

NATIONAL HEALTH PRACTITIONER OMBUDSMAN AND PRIVACY COMMISSIONER SUBMISSION ON THE ENGLISH LANGUAGE REGISTRATION STANDARD AS IT APPLIES TO NURSES AND MIDWIVES

BACKGROUND

About this Submission

I was appointed to the role of National Health Practitioner Ombudsman and Privacy Commissioner in January 2014. At the time of writing, I have only had the opportunity to form some initial impressions about the application of the English Language Registration Standard (the standard), based on those complaints to my office that have been brought to my attention so far.

I am conscious that I have very limited information at this time. Nonetheless, I wish to convey my preliminary views, to inform consideration and debate about the review and redesign of the standard. I would be happy to discuss the matters outlined in this submission and to receive any information you wish to give me about the operation of the English language standard or the review.

The majority of complaints received by this office about the application of the standard have been from individuals seeking registration as registered or enrolled nurses, or midwives. Therefore this submission only examines the standard as it applies to nurses and midwives as I do not currently have evidence to enable me to comment on how the standard applies to professional groups. However, the issues I am raising may also have wider application in reviewing the standard.

This submission is divided into three parts. Part A contains comments in relation to the current standard and the proposals for change outlined in the Discussion Paper. Parts B and C contain a small number of case studies, which have informed my preliminary views. I consider that these case studies illustrate the need for a thorough review of the standard as it applies to nurses and midwives from first principles, having regard to the Council of Australian Governments Principles and Guidelines for Best Practice Regulation (the COAG Guidelines).

I have obtained permission from the individuals whose case studies are outlined in Part B to include their case studies in this submission. Accordingly I am happy for Parts A and B of this submission to be published. However, as I have not been able to contact the person whose case study is outlined in Part C, I request that Part C of this submission be treated as confidential and not be published.

PART A: Comments on the current standard and proposals for change

Key Points

I am very conscious of the importance of ensuring that registrants have sufficient proficiency in English to practice nursing profession safely and competently. However, I consider that -

1. The current standard is too inflexible. It is also being applied inflexibly in practice, without sufficient consideration for the diverse circumstances of individual applicants in some cases.
2. The proposed changes outlined in the Discussion Paper are essentially refinements to the current standard. While the proposals to build some greater flexibility into the standard are welcome, these do not go far enough to introduce desirable flexibility.
3. Consideration should be given to amending the standard to enable additional classes of English speaking applicants to demonstrate that they have sufficient English language proficiency to

practise nursing or midwifery safely and competently, without the need to undergo English language testing of a kind required under the current standard.

4. The data that indicates that some professions have higher failure rates than others should be examined in considering whether the International English Language Testing System (IELTS) and/or the Occupational English Test (OET) are an appropriate means of assessing English language proficiency across all professional groups.
5. A specific review should be undertaken to ascertain whether the IELTS and the OET are fit for purpose in the nursing context, especially in the case of enrolled nursing which is a diploma qualification. One way of doing this would be to run a well-designed trial involving a random sample of Australian born and educated enrolled and registered nurses to test whether they would achieve a sufficient score to obtain registration. If these tests are found not to be fit for purpose, suitable alternatives should be developed.
6. Despite a provision in the current standard which enables the board to exercise discretion as a matter of policy where an applicant can provide compelling evidence to demonstrate English language proficiency equivalent to the standard, there appear to be no administrative systems in place to enable the application of this discretion in appropriate cases. It is unclear whether this provision has ever been applied by the regulator.
7. There is a need to retain residual discretion in the standard, to cater fairly for the diverse circumstances of individual applicants, with an appropriate policy framework to guide the exercise of the discretion.

Overall, it appears to me that, in the development and administration of the current standard, the overriding emphasis is currently on having the same rules apply to all applicants in the interests of consistency and ease of administration. While ostensibly neutral, this approach can prevent individuals with sufficient English proficiency to practice safely from becoming registered, resulting in disadvantage to individual applicants and reducing the number of qualified individuals available to work in the health care system. The goal of consistency should be achieved by treating like cases alike, rather than by having a “one size fits all” approach.

