



23 October 2013

AHPRA  
On behalf of NMBA

By email: [criminalhistoryconsult@ahpra.gov.au](mailto:criminalhistoryconsult@ahpra.gov.au)

### **Consultation on international criminal history checking**

Thank you for the opportunity to provide feedback on this 2013 further round of consultation on international criminal history checking and in particular the additional option 5. The integrity and thoroughness of the process for criminal history checking is of both importance and interest to the Midwifery Council of New Zealand because of course under TTMRA, any midwife registered in Australia must be registered if she applies to be admitted to the register here.

Particular Issues of interest to us are:

1. Use of an external provider for checking
2. Provisional registration, before checking is complete
3. Domestic vetting for all applicants, whether they say they have lived here or not
4. Three or six months' residency rule, in place of the current 12 month rule

### **Options 2 and 5**

We agree that a criminal records check should be required in every case and sole reliance on self-declaration is not an acceptable option. This consultation is for the new Option 5 – applicants are provisionally registered on the basis of self-declaration and an external provider carries out a criminal record check that will subsequently confirm or revoke registration. The Midwifery Council currently uses Option 2 – the applicant must provide a police check as part of the application but we do not provisionally register applicants. Option 2 was one of the two favoured options from the previous consultation although the consultation paper does not specify which the leading option was. There were only 68 submissions which is not many.

### **External provider (Option 5) versus Applicant (Option 2)**

Are there any external providers currently, what can they offer and how much will this cost the applicant. AHPRA intends selecting a provider by tender. We recommend that this option should be investigated, if it has not been done already, before proceeding too far. This would give a better understanding of the availability and viability of Option 5 before too much effort was spent on it.

This option will reduce the personal effort burden on the applicant but increase the cost over Option 2. Applicants will have to pay the relevant fee charged by the off shore police agency plus the external provider's cost and profits.

Will an external provider be more efficient than the applicant? Although the provider may bring some expertise, we doubt that they will be able to circumvent or shorten the requirements of the overseas criminal records agencies. Therefore they will not be more speedy or efficient than the applicant requesting the check themselves, provided they have done it correctly.

There could be problems if the selected provider did not perform to an acceptable standard. This could leave a number of applications uncompleted and could involve some effort by AHPRA to sort out. It could possibly involve selection of a new provider, if a suitable alternative could be found, and difficulties managing a transfer of functions. If this happened some blame could be ascribed to AHPRA by applicants. The contract with the provider should include non-performance penalties but this is not a guarantee of performance. Selecting a provider by tender may mean the provider will tender low and be under resourced.

If all applicants were required to obtain the criminal records check themselves, as per Option 2, some may have difficulty understanding the requirements and may not follow the correct procedures, resulting in frustration and delays. They may contact AHPRA for help, thus using valuable resources. This does happen in New Zealand sometimes but it has not caused a serious problem to date. Failure to understand and comply with the requirement would not be a valid criticism of AHPRA if it were explained clearly. This can be avoided by having clear guide to obtaining a police check for every country, as is provided at the New Zealand Immigration Service web site. Do the Australians have a similar site? It is accepted that though that the use of an external provider will avoid these problems.

If the applicant is required to provide a criminal records check before registration they will be motivated. Any failure will be down to the applicant and AHPRA should not be criticised for this. The same motivation may not apply if the applicant was able to provide the criminal records check after provisional registration.

Can a third party provide gain access to a person's criminal records in every country (with a signed consent form), or do some countries only accept requests from the target person. This information is not provided.

### **Provisional registration pending criminal record check**

This is an interesting option. It does not necessarily mandate the use of an external provider. This system could also be used if the applicant were required to provide the Police check as per Option 2. But there could be problems with this option if the applicant did not provide the required report after being registered. They could cite difficulties and be unmotivated to put in the effort to overcome these. If the applicant had something to hide, they may procrastinate on this in the hope that it will be forgotten. They may just be lazy or disorganised and not get it done. AHPRA could therefore be involved with on-going arguments and threats to unregister the applicant.

Provisional registration is more suited to Option 5 as AHPRA would know that the report should be forthcoming. But even then there could be problems if the external provider did not perform. The applicant would not be happy if their registration was at risk through no failure on their part.

There need to be clear guidelines around what happens if a police check is not produced within an acceptable time, whether it is the responsibility of the external provide (penalties?) or the applicant (deregistration?).

One problem with Option 5, as noted, is that the applicant may be registered and may be practising, before AHPRA has determined that they are safe to do so. There could be some public disquiet at that.

