College of Organisational Psychologists
Victorian Section

Comments for

The Victorian Legislative Council's Legal and Social Issues Legislative Committee

regarding the

Review of the Australian Health Practitioner Regulation Agency and the National Registration and Accreditation Scheme

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This is a public document prepared by the Victorian Section of the APS College of Organisational Psychologists, developed in conjunction with the College's National Regulatory Developments Working Party (NRDWP).

Preamble and Summary

The Victorian Section of the College of Organisational Psychologists (a College of the Australian Psychological Society) wishes to contribute to the Committee's review of AHPRA as it affects Victorian registrants under the National Registration and Accreditation Scheme (NRAS). (Appendix A contains the Legislative Council's announcement of the review.)

We offer our views constructively, in pursuit of the same broad goal that has driven the development of the NRAS so far – *the better protection of the public receiving professional services*. However we are also guided by other professional values and goals, beyond the regulatory concern for "safe" services - the state of our very diverse profession, its continuing viability and capacity to flourish, the welfare of and opportunities for its students, and related matters.

The broad conclusion of the College as a whole (not just its Victorian Section) is that the NRAS remains a scheme designed for the Australian domestic health sector only, and administered and overseen on COAG's behalf by health ministers, health departments and professionals with health backgrounds and perspectives. As such, its introduction has perhaps been as well managed including by AHPRA as one might realistically expect, especially given the NRAS's very large and complex structure (although that structure and its introduction and management have not been free of justified and substantial criticism).

But the NRAS is not a suitable model for psychology as a whole. *Nor is it a suitable regulatory model for the significant proportion of psychological services that are provided outside the "health" context (e.g. where the "client" is an organisation, school, sports team, or community).* The introduction and application of NRAS, intersecting with negative external developments especially in the universities, have been very damaging to the diversity of our profession, and in other ways that are becoming increasingly evident. AHPRA has been and is involved in some of these.

In this submission we begin by making some general observations. Then we address the Committee's Terms of Reference directly. We would welcome the opportunity to discuss the issues raised in this submission further with the Legal and Social Issues Legislative Committee.

General Observations

First, we anticipate that a comprehensive national review of all aspects of the NRAS will be carried out by an "independent authority" at the end of the first three years of operation (after 1 July 2013). This authority has yet (we understand) to be set up and staffed. *We urge that the Committee's review of AHPRA (a central unit in the NRAS) be transmitted to the national review when it is completed. The Committee's reporting date (29 November 2013) may pose a difficulty in regard to the national review if the latter*

proceeds very swiftly. We think it unlikely that such a difficulty will arise but some early consultation with the national review authority may be necessary to avoid it.

Second, we appreciate that AHPRA was given a very difficult task in trying to provide administrative support to the now 14 professional registration boards in the NRAS, which is a largely new and very complex system with ill-defined interrelationships among the very many bodies in it. On the whole, we consider that AHPRA has made strong efforts to identify and satisfy the principal role demands placed on it, in these trying circumstances.

In doing so, however, it may in our view have overdrawn its boundaries, and asserted more control and influence and incurred much greater costs than were envisaged when the NRAS was agreed by the various stakeholders. Registration fees have increased substantially every year, most recently under a CPI-based funding model developed by AHPRA that does not satisfy the objectives of the National Law Act (which specified that "(b) fees required to be paid under the scheme are to be reasonable having regard to the efficient and effective operation of the scheme"). *A CPI-based model ignores efficiencies and always increases fees whether warranted by the costs of activities or not.*

It must also be said that administrative tardiness has been frequently encountered, and the initial registration processes were bedevilled by problems (delays, poor data transfer from the previous State/Territory registration boards, etc.) that perhaps ought to have been anticipated. Since these kinds of problems are well known and some improvement has been evident, we will not comment further on them.