I am especially concerned that some individuals whose first language is English and who have qualified and practised as nurses in Australia or another English speaking country with a substantially equivalent health care system have been required to sit an English language test and have failed to achieve a sufficient score to achieve registration. I am unsure why the standard should require these classes of applicants to undergo English language testing.

I am aware of a case where a native English speaker born and educated entirely in the United Kingdom has failed to pass the IELTS test on two occasions. This and other cases raise questions about whether these tests are fit for purpose, and whether it is appropriate to have a standardised approach to language testing that is generally common across all registered professions, having regard to the different educational preparation required for the different professions. In this context, I am concerned that the current standard operates to the particular disadvantage of women who are seeking to improve their qualifications and employment prospects by studying nursing as mature aged students.

About Registration Standards

Registration standards are subordinate instruments which must be consistent with the objectives and overall scheme of the Health Practitioner Regulation National Law (the National Law). An entity

that has functions under the National Law is required to exercise its functions having regard to the objectives and guiding principles set out in section 3.

The primary policy objective of an English language standard is to ensure that applicants seeking registration have sufficient English language proficiency to practice their particular profession safely, in order to protect the public. Other relevant policy objectives relate to –

- rigorous and responsive assessment of individuals who have trained as health practitioners overseas;
- enabling access to health services; and
- workforce flexibility, mobility and innovation.

The relevant guiding principles of the national scheme are as follows:

- the scheme is to operate in a transparent, accountable, efficient, effective and fair way; and
- restrictions on the practice of a health profession are to be imposed under the scheme only if necessary to ensure health services are provided safely and are of an appropriate quality.

Section 38 of the National Law requires the boards to develop and make recommendations to the Ministerial Council about registration standards, including requirements about the English language skills *necessary* for an applicant for registration in a profession to be suitable for registration in the profession. I consider that the term *necessary* indicates that the English language standard must be fit for purpose, and should not impose requirements that exceed those that are actually necessary for the safe practice of the particular profession in question. In other words, the standard should be proportionate, having regard to the policy objectives of the National Law.

Policy Issues

There is undoubtedly tension between the need to have a standard based on objective criteria that are capable of being administered consistently, and the need to have a system that is sufficiently flexible and is capable of producing outcomes that align with the policy objectives of the National Law and of achieving fairness in individual cases, given the diversity of circumstances of individual applicants.

The case studies outlined in this submission suggest that the current English language standard and the proposed amendments to the standard do not ensure that the right balance is struck between these policy objectives in the case of nurses and midwives. I am also unconvinced that the proposed amendments to the standard would achieve the objectives of the COAG Guidelines. The relevant COAG Guidelines are that -

- in developing and reviewing regulation, a range of feasible policy options are considered and their benefits and costs are assessed;
- the policy option that generates the greatest net benefit for the community is adopted;
- government action is effective and proportional to the issue to be addressed;
- legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs and the objectives of the regulation can only be achieved by restricting competition;
- there is effective guidance to regulators and regulated parties to ensure that the policy intent and expected compliance requirements of the regulation are clear; and
- steps are taken to ensure that regulation remains relevant and effective over time.

While the proposed changes to the standard have been developed in accordance with the process set out in the National Law, it appears that there has been no regulatory impact statement in relation to the standard as envisaged in the COAG Guidelines.

The Evidence Base

Professor Leslyanne Hawthorn was commissioned to examine the evidence base in relation to current English language skills registration standard requirements in health fields and the requirements of comparative international regulators.

Professor Hawthorn has advised that global regulatory bodies adopt highly variable requirements in relation to English language testing in medical and allied health fields, and this is a dynamic area of policy. She noted that regulators may specify few or multiple tests; different test types (ranging from generic to field specific, to embedded, to interview based); require diverse scores by test and field; allow different types of exemption; permit variable lengths of result validity and impose different operational requirements. She also noted that the reference to the IELTS and OET tests in the standard is consistent with the approach of other global health regulators.

