



Aboriginal and Torres Strait
Islander Health Practice
Chinese Medicine
Chiropractic
Dental
Medical
Medical Radiation Practice
Nursing and Midwifery
Occupational Therapy
Optometry
Osteopathy
Pharmacy
Physiotherapy
Podiatry
Psychology

Australian Health Practitioner Regulation Agency

Public consultation paper

September 2013

Consultation on international criminal history checking

Please provide feedback in a word document (or equivalent)¹ to criminalhistoryconsult@ahpra.gov.au by close of business on 31 October 2013.

This consultation paper seeks feedback on options for refining international criminal history checks used by the Australian Health Practitioner Regulation Agency (AHPRA) in assessing applications for registration for the 14 health professions regulated under the Health Practitioner Regulation National Law, as in force in each state and territory (National Law).

You may wish to provide general comments; and/or comments on the issues associated with the different options, the option that you consider is the best available, and the reasons why.

How your submission will be treated

Submissions will generally be published unless you request otherwise. The Boards publish submissions on their websites to encourage discussion and inform the community and stakeholders. However, the Boards retain the right not to publish submissions at their discretion, and will not place on their website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the consultation.

Before publication, the Boards may remove personally-identifying information from submissions, including contact details. The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Boards.

The Boards also accept submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. Any request for access to a confidential submission will be determined in accordance with the *Freedom of Information Act 1982* (Cwth), which has provisions designed to protect personal information and information given in confidence.

Please let the Boards know if you do not want your submission published, or want all or part of it treated as confidential.

Next steps

After the consultation has finished, the Boards will decide whether to implement the proposed option and will publish information about their decision.

¹ You are welcome to supply a PDF file of your feedback in addition to the Word (or equivalent) file, however we request that you do supply a text or Word file. As part of an effort to meet international website accessibility guidelines, AHPRA and National Boards are striving to publish documents in accessible formats (such as Word), in addition to PDFs. More information about this is available on the [AHPRA website](http://www.ahpra.gov.au).

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International criminal history checking

Background

There are 14 National Boards in the National Registration and Accreditation Scheme (the National Scheme). Ten National Boards entered the National Scheme in 2010, and a further four joined in 2012.

- Aboriginal and Torres Strait Islander Health Practice Board of Australia (joined the National Scheme on 1 July 2012)
- Chinese Medicine Board of Australia (joined the National Scheme on 1 July 2012)
- Chiropractic Board of Australia
- Dental Board of Australia
- Medical Board of Australia
- Nursing and Midwifery Board of Australia
- Medical Radiation Practice Board of Australia (joined the National Scheme on 1 July 2012)
- Occupational Therapy Board of Australia (joined the National Scheme on 1 July 2012)
- Optometry Board of Australia
- Osteopathy Board of Australia
- Pharmacy Board of Australia
- Physiotherapy Board of Australia
- Podiatry Board of Australia, and
- Psychology Board of Australia.

The Australian Health Practitioner Regulation Agency (AHPRA) works in partnership with each of the National Boards to implement the requirements of the National Scheme, which has maintaining public safety at its heart. Further information is available at www.ahpra.gov.au.

Relevant sections of the National Law

Section 4 of the National Law provides that a body exercising functions under the Law, such as a National Board or AHPRA, must exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme.

The objectives of the national registration and accreditation scheme are –

- to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered; and*
- to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction; and*
- to facilitate the provision of high quality education and training of health practitioners; and*
- to facilitate the rigorous and responsive assessment of overseas-trained health practitioners; and*
- to facilitate access to services provided by health practitioners in accordance with the public interest; and*
- 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.*

Section 79 of the National Law provides that:

1. *before deciding an application for registration, a National Board must check the applicant's criminal history.*
2. *For the purposes of checking an applicant's criminal history, a National Board may obtain a written report about the criminal history of the applicant from any of the following—*
 - (a) *CrimTrac;*
 - (b) *a police commissioner;*
 - (c) *an entity in a jurisdiction outside Australia that has access to records about the criminal history of persons in that jurisdiction.*