We regret to have to observe that AHPRA has been less than highly consultative and communicative about its discharge of its responsibilities, and its focus has been inward-looking, with little apparent attention to the issues and problems facing registrants in their professional work. This is instanced in its 2012-13 Business Plan (accessible at http://www.ahpra.gov.au/About-AHPRA.aspx) and it's Health Profession Agreement with the Psychology Board of Australia for 2012-2013 (publicly available at http://www.psychologyboard.gov.au/About/Health-Profession-Agreements.aspx). For example, the latter document includes reference to the Psychology Board developing a 'meta-code' for psychologists, when a code of conduct is already in place and no data has been shared about any defects in it. We certainly do not expect AHPRA (or the profession-specific registration boards) to try to take on the role of professional associations. They do not represent registrants in any sense. They are and must remain part of what is essentially an arm of government, even though AHPRA has "independent authority" status. But it should nonetheless be aware of and sensitive to the issues affecting the professions such as workforce changes, i.e. understand well the context in which regulation is being applied. Administrative support cannot be a context-free operation. Structurally and relationships-wise AHPRA is not well placed (in our assessment) to develop that awareness. It is embedded in a health sector and a broader regulatory structure preoccupied with health reform.

Third, it may be helpful to the Victorian reviewers of AHPRA to understand that for psychologists the NRAS is seriously problematic in regard to legal "coverage", and these arise from the founding legislation itself. The National Law Act's objectives are to regulate "health services" provided by "health professionals". The term "health professional" does not accurately apply to many psychologists; and the term "health services" (which legislatively is generally taken to mean "*services that result in an individual's personal health benefit*") does not apply to many psychological services, especially those involving families, groups, teams, organisations and communities. These "*not for individual health benefit*" services include services to bodies such as the Family Court, other courts (especially assessments for forensic purposes), senior military officers, senior government officers, senior business executives and so on. Here the client is typically the organisation headed by those persons. For example in the Family Court context the client is the Family Court (i.e. the judge), not the individual family members appearing before the judge. Psychological reports are written to assist the judge, not to represent or support either party in dispute before the court.

Thus important legal ambiguities and obscurities arise when the question is asked: *"Can clients who receive psychological services that are not of a 'individual health benefit' kind complain about the professional incompetence or misconduct of the service provider, and if so, to whom?"* (The answer is not simply "Yes, through the Psychology Registration Board or AHPRA or the Health Care Complaints Commissioner". Bodies such as the HCCCs have their own enabling (State/Territory) legislation which typically defines "health services" in the restricted "personal health benefit" way outlined above.) Given that the objectives of the NRAS are stated as to regulate the health professions and ensure health service delivery quality, it is arguable that *psychological services which do not provide "individual, personal health benefit" cannot legally be covered by the NRAS or by the Health Care Complaints Commissioners (except in NSW where a circular definition of "psychological services" as "services provided by a psychologist" is employed).*

AHPRA was not the source of these definitional and other legal problems, and is not the appropriate body to solve them. (The Health Ministers Council and individual State/Territory parliaments must do so.) But AHPRA seems to have failed to recognise them, a failure shared with the other units in the NRAS PsyBA. If legal advice has been obtained on these matters – AHPRA's financial statements show major expenditures on legal advice – then registrants, their professionals associations and stakeholders have not been made privy to that advice.

Fourth, many of the psychologists who work outside the health sector and who do not provide "health services" to their clients are concerned with PsyBA's over-emphasis on clinical/health psychology. This is seen in such matters the design of a "clinical/health" type of National Examination in psychology for multiple purposes, and similarly narrow training syllabuses that Universities and Supervisors must follow. Distortions are occurring not only in training syllabuses but also in the character of supervised placements for students and interns, away from the other specialised areas of practice that do not provide "health services", towards those which do. This approach by the

Psychology Board of Australia has been termed (as a “shorthand” expression) the “clinicalisation of psychology”.

