ministerial Council should not have the power to interfere in the setting of any accreditation standard and this power contradicts the statements made on the independence of accreditation in the May 8 Communiqué.

- The notions of the independence of the accreditation function as promised in the Ministerial Communiqué do not seem supported by:
  - Clause 60, which suggests that the Ministerial Council *may* create an accreditation entity other than a committee or if that has not occurred that the National board can establish an accreditation committee. The legislation does not make clear the circumstances under which such action could be taken.
  - Under the definition of *external accreditation entity* (Clause 6) there is an implication that the Ministerial Council appoints an entity to perform an accreditation function. This does not accord with statements made by the Ministerial Council regarding the independence of accreditation functions.
  - Clause 6, definition of *accreditation authority:* creates some uncertainty by separating (a) and (b) by "and". This could be seen to mean that an accreditation body should meet both criteria, whereas in Clause 64 the word "or" is used. If the intent of the Bill is to have either or both then the appropriate separators should be "and/or".
- Clause 49 (a) indicates that the accreditation standards that are developed by the Accreditation Body are *approved* (rather than a less dominant '*endorsed*') by the National Board. This needs changing to "endorsed" to reflect a more equal relationship.
- It is a cause of some regret that Clause 10.3 (d) and 10.4 identifies grounds for the Ministerial Council's intervention on an accreditation standard as being for political concerns of 'recruitment or supply of health practitioners' to the workforce. There is no intervention mooted if there are issues of public safety or the quality of training and practice, which must always be of paramount consideration in matters of accreditation.

## TOR Item D: Complaints and Discipline

As discussed above under General Concerns there are a number of aspects of the proposals in Bill B that continue to worry the APS and threaten the viability of professional practice in Australia. This draft of Bill B has been more explicit than earlier proposals about the intended means of managing a variety of issues some parts of which the Society feels have not struck a reasonable balance.

### 1 Criminal History

The APS supports the notion of Criminal History Checks for applicants by the Registration Boards as central public safety measure. It further respects the importance of Registration bodies having access to clear and comprehensive information about past convictions and patterns of aberrant behaviour. It is the inclusion of dismissed "charges" in this process and the retention of past but dismissed complaints which concerns the APS. This seems to go beyond what even criminal rules of evidence allow and omits the presumption of innocence. The relevant sections of the Bill are as follows:

- The definition of *criminal history* (Clause 6) includes every conviction and every plea of guilty or finding of guilty and in Section (c) of that definition includes “every charge made against the person for an offence”;
- The definition of *criminal history law* suggests that it does not include spent convictions. However Clause 147.4 states that this *criminal history law* principle does not apply to a request by the National Board. This is repeated in Clause 96.4 (spent convictions), and expanded to include even dropped charges: Clause 142 (“charged with or convicted of”) and Clause 155, 2 (b) (“student has been charged with”);
- Dismissed complaints never go away: Clause 167 (2), 172 (2), 178 (2), 189 (2), 197 (2), 208 (2). This could create an avenue of abuse for people with litigious or vexatious intent creating a history of charges that have no substantial basis;
- Clause 147 states that the Board can ask at any time for a criminal history check. Should there not be a qualifying justification so that it is done on the basis of a specific and defensible reason (such as a new complaint).

The APS has three concerns over these Clauses. First of all, the Bill was silent on the process by which the National Boards can consider the relevance of charges and convictions, let alone of their dates and circumstances, in forming an assessment of the applicant’s “fit and proper person” test. This leaves the Boards to exercise their own discretions in such tests, and therefore the possibility of complaints by unsuccessful applicants to bodies such as the Human Rights and Equal Opportunities Commission (HREOC). These risks to the Boards are considerable, given the possibility that such criteria may change from time to time with the Board’s membership.

Secondly, it is our understanding that charges and convictions on a person’s criminal history also include those based on Acts which have been subsequently repealed. This raises serious concerns of the breaches of privacy of applicants. For example, prostitution was decriminalized in NSW in 1995 and homosexuality was decriminalized in Tasmania in 1997. If a mature age student was charged under these Acts, they will be forced to disclose such personal information at point of registration. In absence of the process of the “fit and proper person” test as outlined above, the APS has strong reservation about the National Boards having access to and in possession of such information. We do not believe this to be an intention of this Bill.

Finally, all Australian States and Territories have “spent convictions” Acts or similar, with the exception of Victoria and South Australia. The latter two jurisdictions have also mooted Bills in their Parliaments on introduction of similar legislations. The proposal under the Exposure Draft Bill to exclude such “spent conviction” Acts is therefore an unfortunate, if not regressive, step. A criminal history should never be used as an absolute barrier towards employment. There is a body of research, reports and recommendations on this issue. Of most relevance is a guideline published by HREOC which states employers should only ask job applicants and employees to disclose specific criminal information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job”.