Professor Hawthorn has made the interesting observation that the tests have differential impacts by field, with some professions having higher failure rates. The summary of Professor Hawthorn's research attached to the Discussion Paper did not specify which professions have higher failure rates. This data should be examined closely, as it may be relevant in determining whether the IELTS and/or OET tests are fit for purpose as a means of assessing English language proficiency in some professional groups – especially diploma qualified versus degree or higher degree qualified applicants.

Overall Professor Hawthorn has concluded that the research does not yet provide conclusive positions on key issues and that decisions on the standard are therefore informed by historical approaches, experience with the current regulatory position and the approaches of comparator jurisdictions.

In light of this information, and the case studies outlined in this submission, I consider that a thorough review of the standard should be undertaken from first principles, utilising the approach set out in the COAG Guidelines.

Key Considerations in Reviewing the Standard

In revising the standard, a key aim should be to achieve the objective of protecting public safety while having a law which is proportionate. It would seem possible to achieve this outcome by revising the standard to build in alternative ways in which additional classes of applicants can demonstrate English language proficiency sufficient for safe professional practice without the need to submit to English language testing in the manner required under the current standard. I have made some suggestions for consideration below.

I acknowledge that administering a more layered standard would introduce greater complexity for the regulators. However, it is important to ensure that the requirements imposed by the standard are not unreasonable, having regard to the diverse circumstances of applicants.

This approach is also consistent with contemporary thinking about good regulatory practice, which emphasises the benefits of “outcomes based” laws rather than prescriptive regulations, to the extent feasible. Outcomes based laws provide some flexibility so that individuals who are subject to the law have various ways in which they can demonstrate that they meet the outcome.

I am especially concerned about the proposal in the Discussion Paper to remove the provision enabling discretion from the draft standard. I consider that, as well as introducing alternative means by which additional classes of qualified applicants can demonstrate that they have sufficient English language proficiency to practise safely in their chosen profession, the revised standard should continue to allow for the application of residual discretion in appropriate cases. No law can ever foresee and address all relevant circumstances faced by individuals and it is especially appropriate that residual discretion be retained given the diversity of the personal circumstances of individual applicants in today's highly mobile world.

Further, I note that the discretion in the current standard is worded quite narrowly in that this provision emphasises equivalence *to the standard*, rather than compelling evidence of English language proficiency that sufficient for the safe practice of the relevant profession. If the standard is not fit for purpose, or imposes excessive or inappropriate requirements on some applicants, a requirement to demonstrate equivalence to the standard will not provide an appropriate solution where the application of discretion is required to produce an outcome for individuals which is both just and consistent with the policy objectives underpinning the law.

Issues Posed in the Discussion Paper

Based on the information I have to date, I would support the following proposed changes to the standard as it applies to nurses and midwives in principle, as they would introduce some greater flexibility into the standard:

- providing that applicants who are National Accreditation Authority for Translators and Interpreters (NAATI) qualified interpreters do not have to undergo English language testing;
- extending the period in which test results remain valid; and
- enabling applicants to count IELTS test results from more than one sitting in certain circumstances.

Which countries should be recognised in the standard?

The current standard provides that applicants for nursing or midwifery registration who have undertaken a minimum five years full time equivalent of secondary, tertiary or vocational education taught and assessed in English, including a specified period of pre-registration nursing education, in one of the seven countries listed in the standard will not be required to undergo English language testing. For registered nurses, a minimum of two years full time equivalent of pre-registration nursing education in one of the listed countries is required; for enrolled nurses, a minimum of one year full time equivalent of pre-registration nursing education is sufficient.

