Beyond its power and against the national interest

A response to Consultation Paper 6 of the Psychology Board of Australia entitled:
Registration standard and guidelines—Limited Registration for Teaching or Research

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The authors of this document are not legal practitioners. The document does not constitute legal advice. The content of the document should be read as a statement of the honestly held beliefs of the authors responding to the request by the Psychology Board of Australia for comment on "Consultation Paper 6", issued by the Board on 11 November 2010. Although the comments in this document are critical of Consultation Paper 6, we do not wish to imply any lack of good faith on the part of the Board in drafting the paper.

Summary

On 11 November 2010 the Psychology Board of Australia issued *Consultation Paper 6. Proposed registration standard—Limited Registration for Teaching or Research* [weblink].[1]

The crux of the Consultation Paper, so far as researchers, administrators, policy developers, regulators, managers, and lecturers in psychology are concerned, is the assertion by the Psychology Board of Australia that, "under the new scheme" [i.e., under the *Health Practitioner Regulation National Law*] they are all required to be registered by the Board.

Here we show that, by any reasonable reading of the National Law, the assertion of the Board is false. The broad sweep of people whom the Board would like to bring under its control are *not required* to be registered under the National Law.

In making its false assertion, the Board arrogates to itself a power which is beyond its lawful authority and rightly belongs to Parliament. The proposal contained in Consultation Paper 6:

(a) is founded on a misunderstanding by the Psychology Board of Australia of its own limited powers under the National Law, and

(b) would, if implemented, subvert the explicit object and purpose of the National Law and also subvert the clear intention of Parliament and of the Council of Australian Governments.

We recommend that Consultation Paper 6 be retracted and that it be redrafted in terms which are consistent with the National Law and with the powers of the Psychology Board of Australia under the Law.

[1] Note that text in blue in the electronic version of this document represents a clickable link, either to an external document, or to a location within the current document.

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1 Introduction

On 11 November 2010 the Psychology Board of Australia issued *Consultation Paper 6.* In the Consultation Paper, the Board proposed the introduction of a new category of registration—Limited Registration for teaching or research—and sought comment from the profession, from stakeholders and from the public on the draft standards for registration under the new category.

Unfortunately, in drafting the consultation paper, the Board conflated two distinct matters, treated them as one, and then asked for comment. The first matter with which the Consultation Paper is concerned is the development of a registration standard applicable to individuals who apply for registration under Section 69 (Limited registration for teaching or research) of the National Law. The second matter (which is not described as being open to discussion), is the assertion by the Board that, as a consequence of it having had the Australian Health Workforce Ministerial Council approve a very broad definition of psychological practice, the National Law now *requires* any person whose behaviour is captured by that broad definition to register with Board. We consider the two matters in reverse order.

First, we show that the claim of the Psychology Board of Australia in respect of the second matter—that any person engaged in any activity captured by the Board's broad definition of psychological practice must now register—is not only false, but also misconceived and founded on a misunderstanding by the Board of its own limited powers under the National Law. Furthermore, we show that, were the Board able to effect its claim of arrogated power, it would subvert the explicit object and purpose of the National Law, subvert the clear intention of the Parliament and of the Council of Australian Governments, and have a substantive negative effect on the national supply of health practitioners.

Second, we briefly consider the aspects of registration with which the Consultation Paper should have dealt.

2 Background to the National Law

The current national registration and accreditation scheme for health practitioners was the culmination of several years of negotiation between the Commonwealth and the states and territories, conducted within the framework of the Council of Australian Governments (COAG). The scheme, which is referred to in the COAG Agreement of 26 March 2008,[2] was brought into effect by the *Health Practitioner Regulation National Law,*[3] passed in each jurisdiction of Australia. For ease of reading, we use the terms, *COAG Agreement*, *National Law*, and *national scheme*.

The objectives and principles governing the national scheme were set out in the COAG Agreement and are incorporated into the National Law, as part of the law, at Section 3 (Objectives and guiding principles)—see §4.2.1 of this document.

[2] Council of Australian Governments (2008). *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions*. 26 March 2008. [web-link]

[3] The Health Practitioner Regulation National Law forms the Schedule to the *Health Practitioner Regulation National Law Act 2009 (Qld)* [weblink]. The Law as created in the Schedule is incorporated into the law of each state and territory of Australia by enabling Acts in each jurisdiction.

2.1 COAG approach to regulation of health practitioners

The National Law is drafted in terms that are very different from the previous registration acts in the various states and territories, at least in so far as the Law affects psychologists and the practice of psychology.