Such “clinicalisation” of psychology has many negatives:

- Clients and segments of the public who use psychological services other than “individual health benefit” ones (e.g. organisations, communities) will experience diminished access to properly qualified and expert practitioners. New registrants will have far less specialised training and placement experience, leaving them with fewer specialist skills than today’s graduates.
- It denies access by students to appropriate postgraduate training and placements in their desired specialised areas of practice and is thus inequitable and unfair on them.
- It also forces up costs to the whole NRAS system and to other sectors than health, in that PsyBA has decided that all psychology graduates must be suitably trained for work in the health sector, even if that is not their career goal. Those wanting to work in other sectors (e.g. organisational psychologists, educational psychologists, sports psychologists, community psychologists) are now expected to qualify first as “health” psychologists by completing a more clinically-oriented post-graduate program at the expense of the content areas most pertinent to their desired specialism. Onerous supervision rules (written with clinical settings in mind) make the 2-year supervised practice component (years 7 and 8) almost untenable and unaffordable for those wanting to gain specialist endorsement. Supervisors of registrars working outside the health sector may end up providing more specialist training than the university programs. This all adds to the costs of entry into the specialism for the graduate, and to the costs to the community of maintaining and developing psychology specialists who work outside the health sector.
- It fails to continue to use the specialised training facilities in universities and the placements available outside the health sector because they are not identifiable as “health”, which is already leading to reduced diversity in psychological services, workforce type and workforce flow impairment, and thus impairment of specialised service delivery outside the health sector. In Victoria the situation is already very bad. Postgraduate programs in Organisational Psychology have been closed at the two major universities, Melbourne and Monash. Only one university (Deakin) continues to provide a PG program, and it is limited in the numbers that it can take.
- It creates a bottleneck that will interfere with the flow of graduates into the clinical areas of psychology in that some of the current very limited number of clinical placements will have to be provided to trainees whose interests lie in the other specialist areas of practice but who are forced to complete a clinical placement. This will adversely affect the health sector itself. (Alternatively or in addition, students and graduates seeking clinical placements who are not committed to a “clinical” career may well be denied access to them by the placement agency, even though the registration board insists that a clinical placement be done.)

- Current users of psychological services that are not for “individual health benefit”, including many government departments at all three levels (Commonwealth, State/Territory and local), face serious deprivation of a range of professional services, e.g. business strategy and management services; services designed to improve individual and organisational productivity and performance; applied research and program evaluation capability; personnel selection; training in leadership and staff supervision, human capital management; use of psychological knowledge in the design of equipment, jobs and work processes, and in accident assessment and research in air, sea and road areas; personal coaching for executives and sportspeople to improve individual performance; and many other applications of psychological knowledge (which is about the full range of human behaviour, not just abnormal behaviour and mental health disorders).

AHPRA is not directly responsible for this clinical over-emphasis, which flows mainly from appointments to PsyBA of psychologists with primarily a health sector background and orientation. But AHPRA has, so far as we can establish, shown no concern for the problems that arise from this over-emphasis, such as: problems experienced by overseas-trained organisational and other non-health types of psychologists in gaining recognition in Australia; problems with provision of Professional Development and Peer Consultation activities for psychologists working outside the health sector; and (at the system level rather than the individual level) the drying up of many of the non-clinical types of post-graduate psychology programs (Masters and doctorates) for a variety of reasons including PsyBA’s over-emphasis on clinical/health types of professional work.

We appreciate that it is not AHPRA’s brief to deal with most of these matters. However one would hope that AHPRA would be capable of picking up information about such negative developments (especially their workforce implications), asking PsyBA for an explanation, and communicating (or arranging the communication of) that information to the Ministerial Council and other relevant bodies.

Further, AHPRA sees itself as having a role in succession planning for registration board appointments (as mentioned in AHPRA’s 2012-13 Business Plan.) This involvement would be likely to reinforce the previous dysfunctional appointment process which saw private recommendations being made to the Australian Health Ministers by health departments, and which resulted in almost exclusively health-oriented appointees at least in the psychology arena. The sub-optimal level of diversity in PsyBA membership composition has, we consider, been one of the main reasons for the “clinicalisation” overemphasis in its many forms.