This provision is clearly designed to obviate the need for applicants who have undertaken relevant education in English in those particular countries to undergo English language testing, in order to reduce regulatory burden and cost for this class of applicants. The Discussion Paper indicates that the reasons for this approach are that –

- it reflects similar approaches by State and Territory health practitioner registration boards prior to the introduction of the national scheme;
- the Department of Immigration and Citizenship exempts visa applicants from all of these countries except South Africa from English language skills testing;
- these countries generally have health care delivery systems with significant similarities to Australia; and

- in most of these countries, health care is almost always delivered in English.

I have received complaints that the standard is discriminatory as applicants originating from some Asian countries can also prove that they have been taught and assessed in English, yet their education in English outside the listed countries cannot be taken into account in calculating the required period of education in English.

An individual who complained to my office feels that the current standard creates different rules for “insiders” and “outsiders” and that the selection of the countries listed in the standard reflects an outdated view of what constitutes the English speaking world. They have argued that it would be fairer to have one “fit for purpose” English language test that applicants from overseas are required to submit to, regardless of their country of origin.

I do not have sufficient information to comment on which countries should be recognised for the purposes of the standard. However, an important consideration appears to be that health care systems in the other six countries listed in the standard are similar to that of Australia, and that English is the language of the health care system in those countries. This appears relevant to the requirement that applicants must have completed a specified minimum amount of pre-registration nursing education in one of these countries.

Under the current standard, native English speakers who have migrated to Australia and have undertaken their entire pre-registration program of nursing education in Australia but cannot demonstrate a total of 5 years full time equivalent education in English in one of the seven countries listed in the standard are currently required to submit to the IELTS or OET tests, even if they can prove they have undertaken education that was taught and assessed in English elsewhere. I wonder whether this is necessary, given that these individuals have been specifically educated to practise in the Australian health care system.

I appreciate that it may be difficult for the regulator to be satisfied that a person has received education in English of an appropriate standard at a reputable institution overseas. However, complaints made to my office suggest that a number of these applicants also have a significant history of employment in Australia, where they have been using English in the workplace for many years. Without the application of discretion, there is currently no ability under the standard to take into account proof of applicants’ employment history in Australia and employers’ feedback on staff communication skills. Consideration should be given amending the standard so that the totality of education in English and employment history can be taken into account in the assessment process.

In particular, I do not understand why is there no ability under the standard to automatically take into account nursing registration and evidence of a sufficient period of professional practice in the registered profession in one or more of the listed countries where English is the language of health care delivery and whose health care systems are regarded as substantially similar to that of Australia.

Consideration should be given to amending the standard so that an applicant who is otherwise qualified for initial registration is not be required to sit an English language test where they can demonstrate clearly that they have –

- been registered as a health practitioner in one or more specified countries (where health care is delivered in English); and

- satisfactorily practised that profession continuously in that country for a defined period of time, and have not had any adverse action taken in relation to their registration or employment in that country; and
- sufficient recency of practice to be able to practice safely if registered in Australia.

Consideration should be given to amending the standard to enable proof of recognised secondary or tertiary level education that is taught and assessed in English in other countries to be taken into account in circumstances where people have attained a pre-registration qualification in Australia or, if appropriate, in one of the other six countries currently listed in the standard. The applicant should be responsible for producing the evidence to substantiate their educational history. Consideration should also be given to the feasibility of taking into account any employment history in Australia of this class of applicants. Alternatively, an alternative approach to assessing English language proficiency could be considered for this class of applicants if the IELTS or OET tests are found not to be fit for purpose.

Proposal to remove discretion

The Discussion Paper provides no rationale for the proposal to remove the provision enabling the application of discretion from the standard.

I am unaware of any cases where the discretion has been applied to exempt applicants from English language testing, either in individual cases or for a defined class of applicants. On one occasion, the regulator advised my office that they were unable to provide examples of what is considered to be compelling evidence that the board would consider when contemplating a request for exemption from the English language skills registration standard. The reason given was that each request is considered on a case by case basis based on its own merits.