The National Law defines 'criminal history' as:

- (a) *every conviction of the person for an offence, in a participating jurisdiction or elsewhere, and whether before or after the commencement of this Law;*
- (b) *every plea of guilty or finding of guilt by a court of the person for an offence, in a participating jurisdiction or elsewhere, and whether before or after the commencement of this Law and whether or not a conviction is recorded for the offence;*
- (c) *every charge made against the person for an offence, in a participating jurisdiction or elsewhere, and whether before or after the commencement of this Law.*

The word 'offence' is not defined in the National Law and has its ordinary meaning of 'a breach of the law'.

Current process for checking criminal history

Section 79 of the National Law requires that each Board considers the criminal history of applicants for registration, whether the criminal history occurred inside or outside Australia.

The current approach to checking criminal histories involves:

1. seeking an Australian criminal history through CrimTrac and
2. requiring the applicant to sign a declaration on the registration application form disclosing their criminal history in all countries, including Australia. In cases where applicants declare that they have no criminal history outside Australia; no further evidence, audit or authentication is currently required, nor sought. In cases where applicants declare that they have a criminal history, further investigations are made and the criminal history is assessed according to the relevant Board's *Criminal history registration standard*.

To balance the requirements for public protection with the need for responsive and timely application and assessment processes for health practitioners seeking registration in Australia, National Boards and AHPRA have been considering possible ways to refine the mechanisms for international criminal history checks.

2012 consultation

In 2012, National Boards consulted on four possible options for refining international criminal history checks.

Option 1: Applicant declaration only

Option 2: Applicant provides criminal history clearance evidence with application

Option 3: AHPRA obtains clearance/information from jurisdictions outside Australia when processing application

Option 4: Applicant makes declaration and AHPRA undertakes random sample audit

More detail about these options is in Attachment One.

National Boards received 68 external submissions from public consultation but the feedback about the preferred option was mixed. Most submissions preferred option two or four but still had issues with those options.

Many responses acknowledged the need to balance a range of factors in determining an approach to international criminal history checking, including:

- protection of the public
- minimising the risk of fraud
- avoiding unnecessary delays to application processing times, and
- not imposing unreasonable burdens on overseas applicants, such as obtaining criminal history checks in person.

However, stakeholders balanced these factors differently as reflected in the different preferences for the four options in the consultation paper.

2013 consultation

The need to reconcile competing views about the four options has been overtaken by a new option which was identified after the consultation process.

Option 5: External provider conducts international criminal history checks

This paper explores the issues associated with the new option, Option 5, and seeks feedback.

Option 5 has potential to achieve better outcomes than the other options. It would establish a similar process for checking international criminal histories to the current process for checking domestic criminal histories through CrimTrac. It would strike a reasonable balance between risk, undertaking comprehensive checks where appropriate and not imposing unnecessary delays on applicants becoming registered.

The applicant would be required to meet the cost of the international criminal history checks. Existing general requirements would continue to apply (every applicant to undergo a domestic criminal history check, make a declaration about their criminal history and arrange the provision of Certificates of Registration Status from every jurisdiction where they have been registered).

<i>Benefits of Option 5</i>	<i>Risks</i>
<ul style="list-style-type: none">• Applications can be processed on the basis of a domestic criminal history check and the applicant's declaration about their international criminal history (provided no significant criminal history is disclosed), followed by a comprehensive international criminal history check post-registration.• Will not unnecessarily delay registration.• Will establish a consistent and comprehensive approach to checking international criminal history which is only reliant on declaration for a short time.	<ul style="list-style-type: none">• A small risk that an applicant with an international criminal history is inappropriately registered because an applicant is registered for a short time based on a false declaration before their international criminal history check is completed.
<ul style="list-style-type: none">• The applicant would meet the cost of the international checks so there would be no additional cost for the National Scheme	<ul style="list-style-type: none">• The cost to the applicant will depend on the number of countries that need to be checked, so there is a risk that some potential applicants could view the cost as a disincentive.
<ul style="list-style-type: none">• Increased efficiency and reduced impact on applicants.	<ul style="list-style-type: none">• None identified.