The general approach of much of the previous (state and territory) legislation was to regulate the profession of psychology by restricting the *practice* of psychology, as well as by restricting the use of the words "psychology" and "psychologist".[4] In contrast, COAG has taken an approach which is not only very different from the previous, state-based legislation, but is also considerably less[5] restrictive.

The COAG Agreement states that

> *the primary basis for regulation will be 'protection of professional title', with statutory offences to prevent unregistered or unauthorised persons using professional titles. — Clause 1.28(b)*

and, with regard to practice restrictions,

> *restrictions on the practice of a profession should only occur where the benefits of the restriction to the community as a whole outweigh the cost. — Clause 5.4(c)*

In Attachment A, the Agreement goes on to say that,

> *two professions, dentistry and optometry, will be subject to legislative definitions of core practices and offences to prevent practice by unregistered or unauthorised persons — Clause 1.28(c)(ii)*

and that,

> *elements of the practice of spinal manipulation may also require legislative protection — Clause 1.28(c)(ii)*

Psychology is not among the practices which are restricted.

2.1.1 Title restrictions

The National Law is the means by which Parliament has given effect to the COAG Agreement. The National Law incorporates (at s. 113 and s. 116) a more limited interpretation of the words 'protection of professional title' than one might expect from reading the COAG Agreement. The effect is that there are fewer restrictions in the National Law than are implied in the COAG Agreement—a matter to which we return on page 6.

2.1.2 Practice restrictions

At Section 3(3)(c), the National Law incorporates COAG's general statement about having only limited restrictions on practice; it then effects the limited restrictions by force of Sections 121–123. In keeping with the general statement by COAG, the Law prohibits the prescribing of spectacles, the manipulation of the human cervical spine, and the exercise of four specific dental practices, except when they are practised by an appropriately registered health practitioner.

[4] To enable educational institutions to function properly, state-based legislation frequently had to incorporate exemptions from regulation for psychologists who were working in universities.

[5] The naïve reader might, after reading Consultation Paper 6, be misled by the Board's assertions into believing that the current law is *more* restrictive than the previous regulatory framework.

Other than those few limitations, the approach of the National Law to the regulation of health practitioners is to treat registration as a privilege that may[6] be sought by people who *wish* to be registered, and which may be granted by Registration Boards to appropriately qualified people. This characterisation of registration as a privilege is best understood by recognizing that registration confers benefits (as well as some duties) upon registered practitioners; for example, only those health services that are provided by a registered health practitioner are likely to attract a rebate from Medicare.

The COAG approach, as it is effected through the National Law, has many features in common with the law of the United Kingdom, where, for example, any person may practise psychology, any person may call themselves a psychologist, and any person may teach psychology, but a person must not use the title Chartered Psychologist unless they have been approved by the British Psychological Society.

2.2 Consultation Paper 6 in the context of previous registration law

Unfortunately, the thinking of the Psychology Board of Australia, particularly in its drafting of Consultation Paper 6, appears to be based on the presumption that the National Law has the same objectives and principles as previous state and territory laws, and that the National Law regulates health practitioners and health practices to the same extent and in the same way as did previous state and territory laws. Such is not the case. The powers and functions of the Psychology Board of Australia are not the same as those of the previous state based Boards, and the approach to regulation is very different. The proposal put forward in the Consultation Paper is founded on a misapprehension by the Board of the purpose and scope of the National Law, and on an arrogation of power beyond that which is conferred by the National Law.

3 Textual analysis of *Consultation Paper 6: Proposed registration standard—Limited Registration for Teaching or Research*

Because most of the content of the Consultation Paper is predicated on a flawed argument and incorrect reading of the National Law presented in the first three paragraphs of Page 4 (Definition of practice) of the Paper, we critique those paragraphs in detail. It is somewhat tedious, but worthwhile nonetheless. Our purpose is to pinpoint the place at which the Psychology Board of Australia misleads itself as to its powers.

We present the text, or portions of the text, of the Consultation Paper in ***bold italic*** type. Our comments are in roman type.

[6] Note that "may" is permissive and distinct from "must" which implies an obligation.

3.1 Text and comment. Consultation Paper, page 4, para 1–3.

The initial registration standards approved by the Australian Health Workforce Ministerial Council on 31 March 2010 included those setting out the requirements for continuing professional development and recency of practice for registered psychologists and applicants for registration which are mandatory under the National Law.

First, note that that the words "mandatory under the National Law" in the context of "requirements for continuing professional development and recency of practice" do not mean what one might expect them to mean. It is not the requirements which are mandatory. Rather, the word "mandatory" refers to a required activity of the Board. Section 38 of the National Law demands that National Boards (including the Psychology Board of Australia) develop and recommend certain standards to the Australian Health Workforce Ministerial Council.