To inform debate on how the standard should be revised, it would be useful for the regulator to explain whether any exemptions have been granted and in what circumstances, as this could inform policy decisions about the future content of the standard.

Even if the classes of applicants who are not required to submit to English language testing is broadened or the standard is amended to allow for results of multiple test sittings in certain circumstances, residual discretion should also be retained to cater for exceptional circumstances. Where such discretion is permitted, transparent systems need to be put in place to ensure that -

- a suitable framework exists to guide the exercise of the discretion;
- the discretion is given due consideration and is applied only where appropriate;
- decision making occurs at an appropriate level; and
- the decision maker is accountable.

The OET and IELTS Tests

I am concerned that the IELTS and OET tests may not be fit for purpose in determining whether applicants for registration in nursing or midwifery, have sufficient English proficiency to safely practice their profession; especially in the case of enrolled nurses who have a diploma qualification.

As noted above and in the case studies attached to this submission, I am aware of cases where native English speakers seeking registration have not achieved the required score in all components of the test, and have failed to achieve registration as a result.

The IELTS test is a generic test and applicants must achieve the prescribed score for all elements which must be undertaken in one sitting. It includes an English comprehension component in which applicants are asked to read and answer questions on topics unrelated to the practice of their profession (e.g. agricultural productivity, military operations and the like). This can be very daunting, as the applicants are faced with having to read and understand material on a topic that is totally unrelated to their field of study or their personal or professional interests.

Clearly the testing process can be highly stressful. I have been provided with information about applicants who have sat the tests a number of times, achieving varying scores on each occasion. A complaint that has been brought to my attention relates to an individual who sat the OET four times in one year at a cost of \$2,400 and also paid additional fees for coaching. This individual achieved their lowest score on the fourth testing occasion.

Concerns have been raised with me that the testing organisations are private businesses that have a financial incentive to design the tests so that some applicants will have to repeat the test on multiple occasions. I have been advised that applicants are strongly encouraged to enrol in workshops costing several hundred dollars to learn about how the test is structured before sitting the test.

As a small experiment, a staff member of my office who is an Australian born, tertiary qualified native English speaker with high level communication skills did a sample IELTS written comprehension test. Its subject was agricultural productivity. According to the answers provided, she answered one question incorrectly. On a close examination of the answers, we detected quite a subtle distinction between the ostensibly "correct" answer and the answer that she chose. The answer nominated as the correct response was a little more on point.

In light of the above, and the information provided to this office that indicates that qualified applicants for registration whose first language is English have failed to achieve the required scores to obtain nursing registration, I request that an urgent study be undertaken to ascertain whether these tests are actually fit for the purpose of assessing whether otherwise qualified registered and enrolled nurses have sufficient English proficiency to practise safely in their professional roles.

For example, consideration should be given to conducting a well-designed trial that involves selecting a random sample of currently practising Australian born and educated registered and enrolled nurses from different jurisdictions (of a sufficient sample size to obtain reliable results) and engaging them to sit the IELTS and OET tests, to determine whether or not these individuals would achieve the required scores to obtain registration.

If this trial or some other form of rigorous study suggests that either or both of these tests are not fit for purpose, an alternative test should be specifically developed that is fit for purpose.

PART B: Case Studies

Case Study 1

The applicant is an articulate Australian born citizen, who has lived in Australia for 31 of their 38 years and speaks English as their first language. The applicant spent 6 years living in an overseas country, where they completed secondary education, then returned to Australia. The applicant has been awarded a diploma in nursing (enrolled nurse qualification) from an Australian educational institution recognised by the Nursing and Midwifery Board.

Material provided to this office indicates that the applicant received favourable assessments during work placements, including positive assessments in relation to communication skills and competencies. In addition, the applicant is a National Association certified paraprofessional interpreter between English and another language, for both language directions.