<i>Benefits of Option 5</i>	<i>Risks</i>
Avoids the need for applicants to communicate with overseas jurisdictions to gain the required information and provides a streamlined process through an external agency which regularly obtains checks and has relationships with the relevant organisations in each country	

International criminal history checks by external provider

International criminal history checks could be done by an external service provider with demonstrated expertise in employment screening, including international checks.

This option would involve the following aspects.

- AHPRA would tender to identify a provider with expertise in international criminal history checking.
- All applicants would continue to have an Australian criminal history check before registration.
- An international criminal history check would also be done for any applicant who declares that they have lived in a country other than Australia for a specified period of time (see discussion below) when 18 years of age or older.
- A check would be done on each country where the applicant has lived a specified period of time (see discussion below) when 18 years of age or older.
- The check would apply to the applicant's entire criminal history (there will be no time limit on the check).
- The check would be done after the applicant is registered. The period between granting registration and the completion of the check would be covered by the applicant making a declaration about their international criminal history.
- The applicant would pay the cost of the international criminal history checks required plus an administration fee.

More detail about these aspects is listed below.

Scope of international criminal history checking

1. Who should have an external international criminal history check?

The usual time that an applicant will need an international criminal history check is when they apply for registration and declare that they have lived in a country outside Australia for the specified period or more, whether their qualification is from Australia or overseas.

However, sometimes current registrants will also need an international criminal history check. A currently registered practitioner will need an international criminal history check when they:

- apply to renew their registration and declare a change in their criminal history which occurred outside Australia (s. 109 of the National Law), and/or
- advise the Board that they have been charged outside Australia with an offence with a possible sentence of 12 months imprisonment or more, or have been convicted of, or the subject of a finding of guilt for an offence, outside Australia, that is punishable by imprisonment (s. 130 of the National Law).

2. Which countries should international criminal history checks be obtained from?

When an applicant or registrant needs an international criminal history check, the check will be done on each country other than Australia where they have lived for a specified period.

Feedback is sought on whether the specified period should be:

- three months or more, or
- six months or more.

The check will not be done on countries where an applicant has lived for less than the specified period because it:

- excludes short stays, such as briefer holidays, reducing the costs of obtaining international criminal history checks, and
- does not increase the risk of registering someone with a serious criminal history because imprisonment terms for serious offences would be longer than the specified period.

Time period for check and scope of declaration

Boards will continue to require applicants to declare their entire criminal history, including:

- every conviction of a person for an offence
- every plea of guilty or finding of guilt by a court of the person for an offence, whether or not a conviction is recorded for the offence, and
- every charge made against the person for an offence.

However, Boards have no power under the National Law to override spent convictions and rehabilitation legislation in countries that have established this legislation. Information about these countries is in Attachment 2.

The rules that apply to 'spent' convictions in different countries vary significantly. This means that setting any cutoff period (for example, only seeking an international criminal history check for the 10 years before the application) would risk excluding a criminal conviction. Therefore, there will be no time limits on international criminal history checks, and they will apply to the applicant's entire criminal history.

Where an applicant declares a 'spent' conviction, the international check will return a nil result and that person's criminal history will need to be assessed solely on the basis of their declaration.

Continued requirements - domestic criminal history check, declaration and Certificate of registration status

Domestic criminal history checks will still be conducted on all applicants before they are registered, even if they declare that they have not previously been in Australia. This will ensure that any Australian criminal history is considered before the applicant is registered.

There will be no change to the requirement for all applicants to make a declaration about their criminal history both within and outside Australia when they apply for registration. Where an applicant discloses a significant criminal history outside Australia, an international criminal history check will be undertaken before registration.