Next, note that the Australian Health Workforce Ministerial Council did indeed approve certain registration standards.[7] The registration standards that were approved were (a) those standards that set out the requirements that an applicant for registration in psychology must meet if they are to be registered, and (b) those standards that set out the requirements that an already-registered psychologist must meet if they are to demonstrate that they have engaged in sufficient ongoing practice to allow them to renew their registration.

Nothing in the approved registration standards *requires* a person to seek registration.

In developing these standards it was determined that a broad definition of psychological practice is necessary to recognise the breadth of the psychology profession and allow psychologists working in positions not involving the provision of direct clinical care to meet the continuing professional development and recency of practice requirements.

Therefore the Board's definition of practice is as follows:

> ***"Any role, whether remunerated or not, in which the individual uses their skills and knowledge as a psychologist in their profession. For the purposes of this registration standard, practice is not restricted to the provision of direct clinical care. It also includes using professional knowledge in a direct non-clinical relationship with clients, working in management, administration, education, research, advisory, regulatory or policy development roles, and any other roles that impact on safe, effective delivery of services in the profession."***

This definition of practice is broader than the definitions of previous psychology regulation authorities in Australia.

It is true that this definition of practice is considerably broader than the definitions of psychological practice that existed under previous State legislation.

[7] Australian Health Workforce Ministerial Council. (2010). Communiqué. 22 April 2010. [web-link]

However, the current definition serves a purpose under the National Law that is different from the purpose served by previous definitions.

Previously, state laws restricted the practice of psychology, and the state-based definitions served to define the practice that was restricted. In contrast, the definition of practice enunciated in Consultation Paper 6 has only an enabling function under the National Law and not a restrictive function. As the Board correctly notes, the broad definition ***allows*** (!) psychologists working in positions not involving the provision of direct clinical care to meet the continuing professional development and recency of practice requirements. If the broad definition did not exist, then a registered psychologist who wished to retain the privilege of registration might find it difficult to meet the continuing practice requirements for registration if they were employed largely in an administrative or policy making role.

The fact that this definition *allows* some, otherwise unregisterable, people to register under the National Law does not imply that those people *must* register.

Previously individuals who used their psychological skills and knowledge working in areas such as education and research were not considered to be engaging in the practice of psychology…

The statement is true, but at this point, the Psychology Board of Australia begins to mislead itself.

and therefore were not required to be registered ...

We have just passed the first misunderstanding on the part of the Board.

The statement above is (strictly) true, but incomplete. Not only were those individuals not required to be registered under the previous regulatory framework, but they might have been unable to register even had they wished to.

The Board should more accurately have said that, previously, a psychologist who was working in a "management, administration, education, research, advisory, regulatory or policy development role" could not be given access to the privilege of being a Registered Psychologist because they would not have been considered to be practising psychology. In contrast, the new scheme might enable them to register *if they so wish*.

... but under the new scheme they are required to be registered.

At this point, the Board has completely misled itself. The statement is false under the National Law.

For the statement to be true, the Psychology Board of Australia would have to be able to:

(1) show that the National Law prohibits the practice of psychology by any person who is not registered, or alternatively, show that the National Law confers upon the Psychology Board of Australia the power to restrict (prohibit) the practice of psychology amongst non-registered persons; and

(2) define (perhaps generally, or perhaps by example) the behaviours that constitute the restricted practice.

As we noted in §2.1 above, the objectives and guiding principles of the National Law include the statement that

> *restrictions on the practice of a health profession are … imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality—s. 3(3)(c)*

and as we also noted, the National Law incorporates just three such restrictions: restricted dental acts, prescription of spectacles, and human spinal manipulation.

However many of the individuals who are affected by this change …

The "change", to which the Psychology Board of Australia refers, is the purported exercise by the Board of a power—that it does not have—to demand that a certain (new) class of people register as psychologists.

… do not hold and are not undertaking an accredited postgraduate qualification and are therefore not eligible to apply for General or Provisional registration.

In fact, most of the people in Australia who "[use] their psychological skills and knowledge" in their professions do not even think of themselves as psychologists. Some of them will have gained formal qualifications in psychology, some will have had an extensive education and training in the discipline of psychology but gained a qualification in another profession, some will have had formal training in psychology but not gained any formal qualification, and some will be practising psychology without having had any formal training at all. They include parents (using behaviour modification with their children), advertisers (manipulating the public's attitudes), marketing professionals (testing public preferences), animal trainers (using operant and classical conditioning), and a host of others.

