

From: criminal history consult
Subject: FW: AHPRA Consultation on International Criminal History Checking - SA Health

From: Leigh, Michelle (Health)
Sent: Friday, 25 October 2013 6:03 PM
To: criminal history consult
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Dear AHPRA

I refer to AHPRA's "Public Consultation Paper" of September 2013 ("the Paper") requesting feedback from SA Health to criminalhistoryconsult@ahpra.gov.au by 31 October 2013 on the newly proposed Option 5 for AHPRA's international criminal history checks (following Options 1 to 4 that were consulted on mid 2012). The Paper requests feedback on the five questions below. SA Health's feedback on the questions is as follows:

1. Is the proposed new approach (Option 5) the best option?

It is considered that the key criteria for considering the merits of Option 1-5 should be (in order of importance):

- i. Compliance with the National Law;
- ii. Protection of the public;
- iii. Minimising the risk of fraud;
- iv. Avoiding unnecessary delays to application progression times, and
- v. Not imposing unreasonable burdens on overseas applicants.

Option 5 may not comply with legal requirements (as discussed under Question 5 below) and legal advice should be obtained on this, if not already done do.

However, if legal advice would be that Option 5 does comply with the National Law, it might be the best Option as it seems to provide a good balance of considerations (ii) to (iv).

If Option 5 does not comply with legal requirements, Option 2 (Applicants providing evidence of criminal record with their application) would be the preferred Option as:

- It appears to be the only Option available for obtaining criminal histories in international jurisdictions such as China where the authorities will only provide such documents directly to the applicant.
- It puts the onus to obtain evidence of a satisfactory Criminal History on the applicant who would be in a better position than AHPRA to manage any issues that may cause delays in obtaining the Criminal Clearance Certificates (CCC) if they request the CCC themselves.
- It is understood that Department of Immigration and Citizenship (DIAC) requires criminal history clearance for visa assessment and this has to be provided by the applicant. An applicant for AHPRA registration from other countries will therefore be aware that criminal history evidence has to be provided before obtaining a visa and is likely to apply for it in advance of them applying for registration to AHPRA.
- AHPRA can notify current registrants of the need for them to obtain an international criminal history check after they have visited another country for an extended period (e.g. 3-6 months as determined by AHPRA). This will allow sufficient time for current registrants to obtain international criminal history evidence before applying for renewal of their current registration.
- Option 2 significantly relieves AHPRA from the administrative burden of obtaining CCC for applicants (but there is a risk that fraudulent documents may be submitted).

2. Is the (Option 5) approach clear?

Yes, the consultation document provides sufficient and clear detail on the proposed process; the evidence required for registration; and how possible issues will be dealt with.

3. Are there any risks or issues about the proposed process that need more consideration:

Key likely risks are:

- Non-compliance with legal requirements: Option 5 may not comply with the requirements for registration as prescribed by the National Law (as discussed under question 5).
- Risk of fraud and risk to the public: As the required declaration by the applicant is not a statutory declaration, there is a real risk of an applicant with an adverse criminal history of making a false declaration regarding a clear criminal history record with not risk to themselves but real risk to the public for an undetermined period until the matter of the unsatisfactory criminal history has been resolved.
- Risk of not obtaining all information on an applicant's "entire" international criminal history: The National Law requires that the entire criminal history of an applicant has to be considered, including every conviction; every plea or finding of guilt by a court, and every charged made in a jurisdiction. It is unlikely that the international criminal histories made available to AHPRA will include all of these aspects – particularly regarding spent convictions or where charges were withdrawn. There is therefore a risk that an aspect of an applicant's international criminal history may not be visible to AHPRA for consideration.

4. Should international criminal history checks be conducted for countries where applicants have spent three months or more or six months or more?

It is proposed that a period of 6 months or more be accepted as the norm for requiring an international criminal history check. The current SA Health policy for criminal history assessments require international checks where the person has spent one year or more in another country.

5. Any other comments?

Compliance with the requirements of the National Law

Option 5 does not seem to comply with the provisions regarding national registration as required in the Health Practitioner Regulation National Law ("National Law") on three counts, e.g.:

a. Mandatory obligation to check the applicant's criminal history in a prescribed manner before registration:

Section 79 (1) of the National Law requires that AHPRA must check the applicant's criminal history before deciding on the application for registration [and check this in the manner prescribed in Section 79(2)].

Option 5 proposes to register the applicant before the prescribed evidence of criminal history has been received as prescribed by the National Law.

b. Manner in which criminal history checking has to occur before registration:

Section 79 (2) requires that a written report be obtained (from specified sources) on the criminal history of the applicant before registering the applicant.

A declaration of a clear criminal history by the applicant himself/herself does not reasonably fall within the normal understanding of "obtaining a written report"

c. Obtaining a written report on criminal history from a prescribed list of sources:

Section 79 (2) also provides a list of limited sources of acceptable evidence of criminal history for checking an applicant criminal history. The nature of the list implies it is intended to be a comprehensive list: e.g. the sources of a written report are stated as either from Crim Trac; from a Police Commissioner or from "an entity in a jurisdiction outside Australia that has access to records about the criminal history of persons in that jurisdiction".

This list of acceptable evidence for a clear criminal history does not include a declaration of a clear history by the applicant himself/herself.

The registration of an applicant may not be valid where AHPRA did not comply with the National Law on requirements for registration of applicants, i.e.:

- Where AHPRA relied on evidence other than written reports from the entities stated in the National Law; or

- AHPRA did not obtain this report before the registration of the applicant.

The above comments have to be considered in context of the objectives of the National Law (section 4) including facilitating “the rigorous and responsive assessment of overseas-trained health practitioners”.

As previously mentioned, it is recommended that AHPRA seek legal advice on the legality of the proposed alternative Options (if not already done so).

Regards

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