The National Boards will continue to require all applicants to arrange the provision of a Certificate of Registration Status or Certificate of Good Standing from every jurisdiction in which they are currently, or have previously been registered as a health practitioner (including overseas registrations) during the period specified by each Board (mostly five years and ten years for the Medical Board of Australia). The applicant must arrange for original Certificates to be forwarded directly from the licensing or registration authority to the relevant National Board.

How claims of persecution and 'questionable' international convictions will be addressed

Offences in some countries are not offences under Australian law. For example, some countries have established offences for political activity which do not exist in Australia. There are also countries where the criminal justice system is less robust and a conviction may be made on the basis of questionable evidence or the applicant may make a claim of persecution.

International criminal history checks will still be done for these countries. However, the National Boards' criminal history registration standard explains how Boards will take these issues into account when considering an applicant's criminal history.

Any evidence that 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.

You are invited to provide feedback

The National Boards are seeking feedback on the proposed new process for international criminal history checking as well as on the following questions.

- Is the proposed new approach the best option?
- Is the proposed approach clear?
- Are there any risks or issues about the proposed process that need more consideration?
- Should international criminal history checks be conducted for countries where applicants have spent three months or more, or six months or more?
- Do you have any other comments?

Attachment one

Options from previous consultation

The options and issues are complex. The scope and content of criminal history documentation is likely to vary across countries. In addition, different approaches to the criminal law and varying political environments may mean that it may be difficult to determine the accuracy of an international criminal history, or the weight to be assigned to a particular offence.

Listed below are a number of options on how to process international criminal history checks for internationally qualified practitioners applying for registration, and their associated risks and benefits. These options have been developed taking into account the requirements of the National Law, including the objectives and guiding principles, and the risks associated with practitioners who have an international criminal history.

Option 1: Applicant declaration only

This option requires the applicant declaration only - no additional evidence of criminal history is required, sought or obtained from jurisdictions outside Australia (this is the current approach).

<i>Benefits of Option 1</i>	<i>Risks</i>
A false declaration on application may be deemed provision of false or misleading information and can be actioned under Part 8 of the National Law including the cancellation of registration	Declarations/statements made on application are not statutory declarations, as such there are lesser penalties or remedies available for provision of false information
No difficulties in communicating with overseas jurisdictions, either by the applicant or by AHPRA, meaning that assessment processes are not delayed	To investigate/pursue action under Part 8 for all instances of false information would be resource intensive
No additional cost or resource implications (unless pursuing Part 8 action/s)	Minimal consequence or deterrence for not declaring overseas criminal history
	Unlikely that AHPRA would easily gain evidence/proof of false declarations

Option 2: Applicant provides criminal history clearance evidence with application

This option requires the internationally qualified applicant to:

- provide evidence of criminal history clearance, or
- provide/facilitate provision of criminal history information from jurisdictions outside Australia.

<i>Benefits of Option 2</i>	<i>Risks</i>
Applications will be incomplete until applicants provide all the necessary information	Delays for applicants communicating with overseas jurisdictions to gain the required information
No additional cost for the National Scheme and minimal resource implications	The National Law is not binding on overseas jurisdictions (spent convictions and release of information)
Provides additional assurance to verify declaration from applicant	Potential for the submission of fraudulent documents – specialist knowledge and resources are required to assess the evidence
	Limitations (time and location) as to scope of information applicant must provide
	Relies on the honesty of applicants and carries risks similar to those detailed under option one

<i>Benefits of Option 2</i>	<i>Risks</i>
	May add significant time to and burden of preparation of applications (by applicant)

Option 3: AHPRA obtains clearance/information from jurisdictions outside Australia when processing application

This option places the onus on AHPRA to obtain criminal history clearance or evidence from jurisdictions outside Australia for internationally qualified applicants.