The APS would strongly suggest the following in relation to the Criminal History Checks provisions of the Bill:

- the reference to "charges" be removed from the definition of criminal history and subsequent Clauses;
- that criminal history law ("spent convictions" Acts) should apply to all criminal history checks by Boards;
- 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";
- similarly, references to the use of dismissed complaints be removed.

## 2 Mandatory Reporting Provisions

**By Therapists**. Clause 156 deals with the mandatory reporting by health practitioners. If the *first practitioner*, who may be in a psychotherapeutic relationship with a *second practitioner,* is not protected by Clause 156.4 (as is a legal practitioner, for instance) then it is vital that the concept of "lesser standard" as defined under Clause 155.1 must be qualified by **substantially,** as is found in the definition of *professional misconduct* (Clause 6), and therefore intended to protect the *second practitioner* from frivolous or over-reactive reporting by the *first practitioner*.
**By Employers.** Clause 157 relates to the mandatory reporting by employers. The APS wishes to object to this whole clause in the strongest possible terms for the following reasons;

- It is likely that the consequences will be worse than the problem being addressed. For instance, the threat of the disciplinary sanctions and their potential impact on the employer and the organisation for which they work will prompt over-reporting by the employer for fear of those consequences;
- It would destroy programs of professional supervision and professional mentoring in the organisation for fear of inappropriate or even appropriate reporting;
- It would have impact beyond the health profession on organisations who employ health practitioners but are not themselves health organisations, e.g. accident compensation schemes, medico-legal bodies, family courts, schools and industrial organisations.

In summary, the APS requests that a review of Clauses 156 and 157 in light of the above. That a minimum for Clause 157.5 – the definition - should have an addition to the *employer* definition that includes the phrase following *entity*: "that is a health service".

## 3 Treatment of Non-health Practitioners

One of the continuing concerns with legislation that is health focused is the large percentage of psychologists who do not work in the health domain nor provide services to people with health conditions (e.g. organisational and educational psychologists). Original State and Territory legislation for the registration of psychologists was profession specific. Many States now have health profession Acts and this new proposed legislation will be a Health Act. It is of serious concern that this legislation may not be able to fairly represent and manage the issues of non-health practitioners nor be able to adequately protect consumers of non-health psychology services. In fact it may isolate such professionals if not discriminate against them. One particular concern is that the disciplinary powers of the legislation may be misused against these practitioners in attempting to demonstrate that they do not meet the standards of a "health practitioner". There have been repeated requests of Government Ministers and

officers to find an adequate solution to this problem without success. The attention to this by the Senate Committee would be much appreciated.

### 3 The Public Interest Assessor (PIA)

This new proposal, while having appeal to the supporters of an oversight role within the disciplinary process, also raises other complications:

- It depends on a view of the "public interest" as only inclusive of individual consumers of health services rather than the broader view expressed above;
- Without there being a broader view of the public interest, this could be a very blunt and insensitive process;
- Clause 165 enunciates the collaborative process between the Board and the PIA. The grounds for review or appeal by a practitioner at the various stages of the PIA's involvement need to be open and clear; will the reasons or grounds for overriding the Boards, if this occurs, be also made explicit (Clause 165.3)?
- The deference given to the PIA is a bit concerning (Clause 165.3). How does this relate to Clause167 which empowers the Board to dismiss a complaint? Can a Board be overridden by the PIA on a matter of whether a complaint should proceed on or not?

## Specific Issues for Psychologists

The APS is very concerned about two aspects of the proposed legislation as it applies to psychologists and about these it would like to make strong and urgent pleas for a review of the current content of the legislation. These two issues involve protection of title and aspects of scope of practice.

### 1 Protection of Title (Clause 129)

It was argued in a previous submission to the Implementation Group that "psychologist" alone is insufficient to protect the title of the profession. It will be necessary to add other variations and derivatives to protect the public from being *induced to a belief* (Clause 129, (a) and (b)) that a person is a psychologist.

The APS made joint submissions in November 2006 and again in February 2007 in collaboration with the Australian Psychology Accreditation Council (APAC) and the Council of Psychologists Registration Boards (CPRB) and put on record the following:

"The title 'psychologist' (and all adjectival derivatives, such as 'psychological' in 'psychological services') should be protected and reserved for use by registered psychologists, whether they work in health or other fields of psychology, and whether or not they provide direct services to individual clients. Similarly, the term 'psychological assessment and treatment' should be seen as a subset of 'psychological services' not as its synonym. Furthermore the provision of 'psychological services' should be seen as something that includes services to groups and organisations as well as to individuals."