### **Minimum residency period**

It appears that there is no logical argument why the criteria of three months' residency is better or worse than six months. Criminal records' checking is not an easy task and there must be some balance between effort and risk. So this may be a value judgement.

AHPRA cites the aim to avoid checking in the case of countries visited for holidays, presumably because overseas holidays could be numerous and do not offer much opportunity for mischief. But it is possible that an applicant committed an offence while on holiday which may not be an extremely rare event. It would be an unusual holiday that exceeded three month in one country.

The paper also says that a period of residency of less than three or six month implies that whatever they applicant did it was not serious enough to involve a prison sentence of that length. What is the definition of a serious offence? An offence may have a possible sentence of more than three months or six month but that does not mean the applicant must have been resident there for that period. They may have been sentenced to a term less than the maximum. They may have been sentenced to more than three months or six months but be released before then. The overseas jurisdiction may have simple chosen deportations as the easier option. However, the Council concedes that these are unlikely scenarios.

In New Zealand , twelve months' residency is the general standard.

### **Evidence of residency**

The proposal is to require a criminal records' check from every county where the applicant has lived for a specified minimum period. The question arises, how will AHPRA know where the applicant has lived? If the applicant wants to hide a criminal record for a country they have lived in, apart from the obvious countries such as their country of birth or current residency, they may simply not mention that country in their application. If they have criminal tendencies and a criminal record they may have no qualms doing this. Thus AHPRA will go back to relying on declarations. To some extent, this risk can be mitigated by careful attention to the applicant's supporting documentation, especially their CV, and investigation of any inconsistencies. However we can see no effective mechanism for completely addressing this risk.

### **Spent record**

The law on 'spent' convictions will vary between countries. You state you will have to rely on any declaration of spent conviction by applicants where this would not be revealed in a criminal convictions report. The Clean Slate Act in New Zealand provides that any person who qualifies under the Act can say legally say they have no convictions. It is an offence to require any person to disclose a conviction that can be suppressed under the Act.

The New Zealand Act has a provision that allows the disclosure of convictions that would otherwise be withheld, if the person being checked will be involved with the care of children or other venerable persons. Other countries may have similar provision but it is not known if this can be accessed externally, if available.

It is not certain how the law in a particular country can be applied in another country.

### **Criminal Record Check versus Police Vetting**

The consultation paper does not discuss the difference between checking an applicant's criminal record, and having them vetted which is more comprehensive. It may be worthwhile to discuss the differences.

Vetting would be the preferred option if it was available. It may be that these are internal options and that Police Vetting is only available to domestic organisations in the country concerned. We know that New Zealand and the UK both have this distinction. It is not known if this applies in other countries.

It looks like Section 79 of the National Law in Australia only provides for checking for convictions or criminal charges. If AHPRA believes that it does not have any right to check outside of these circumstances (e.g. for public safety reasons) then you may feel that vetting is not an option available to you.

### **Vulnerable Children's Bill and Safer Recruitment Guidelines**

We draw your attention to the current initiatives in New Zealand to protect vulnerable children and the associated screening and vetting of people who work with children, including health professionals.

The aim of the Bill is to amend existing Acts “to protect and improve the well-being of vulnerable children” especially in the “key result area of reducing the number of assaults on children”. The Bill is intended to result in two new Acts: a Vulnerable Children Act and a Child Harm Prevention Orders Act. A copy of the Bill and the accompanying policy statement can be found at [www.legislation.govt.nz/bill/government/2013/0150/12.0/whole.html](http://www.legislation.govt.nz/bill/government/2013/0150/12.0/whole.html)

Section 31 specifies that safety checks must include:

- Confirmation of the identity of the person
- Consideration of specific information
- A risk assessment that assesses the risk the person would pose to the safety of children if employed or engaged as a children’s worker.

Section 32 allows for regulations to be introduced that provide greater specificity around these requirements, along with additional requirements for safety checks. This section includes a provision which provides for regulatory authority processes to be recognised as part of the safety checking process. In particular, there is a provision which provides that the Governor-General may, by Order in Council, make regulations prescribing requirements for safety checks including “...providing that certain forms of safety checking undertaken by the licensing body of any specified profession or occupation may be treated as satisfying the requirement for safety checking, or for satisfying any 1 or more prescribed requirements for safety checking.” Currently, there is a second version of suggested screening and vetting guidelines for regulatory authorities circulating but these have yet to be agreed.

I hope this submission from the Midwifery Council is helpful.

Yours sincerely

  
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CEO/Registrar