<i>Benefits of Option 3</i>	<i>Risks</i>
Increased the veracity of criminal history information obtained directly from overseas authorities	Significant increase in resources required to manage applications
Reduces risk of fraudulent documents	The National Law is not binding on overseas jurisdictions in relation to spent convictions and release of information
Provides additional assurance to verify declaration from applicant	Poor or no liaison relationship with some jurisdictions, which may result in extended delays or failure to gain the necessary documentation
	Likely to lead to significant time delays in assessing applications for registration, beyond AHPRA's control

Option 4: Applicant makes declaration and AHPRA undertakes random sample audit

This option requires internationally qualified applicants to make declarations on their registration applications, and AHPRA to undertake random audits, with clear and publicised deterrent consequences.

<i>Benefits of Option 4</i>	<i>Risks</i>
No delays at the time of assessing applications	Need to determine from what time period/locality criminal history information will be required/sought, such as for the last 10 years to be consistent with some Boards' requirements for Certificates of Registration Status (as is the case for the Medical Board of Australia for limited registration)
Less resource implications compared with option three	Additional resources required to undertake audit process
Reduces risk of fraudulent declarations from applicant	Effectiveness of audit process will depend on the liaison relationships AHPRA establishes with organisations issuing Criminal Clearance Certificates (CCC) and subject matter expertise within AHPRA about CCC contacts in different countries, which would need to be developed
Provides additional assurance to verify applicants' declarations	The National Law is not binding on overseas jurisdictions in relation to spent convictions and release of information

The options – where to from here?

Option 1 is to maintain the status quo. In light of the above information, Option 3 may not be viable.

Therefore, the two most likely options to manage international criminal history checking are:

- Option 2 - requires all internationally qualified applicants to provide criminal clearance certificates with their application, or
- Option 4 - relies on applicant declarations supported by a well publicised and targeted audit to assure compliance.

Option 2 is likely to be more expensive and time consuming for both applicants and AHPRA. It may significantly add to the time required to become registered. This may be difficult to justify in light of the very small numbers likely to have an international criminal history. However, there is an argument that requiring Criminal Clearance Certificates (CCCs) with applications is in itself a deterrent for those who have a criminal history.

Option 4 uses the mechanism of a targeted audit to assure compliance with the declaration approach and recognises the minimal risk of registering an applicant with a significant criminal history. It also recognises that requiring CCCs with applications cannot extinguish the risk of registering an applicant with a criminal history given rehabilitation of offenders legislation in source countries. It is likely to be less expensive and time-consuming than option one.

Work will be required to implement whichever option National Boards ultimately decide to adopt, including making necessary administrative changes and establishing a communication strategy for international applicants. The communication strategy will include:

- clarification of requirements for applicants with dual nationality
- the relationship between criminal history checking and each Board's criminal history registration standard, which the Board will apply when a practitioner has a criminal history, and
- the scope of international criminal history checks, and coverage of international tribunals such as war crimes tribunals.

Attachment two

Examples of countries with spent convictions legislation

Germany - information will not be provided on offences where:

- there was no conviction
- an individual was under the age of 21
- it has been five years since the offence took place
- convictions resulting in imprisonment that do not exceed two years and where a provisional discharge has been approved, and
- convictions resulting in imprisonment do not exceed three months.

New Zealand - the *Criminal Records (Clean Slate) Act, 2004* states that information will not be provided where:

- it has been seven years since the offence took place
- an individual has never been sentenced to imprisonment, corrective training or any other custodial sentence
- an individual has never been ordered by court to be detained in a hospital for a mental condition instead of being sentenced in a criminal case
- an individual has never been convicted of a 'specified offense' (sexual offenses against children, mentally impaired etc.), and
- an individual has never been disqualified indefinitely from driving under s65 *Land Transportation Act 1998*.

United Kingdom - the *Rehabilitation of Offenders Act 1974* applies to England, Scotland and Wales and provides for:

- certain convictions to become 'spent' if the sentence involved 30 months of imprisonment or less and the rehabilitation period was completed successfully, and
- any adult or youth conditional caution to be spent after three months has passed and that final warnings, simple cautions and reprimands become spent immediately.

Spain - an offence is considered spent where it has been five years since a sentence has been served.