Hence it has become necessary to introduce a new registration category to allow these people to obtain registration and undertake psychological practice in the areas of teaching and research.

The statement is manifestly absurd. The right to apply for registration does not imply a duty to register.

It is not necessary under the National Law to be a registered psychologist in order to teach psychology (whatever that ill-defined thing might be). It is not necessary to be a registered psychologist in order to do research in psychology. And, while there might be good reasons to ***allow*** certain people to obtain the privilege of registration—even though their psychological practice is limited to teaching or research—the reasons for doing so are not those that are given by the Board.

Through this mechanism, such persons will be eligible to use the title 'psychologist'.

The statement is trivially true in so far as it says that a person who is registered as a psychologist under Section 69 (Limited registration for teaching and research) of the National Law will permitted to use the title 'psychologist'. But it is *not* true to suggest that, but for being registered under the National Law, a psychologist would not be entitled to call themselves a psychologist or to practice psychology.

To be clear, the National Law regulates certain health professions and the conduct of health practitioners. It prohibits a person who is not a registered health practitioner from claiming to be a registered health practitioner (Section

116). It also prohibits a person who is not registered in a particular health profession (e.g., psychology) from using a regulated title in a way which could reasonably be expected to mislead another person into believing that the first person was a registered health practitioner (Section 113).

Although one can imagine that there will be circumstances where a psychologist who is not registered under the National Law might need to be careful in the way that they describe themselves, the National Law does ***not*** control the use of the word *psychologist* in any generic sense and confers no power upon the Board to regulate the general use of the title.

3.1 Consultation paper: fees, transition period, etc.

In the absence of a genuine power of the Psychology Board of Australia to demand the registration of academics and researchers who are involved in psychology, most of the remainder of the Consultation Paper (i.e., virtually the entire text of pages 5–8) become meaningless. In particular, the implicit demands in the section entitled "Transition Period" are of no effect.

Curiously, the wording of the proposed standard itself—as it appears on pages 9–10 of the Consultation Paper—is legitimate though not particularly useful. That is to say, the wording of the proposed standard fulfils its lawful function in as much as it describes a standard that must be met by any person who would *wish* to register under Section 69 of the National Law. However, it is not at all obvious who such a person might be; see §5.1 of this document.

4 Effect of false assertion by the Board

4.1 Adverse effects generally

If universities, and individuals employed as educators and researchers (either within universities or elsewhere), come to believe that the Psychology Board of Australia has the power to demand, as it claims, that certain people register, then the effect will be to harm the national interest.

(1) Many of those people who are involved in the "practice" (as defined by the Board) of psychology but who have no formal qualifications in psychology—for example, an anthropologist teaching psychological interviewing skills, a statistician teaching psychological research methods, a person with an unfinished 3-year undergraduate degree in psychology, a psychology clinic administrator, a teacher, or a policy officer—will find themselves improperly restrained from practicing their profession.

(2) Those people who do have formal qualifications (of some kind) in psychology but who cannot, or do not wish to meet the requirements for registration under Section 69 of the National Law, will be improperly restrained from practicing their profession.

(3) The capacity of teaching institutions, such as universities, to recruit quality teachers and researchers from overseas will decline, and a consequent decline in the quality of education and training in psychology will accrue.

(4) The discipline of psychology will suffer as a consequence of a lack of diversity amongst those who teach, research, and otherwise engage with the discipline.

(5) The quality of the Australian health workforce will decline as a consequence of the decline in the discipline and in the quality of education and training. It will also decline as a consequence of the lack of external influences on the knowledge base of the health profession of psychology.

(6) The opportunities to develop a innovative, flexible, responsive and sustainable Australian health workforce will be substantially reduced.

(7) Direct costs will increase. Registration fees under the National Law are dramatically higher ($390) than they were under most state-based legislation, despite the objective (Section 3.3) that "fees required to be paid under the scheme are to be reasonable having regard to the efficient and effective operation of the scheme." The costs will initially be borne directly by affected individuals but in time, flow-on claims will mean that the costs are borne by employers, and then by the public.

(8) Indirect and non-monetary costs will increase. Individuals, who do not, in fact, have to be registered, will bear a new administrative burden relating to their own registration, adding to the very "red tape" that COAG wished to reduce.[8] Application fees will apply to the unnecessary registration of the individuals caught in the net of the proposal and a far larger class of people than previously will require professional indemnity insurance. The fact that some of those people might be covered by existing employer indemnity arrangements will not mean that costs do not increase. Rather, insurers will be forced to increase premiums for employers (universities) in line with the increased numbers of employees requiring professional indemnity cover.

Each of the listed adverse consequences is contrary to the purposes, objectives and guiding principles of the National Law and of the COAG.