"The support for the catchall provision is very important. If there was some doubt that the 'catchall' provisions would cover 'psychological' and therefore 'psychological services', the APS would be seeking that such terms would be included under 'restricted titles'. 'Psychology Assistants' should be added to the list of protected titles."

None of this seems to have been acted on or responded to. Therefore, the APS requests that this earlier submission be accepted to produce the benefits noted above and the title of Psychology Assistant be added to the currently proposed title of Psychologist

The other matters raised above will be dealt with under Scope of Practice, below.

**2 Scope of Practice and Psychological Testing (**Clause 137)

The risks to the public associated with the open access and misuse of psychological tests are very serious and concerning. The significant arguments against the open utilisation of psychological tests are provided in Attachment 1 and have the endorsement of the CPRB and APAC.

The exposure Draft of Bill B has a clause that provides the basis for necessary restrictions on the use of certain psychological tests. Clause 4 (2) (c) states that

*restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.*

In accordance with these Clauses (135-137), Subdivision 2 of Division 11 of Part 7 already contains specific restrictions on dental, optical, and spinal manipulation practices. In the interests of public safety, the Council of Psychologists Registration Boards, the Australian Psychologists Accreditation Council and the Australian Psychological Society request a similar inclusion on the use of certain psychological tests between clauses 137 and 138.

Suggested wording of the Clause:

***Restrictions on the use of psychological tests***

***(1) A person must not perform an assessment of a child or adult using psychological tests restricted to registered psychologists, unless the person***

- ***a. is a registered psychologist***
- ***b. is a student who performs assessments under supervision in the course of activities undertaken as part of an approved program of study in psychology, or***
- ***c. is a person, or a member of a class of persons, prescribed under a regulation as being authorised to perform psychological assessments by the Psychology Board of Australia***

***(2) Health practitioners utilising standardised health and clinical questionnaires, inventories, checklists and published tests of psychopathology to screen for health disorders and inform referrals for further assessment are not included in the restrictions under (1)***

***(3) Other suitably trained professionals (e.g. specialist teachers) using unrestricted standardised tests of educational achievement, psychosocial attitudes and behaviour, vocational preferences are not included in the restrictions under (1).***

An additional item including a definition either here or in Clause 7 should read:

***psychological tests*** *means published, standardised tests of intelligence, specific cognitive abilities, psychopathology and personality*

**Conclusion**

The APS has identified a number of areas of the draft of Bill B that it feels need modification and review. This a landmark legislation for the health professions in Australia and the APS welcomes and applauds the effort and resources that have been invested in it by all levels of Government and a wide range of professional and community groups. For this reason, the APS is invested in seeing the best possible form of the legislation that will serve the community for many years to come.

The major issues and recommendations identified in this submission are:

- Ensuring that the changes proposed in the legislation do not over balance the current profession/community balance and create the opposite problems that have driven some of these changes;
- The need to limit intrusions into professional practice that threaten patient confidentiality and protection of personal information though the proposals around seizure of patient information by Investigators;
- Guaranteeing “independence” of accreditation in line with international standards and the promise given by Health Ministers;
- The APS would strongly suggest that criminal history law (“spent convictions” Acts) should apply to all criminal history checks by Boards. However, 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”;
- Proposals around mandatory reporting prompt a need for a careful review of such processes to avoid unintended consequences for practitioners and employers;
- The need to take into account the needs and protection of clients of non-health practitioners under a ”health” Act;
- Care needs to be given in considering the powers of the Public Interest Assessor;
- Psychologists consider that there are as yet some gaps in the areas of Protection of Title and Scope of Practice provisions, both of which have significant implications for the protection of the public.

**ATTACHMENT 1**

# Use of Restricted Psychological Tests

## Background

The development and application of tests of intelligence, personality, psychopathology, attitudes, and behaviour is an area of professional practice unique to psychology. Psychological assessment using these tests is applied in the areas of health, education, forensics, the military, and industry. In the past, one of the drivers for the registration of psychologists was the protection of the public from the misuse of these tests recognising that misinterpretation can have life long damaging consequences for individuals. For this reason, publishers of certain psychological tests restrict their sale and use to registered psychologists only.