Despite their personal circumstances, this applicant was required to undergo English language testing because they had not met the requirement in the standard of having completed five years full time equivalent of vocational, secondary and tertiary education taught and assessed in English in one of the seven countries specified in the standard. The applicant sat both the IELTS and OET tests with widely varying results. They were informed that their IELTS results indicated poor proficiency in English whereas their OET results indicated good English proficiency. However, because the applicant failed to achieve a sufficient score on the reading and comprehension component of the OET, they were unable to obtain registration as a result.

The applicant has indicated that they found the testing process daunting, and they had difficulty in meeting the costs of repeated testing. They also noted that people sitting these tests were advised to enrol in workshops costing several hundred dollars each to learn how to complete the tests.

This applicant recently sought tribunal review of the decision to refuse registration and was successful. The process was extremely stressful for the individual concerned. The applicant also complained that they received inconsistent and at times, incorrect advice from the regulator about the English language standard and their right to seek review of the decision to refuse registration.

Case Study 2

The office received a complaint from an individual who provided evidence that they were taught and assessed in English in India at both secondary and post-secondary education levels, and qualified as to practise as a nurse in India in 2000. Between 2000 and 2004 the applicant worked as a nurse in India.

In February 2004, the applicant moved to the United Kingdom. They successfully completed an adaptation program in the United Kingdom and were subsequently registered by the UK Nursing and Midwifery Council (the equivalent of a registered nurse in Australia). The applicant has provided evidence that they spent a total of 8 years working as a full time staff nurse in the UK. They also completed various training courses during that time in various aspects of nursing care which were taught and assessed in English.

The applicant applied to AHPRA for registration as a registered nurse in May 2011. They were originally advised that their nursing qualifications were not recognised as sufficient for registration as a registered nurse. Various letters and entreaties to AHPRA did not produce a different outcome.

In March 2013 the applicant was advised that their qualification was now accepted as suitable for registration as a registered nurse under a new framework for assessing the equivalence of nursing qualifications. However, the applicant was then advised that they would need to sit an English language test as prescribed in the standard in order to meet the English language skills requirement. This was the first time that the applicant was informed specifically that they would need to undertake English language testing.

The applicant is aggrieved about the way their case was handled. They have requested that discretion be applied so that they are not required to undergo English language testing, given their circumstances.

Case Study 3

This applicant for registration as an enrolled nurse who speaks English at home and at work has provided evidence that they have –

- completed tertiary education in India which was taught and assessed in English;
- lived in Australia for 12 years, with 10 years employment in the aged care sector;
- successfully completed a diploma in Australia to qualify as an enrolled nurse as well as successfully completing other certificates, short courses and training sessions all taught and assessed in English; and
- received government training subsidies to assist them to achieve their qualification so they could work as an enrolled nurse.

The applicant was required to sit an English language tests and after a number of attempts, recently achieved a sufficient score on the OET to obtain registration.

The applicant is concerned about the unwillingness to take their personal circumstances into account. They feel that no value has been placed on their studies in English both in Australia and in India. In a submission made to this office they have argued that the standard is discriminatory and that –

- people are educated in English in places other than the seven countries listed in the standard and that English is widely spoken in Asia today;
- there is no clear rationale for recognising education that is taught and assessed in English only in those seven countries listed in the standard;
- if the high level of English required to achieve sufficient scores in the prescribed tests is to be required from “outsiders”, it is only fair that all overseas qualified applicants for registration be required sit these tests, regardless of where they received their education;
- if a person can successfully complete a diploma of enrolled nursing in Australia, they should have sufficient English language proficiency to work as an enrolled nurse;
- AHPRA should be required to have regard to the circumstances of individual applicants, rather than just relying on the standard;
- consideration should be given to requiring English language competency test as a pre-admission requirement for acceptance into nursing courses in Australia. Then there would be no need to require graduates to sit an English language test when applying for registration; and
- government subsidies to encourage people to upgrade their qualifications and skills to address skills shortages are a waste of taxpayers’ money if people who successfully attain the qualifications cannot practise their profession once they graduate.