To achieve greater diversity in the Board’s composition (including in gender terms), we strongly urge the application of the Nolan Rules long adopted in Britain with such appointments. Essentially they should be merit-based and transparent in process, with objective descriptions of the tasks to be performed by appointees and associated criteria for appointment. Invitations to be considered for appointment should be publicly advertised. (See Appendix B for relevant extracts from the Nolan Rules.)

Addressing the Committee Terms of Reference: cost effectiveness, regulatory efficacy and protection of the public

Baseline for assessment:

The baseline for assessing better protection of the public (the main index of "effectiveness") is not "no protection" or "poor protection" previously. The previous jurisdictional systems, at least for psychology, were broadly functioning well and economically despite some operational shortcomings from time to time.

That was certainly true for Victoria, which introduced the first regulatory legislation for psychology in Australia in 1966. The need for a single national system was later (circa 1995) expressed largely in terms of administrative convenience especially *saving of legislative effort*. There was no reference then to evidence-based defects in the protection of the public.

Indeed Victoria was leading the way in regard to researching the causes of complaints against psychologists, found to be largely arising from the Family Court (some 70% of complaints). The Victorian Psychologists Registration Board (and since 2009 the Psychology Board of Australia) and the Australian Psychological Society (APS) entered into productive discussions with the Family Court's Chief Justice to address one disturbing aspect of these complaints – the use of a complaint as a legal manoeuvre by counsel representing the losing side as a stratagem for making an appeal (undermining the psychologist witness's evidence where it was considered crucial to the court's adverse decision). *This was an instance of successful cooperation between the regulator and the professional association that predictably will reduce complaints of this "stratagem" kind, and thereby reduce costs substantially.*

However the introduction pre-NRAS (in 1995) of a "health template" to cover under a single act the various professions with their own legislation (in Victoria) was the start of serious problems for those many psychologists who did not identify themselves as "health professionals" or offer individual health benefit-type services. This problem was unfortunately transported into the design of the NRAS.

Expected benefits:

The main expected benefits were stated in the NRAS Intergovernmental Agreement and the National Law Act in terms of greater practitioner mobility (through a single national register for each profession), less red tape especially for complaints by aggrieved clients, and clearer entry standards that prevented inadequately trained persons from entering a particular designated profession. Review of AHPRA should ask as principal questions*: "How (if at all) has the national scheme improved on the previous jurisdictional systems?"*, and *"If it has not, where has it fallen down and what can be done to achieve the desired improvements?"*

Actual improvements:

We do not see many obvious improvements so far.

- *Practitioner mobility:*

The only real "increased mobility" action has been to establish a national register (with more efficient electronic access and application/renewal processes). In an abstract sense, national professional service standards may be said also to improve mobility but this link is tenuous. (Nonetheless we support the development of such standards, if with important caveats.)

- *Information to public through protection of "title":*

The National Law Act as interpreted and applied by AHPRA and PsyBA protects only titles (and their grammatical derivates), and not *scope of practice*. (Nothing prevents unregistered people from providing psychological services providing the providers do not suggest that they are "psychologists" or that their services are "psychological".)

Another particular problem lies in the forced use in psychology of 'practice area endorsements' – a weak form of specialist title with some "scope of practice" implications that appear however to be unenforceable. They appear to protect titles that apply to specific practice areas, e.g. "Organisational Psychologist" (There are 9 such practice areas with associated protected special titles.) But registrants without those endorsements may use other titles with impunity provided the title does not imply possession of a practice area endorsement. (E.g. they may call themselves "business psychologists", "corporate psychologists", "selection psychologists", etc.)