All States and Territories had restrictions in their earlier psychology-specific legislation that prevented the use of such tests by non-psychologists. Currently this is not so in Queensland, for instance. The consequences of this in Queensland have been exemplified by complaints received by Queensland Psychologists Board (QPB) from registered child psychologists concerning poor and misleading standards of reporting by Guidance Officers and from parents who claim their children have been tested inappropriately, inadequately and unprofessionally within the State Education Department by unregistered Guidance Officers. The Board has had to inform the parents that it may act only if registered psychologists have provided an inadequate service. Since the Guidance Officers are not psychologists and have not called themselves psychologists, QPB cannot act.

The Australian Psychological Society (representing over 17, 500 registered psychologists in Australia) has written to QPB pointing out that the policies of Queensland Education can place the psychologists whom they employ in breach of the Code of Ethics and Ethical Guidelines adopted by the QPB if they endorse reports based on testing they have not performed. This situation needs resolving.
The absence of specific legislation in the Exposure Draft of Bill B to restrict certain psychological testing has the potential to similarly expose the public to harm and psychological distress.

## Purpose of psychological testing

It may assist NRAIP to understand the variety of professional and public purposes which psychological testing serves:

(1) Measurement of thinking and reasoning capacity using intelligence and /or specific cognitive tests by all psychologists;

(2) Measurement of disturbed personality, behaviour and thinking and diagnosis of mental illness disorders by developmental and clinical psychologists;

(3) Diagnosis of neuropathology by clinical neuropsychologists;

(4) Identification and classification of intellectual disability and learning disorders using World Health Organisation standards by developmental/educational psychologists;

(5) Identification of occupational/vocational potential by occupational psychologists;
(6) Assessment of personal qualities and capacities (occupational and other psychologists).

**Risks to the public**

There are many serious risks to the public from not limiting these tests to trained psychologists both from misuse and freedom of access to these tests:

(1) Misdiagnosis of serious and/or co-morbid psychological disorders (e.g. neuropathology, psychopathology, intellectual disability, developmental disorders);
(2) Personal distress and life-long personal misperceptions from misinformation;
(3) Poorly informed career and life decisions;
(4) Threats to life opportunities and self esteem from misclassification;
(5) Invalidation of diagnostic tools by public familiarity with the content of the tests. (Because of practice effects, many tests cannot be re-administered until at least one year later.)

**Appropriate training needed to use psychological tests**

The complexities and depth of psychological test construction and content needs to be fully understood before users can safely and professionally utilise them. The basic knowledge and training must include:

(1) Understanding test construction for particular applications;
(2) Specific training in the concepts and meaning of specificity, sensitivity, reliability and validity;
(3) Understanding of the concepts and theory of intelligence, cognition, personality, behaviour, psychopathology, attitudes;
(4) Measurement in psychology and familiarity with descriptive statistics and standardisation;
(5) Ability to understand the underlying constructs of a test so as to interpret results accurately and validly;
(6) Familiarity with the administration of a comprehensive range of tests;
(7) Understanding of the discipline and context in which tests results are generally useful (psychiatry, neurology, education, paediatrics, industry, management, etc).

**Request to modify Bill B**

The exposure Draft of Bill B has a clause that provides the basis for necessary restrictions on the use of certain psychological tests. Clause 4 (2) (c) states that

*restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.*

In accordance with these Clauses (135-137), Subdivision 2 of Division 11 of Part 7 already contains specific restrictions on dental, optical, and spinal manipulation practices. In the interests of public safety, the Council of Psychologists Registration Boards, the Australian Psychologists Accreditation Council and the Australian

Psychological Society request a similar inclusion on the use of certain psychological tests between clauses 137 and 138.

Suggested wording of the Clause:

***Restrictions on the use of psychological tests***

(4) ***A person must not perform an assessment of a child or adult using psychological tests restricted to registered psychologists, unless the person***
   a. ***is a registered psychologist***
   b. ***is a student who performs assessments under supervision in the course of activities undertaken as part of an approved program of study in psychology, or***
   c. ***is a person, or a member of a class of persons, prescribed under a regulation as being authorised to perform psychological assessments by the Psychology Board of Australia***

(5) ***Health practitioners utilising standardised health and clinical questionnaires, inventories, checklists and published tests of psychopathology to screen for health disorders and inform referrals for further assessment are not included in the restrictions under (1)***

(6) ***Other suitably trained professionals (e.g. specialist teachers) using unrestricted standardised tests of educational achievement, psychosocial attitudes and behaviour, vocational preferences are not included in the restrictions under (1).***

An additional item including a definition either here or in Clause 7 should read:

***psychological tests*** *means published, standardised tests of intelligence, specific cognitive abilities, psychopathology and personality*