4.2 Adverse effects contrary to law

Even had the Psychology Board of Australia not exceeded its lawful authority and function (which it has) in declaring that a new class of people must register with the Board, the exercise of that function—in the manner that it has been exercised by the Board—is contrary to the National Law because the objectives themselves form a part of the National Law.

4.2.1 Interpretation of the National Law

In case there is any doubt as to how the current National Law should be understood and interpreted, the Parliament drafted large sections of the National Law specifically for the purpose of helping a reader to understand it. In particular, the object of the National Law is clearly stated in Section 3 of the Law.

[8] "The scheme will provide for the protection of the public, facilitate workforce mobility, reduce red tape, facilitate the provision of high-quality education and training…"—Council of Australian Governments (2008). *Supplementary Information to that Contained in the Communique*. 18 April 2008. [web-link]

3. Objectives and guiding principles

(2) The objectives of the national registration and accreditation scheme are—

…

(c) to facilitate the provision of high quality education and training of health practitioners

…

(f) 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.

In addition, Section 4 of the Law requires that the Psychology Board have regard to the objectives and guiding principles of the Law when the Board exercises its functions.

4. How functions to be exercised (sic)

An entity that has functions under this Law is to exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme …

Finally, Clause 7 of Schedule 7 of the National Law provides guidance as to how the National Law should be read and understood.

Clause 7. Interpretation best achieving Law's purpose

(1) In the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation.

(2) Subclause (1) applies whether or not the purpose is expressly stated in this Law.

5 What about Limited Registration—Teaching and Research?

We have been diverted by the extraordinary claims of the Psychology Board of Australia from the stated purpose of Consultation Paper 6 which was to propose a standard for registration under Section 69. Our diversion was not intended to suggest that there should not be a standard for registration under Section 69, nor to suggest that the issuing a consultation paper in conjunction with the development of such a standard was a bad idea. Indeed, for the following reasons, it is proper for the Board to be concerned with the development of such a standard and for the Board to issue a consultation paper:

- Individuals are eligible for limited registration under the National Law provided that they meet certain requirements specified in Section 65(1) of the Law, including that of meeting "any other requirements for registration stated in an approved registration standard for the health profession."
- An approved registration standard is one which has been developed under Section 38 of the National Law and which has been approved by the Australian Health Workforce Ministerial Council under Section 12 of the National Law.

- Section 40(1) of the National Law requires the Board to engage in wide-ranging consultation about the content of any proposed registration standard or code or guideline.

5.1 With what should such a standard be concerned?

One might ask why the National Law includes a registration category called *Limited registration for teaching or research* if it is not for the purpose that the Board purports. The answer to that question is two-fold.

First, the National Law is a generic law designed to register health practitioners in nine very different health professions. There is no reason to suppose that every provision of the Law will be equally applicable, or equally relevant to every health profession.

Second, the necessity for a category of registration concerned with teaching and research is best understood in the context of a health profession such as dentistry or optometry. Consider, for example, a person who is not otherwise eligible for general registration under the National Law as an optometrist but who teaches optometry, and who might be expected—as part of his or her teaching duties—to demonstrate how to prescribe spectacles. Since the National Law prohibits any person from prescribing spectacles unless they are registered, it will necessary for the person to be registered, "to ***enable*** [them] to fill a teaching … position".[9] Advantageously, Section 69 provides precisely that enabling function.

A similar situation would exist were an otherwise unregisterable person to be employed in a research project that necessitated them making intra-oral adjustments to a new kind of denture. But for the possibility of registering under Section 69, the person would be barred from their research position by Section 121 (Restricted dental acts) of the National Law.

It is more difficult to envisage situations which would necessitate registration as a psychologist under Section 69. That is, it is more difficult to envisage a situation where a person would *need* to register as a psychologist to *enable* them to fill a teaching or research position in psychology, and consequently it is more difficult to determine what standard a person should be required to meet in order to be eligible for such registration. Nonetheless, Section 69 stands as an enabling provision to assist a person who needs to be registered but is not eligible for general registration. The section allows for the development of a standard for limited registration … and a suitably framed consultation paper is precisely what is needed to assist with that development!

6 Next steps

The next step for the Psychology Board of Australia is clear. Consultation Paper 6 should be retracted and an new Consultation Paper should be drafted in terms which are consistent with the National Law and with the statutory powers and functions of the Board.

[9] Section 69(1) states that, "An individual may apply for limited registration in a health profession to enable the individual to fill a teaching or research position." Note the words ***may***, and ***enable***. The section does not prevent a non-registered person from teaching or from conducting research.