- *Action against unregistered people:*

We are unaware of any action being taken to identify or discipline unqualified and unfit service providers who are not registered at all. Under the previous Victorian legislation, the registration board was said to have doubts about its legal capacity to deal with such people. Under the NRAS legislation there have been few if any such actions. If they have been, there has been little publicity about them, and no obvious deterrent impact. The disciplinary focus has remained on *registrants*, who are qualified and expert and who rarely offend. (See AHPRA data on Complaints, available on its website.)

- *Cognate legislation demands on practitioners and complexities re complaints processes:*

The retention of separate jurisdictional complaints-hearing bodies in the NRAS has meant that one "old" problem remains, that if a practitioner works across jurisdictional boundaries, s/he is expected to know and observe the different pieces of relevant legislation (Crimes Act, Working with Children Checks, Mental Health Acts, etc.) And jurisdictional complaints systems have messy 'intersections'.

For example a psychologist who is providing services in Wodonga to a resident of Albury may be complained against in one or other jurisdiction (Victoria or NSW), or both. The fact that PsyBA has combined some of the jurisdictions into groups for administrative purposes regarding complaints-handling (e.g. Victoria, the ACT and Tasmania) does not thereby combine the legislation to be observed, or reduce the number of separate jurisdictional avenues of complaint. In the Albury/Wodonga situation, in addition to AHPRA nationally and/or its local section "boards" in Victoria and NSW, the NSW Health Care Complaints Commission and the NSW Psychologists Tribunal could be involved in a complaint, as well as the Victorian HCCC and/or VCAT.

- *Clearer statements about entry standards*:

Such statements have been made by PsyBA (albeit with insufficient consultation with the APS and registrants). Latterly there has been a contentious PsyBA thrust to convert those entry standards into more clinically-oriented ones. PsyBA has gone well beyond this ("safe practice" though appropriate "entry standards") remit into the arena of post-entry specialist qualifications. It is trying to determine and specify "best practice" rather than "safe practice", and to set the directions for future development of the profession. *This is not the task of a regulator, as part of the apparatus of government. Assurances were given during the establishment of the NRAS that the independence of the profession and the universities from governmental interference would be guaranteed.*

- *Duplication and "red tape":*

There has been much unnecessary duplication of effort by AHPRA and especially PsyBA, the APS already having developed appropriate specialist types and its internal College entry standards and competency statements. Considerable associated costs have been incurred.

In addition PsyBA and AHPRA protocols about many professional matters, nominally "guidelines", in fact constitute "rules" and involve further "red tape", which the NRAS was intended to reduce.

- *Costs:*

The Scheme is much more expensive than the previous jurisdictional arrangements, directly for practitioners (who have to "self-fund" AHPRA and the registration boards administratively and in regard to complaints), and arguably indirectly for governments, costing in the 2011/12 financial year over $157M to run. This is for AHPRA and the registration boards alone. We can find little or no data about the costs of the other elements of the NRAS such as Health Workforce Australia.

Fiscal discipline is patently insufficient: AHPRA and the registration boards may charge registrants whatever they wish to fund their aspirations and activities, with no scope or mechanism for registrants to have a say or protest. That governments have no stake in paying some of the costs of the system is, we suggest, a recipe for a cavalier attitude towards expenditure that must be addressed.

Conclusion

We do not consider that the NRAS has yet produced the results intended. It has not thus far demonstrated greater efficacy and efficiency than the previous separate jurisdictional systems, save for improved practitioner mobility in some respects.

Many problems still exist. For example complaints avenues for aggrieved clients (and others) are still multiple and complexly interrelated. Hearings of complaints are still slow resulting in "justice delayed and thus justice denied". Practitioners may still be bankrupted by such delays or by multiple versions of the same basic complaint brought by an aggrieved party simultaneously or sequentially in those multiple avenues. 'Jurisdiction hopping' is still possible in some circumstances. Mandatory reporting requirements are still contentious and in sore need of review.

If these various problems were solved, the NRAS could perhaps be brought up to the desired standard. But *first a "paradigm shift" seems necessary* before those problems are fully recognised and understood, and workable solutions identified. The current paradigm is, we consider, an inappropriate "top down command and control" one, distrustful of registrants and their professional associations, and lacking in the flexibility and speed of change necessary to adapt to the fast-moving environments faced by registrants, educators, other institutions such as courts, the public and private sectors as both users and providers of services, and governments.

Many Consultation Papers have been issued by AHPRA and PsyBA, to which large numbers of submissions have been made at very substantial cost to contributors. But little or no feedback has been given by AHPRA or PsyBA about or in response to those submissions. This makes consultation appear tokenistic. It seems two-way dialogue is not encouraged – it is at best limited to Q&As at the end of a forum.

Greater collaboration and partnerships with stakeholders is needed, with more emphasis on trust in, full consultation with, and empowerment and involvement of stakeholders regarding policy developments and implementation.

At the same time greater accountability is needed. AHPRA and PsyBA must live within their means and not expect annually increased fee income or access to "legacy" monies (inherited from the previous registration boards) to cover excessive cost overruns, as has been the case with PsyBA (whose $1.5M legacy funds have been eroded by two-thirds already). Unlike all the other registration boards, PsyBA has classified students as "provisional psychologists" and charged them fees. We consider this to be in breach of the National Law Act, and grossly unfair to psychology students and inequitable. In financial terms, were it not for this income flow, the financial performance of PsyBA over the past two years would be even more worrying.

Solutions to these various problems are possible, some simple, others complex. We have some further, more detailed suggestions to make about them, should the Committee request.

We appreciate the opportunity for providing these comments.

When the College's comprehensive review of the NRAS is completed for the intended review by the "independent authority" that is yet to be established, we shall forward it to the Committee for its information.

Appendix A:

The basis for the Legal and Social Issues Legislation Committee's Review

The published statement from the Legislative Council reads:

"On 23 October 2012, the Legislative Council agreed to the following motion:

That, with reference to the 2009-10 and 2010-11 reports of the Australian Health Practitioner Regulation Agency, tabled in this House on 8 February 2011 and 7 December 2011 respectively, and any subsequent reports of the Agency tabled in this House, this House requires the Legal and Social Issues Legislation Committee to inquire into, consider and report on the performance of the Australian Health Practitioner Regulation Agency including the cost effectiveness, the regulatory efficacy of and the ability of the National Scheme to protect the Victorian public and the Committee is required to present its final report no later than 29 November 2013.

Written Submissions

The Committee invites submissions from any persons or organisations who wish to express views on any aspects of this Inquiry. All submissions are treated as public documents unless confidentiality is requested and granted by the Committee. Anyone who wishes to give evidence in a public hearing should indicate so in their submission.

Further information can be obtained from the Committee's Secretary, Mr Richard Willis, on (03) 9651 8696 FREE (03) 9651 8696.

Submissions should be sent to the address below by Friday 1 February 2013.

The Secretary
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Appendix B:

Relevant extracts from the Nolan Report (pages 11-12)

QANGOS (Executive Non-Departmental Public Bodies and National Health Service Bodies)

Appointments

33. The ultimate responsibility for appointments should remain with Ministers.

34. All public appointments should be governed by the overriding principle of appointment on merit.

35. Selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds. The basis on which members are appointed and how they are expected to fulfil their role should be explicit. The range of skills and background should be clearly specified.

36. All appointments to executive NDPBs and NHS bodies should be made after advice from a panel or committee which includes an independent element.

37. Each panel or committee should have at least one independent member and independent members should normally account for at least a third of membership.

……

42. All Secretaries of State should report annually on the public appointments made by their departments.

43. Candidates for appointment should be required to declare any significant political activity (including office-holding, public speaking and candidature for election) which they have undertaken in the last five years.

44. The Public Appointments Commissioner should draw up a code of practice for public appointment procedures. Reasons for departure from the code on the grounds of “proportionality” should be documented and capable of review.