



australian
nursing federation

Submission to the consultation on revision of
the Professional Indemnity Insurance
Arrangements Registration Standard; and newly
developed Guidelines: Professional Indemnity
Insurance for Midwives, by the Nursing and
Midwifery Board of Australia (NMBA)

May 2011

Lee Thomas
Federal Secretary

Yvonne Chaperon
Assistant Federal Secretary

Australian Nursing Federation
PO Box 4239 Kingston ACT 2604

T: 02 6232 6533

F: 02 6232 6610

E: anfcanberra@anf.org.au

<http://www.anf.org.au>

Introduction

The Australian Nursing Federation (ANF) was established in 1924. The ANF is the largest professional and industrial organisation in Australia for nurses and midwives, with Branches in each State and Territory of Australia. The core business of the ANF is the professional and industrial representation of our members and the professions of nursing and midwifery.

The ANF has membership of over 200,000 nurses, midwives and assistants in nursing who are employed in a wide range of enterprises in urban, rural and remote locations in both the public and private health and aged care sectors.

The ANF participates in the development of policy relating to: nursing and midwifery practice, professionalism, regulation, education, training, workforce, and socio-economic welfare, health and aged care, community services, veterans' affairs, occupational health and safety, industrial relations, social justice, human rights, immigration, foreign affairs and law reform.

The ANF was and continues to be a strong supporter of the move to the national registration and accreditation scheme for health professions in Australia. Given our commitment to the success of this important scheme, the ANF has participated in all consultations regarding the development of standards and guidelines relating to registration for the nursing and midwifery professions.

Members of the ANF have indicated significant issues regarding the clarity of the standard for professional indemnity insurance which was enacted on the introduction of the National Registration and Accreditation Scheme (NRAS) on 1 July 2010. The ANF has voiced concerns in relation to these significant issues to the Nursing and Midwifery Board of Australia (NMBA) during previous consultations. The current consultation on revision of the Professional Indemnity Insurance Arrangements Registration Standard; and newly developed Guidelines: Professional Indemnity Insurance for Midwives, by the NMBA therefore provides a most welcome opportunity to share on-going concerns.

Professional Indemnity Insurance Arrangements Registration Standard

The ANF provides the following response to the amendments proposed by the NMBA to the Professional Indemnity Insurance Arrangements Registration Standard.

The drafting of the current Professional Indemnity Insurance Arrangements Registration Standard (the Standard) has provoked discussion concerning the distinction between:

- a) Professional indemnity cover for a practitioner; and
- b) Professional indemnity cover for the practitioner's professional practice.

This distinction is illustrated by the amendment to the definition of "professional indemnity insurance arrangements" as proposed in the Board's Draft Standard.

Under the current Standard, the definition of professional indemnity insurance arrangements is as follows:

"...means arrangements that secure for the practitioner insurance from civil liability..."

The proposed amendment to the Standard is for the definition to be:

"...means arrangements that secure for the practitioner's professional practice insurance from..."

The ANF appreciates this aforementioned amendment is attempting to clarify the ambiguity to which we have drawn the NMBA's attention in the past.

The ANF notes the following are proposed amendments to the current registration standard:

- a) The inclusion within Requirement 1 of the expression: "they will not practice in the profession unless";
- b) The removal from Requirement 3 of the condition that: "nurses and midwives to whom this applies may be required by the Board in a limited number of circumstances to seek documentation from their employers, or education institutions to verify PII cover";
- c) The inclusion of reference in Requirement 3 to particular: "professional indemnity insurance arrangements" that should be considered by practitioners as part of their responsibility in understanding the "nature of the cover under which they are practising". These are civil liability, unlimited retroactive cover and run-off cover;
- d) The redrafting of the considerations in Requirement 6 to place "current employment status" at the top of the considerations and to add four new considerations for practitioners to assess; and
- e) The inclusion of a definition of retroactive cover.

In particular, it is noted that the proposed amended Standard retains the proposition under Requirement 3 that:

"Nurses and midwives in a genuine employment or student relationship would be covered vicariously by the employer's or education institution's insurance."

The ANF remains of the view that this proposition is misleading and confusing. Embedded in what is a statement of opinion, are a set of assumptions as to the existence of a contract of insurance and such insurance containing an extension of cover clause applying to the employer's employed nurses and midwives. There is no legal obligation on employers to provide insurance that extends to nurses in respect of their liability. If the NMBA consider

that the fact of genuine employment in Australia is of itself adequate to provide "appropriate" PII cover for nurses and midwives it should say so in clear terms. If not, then the proposition in Requirement 3 should be omitted.

In either case, the ANF suggests that the proposition should be deleted.

Furthermore, the structure of the proposed Standard is unsatisfactory. Under the heading of 'Requirements' the Standard contains seven paragraphs. Of these, five paragraphs identify what might be called 'requirements'. The other two paragraphs, numbers 3 and 6, are not properly 'requirements' of a Registration Standard at all.

Paragraph 3 includes a misleading statement about vicarious cover, and an expression of a 'responsibility to understand' and a requirement 'to consider' three particular forms of cover being 'professional indemnity insurance arrangements', a term differently defined elsewhere in the Standard, namely civil liability cover, unlimited retroactive cover and run-off cover.

Paragraph 6 is not a 'requirement' at all, but rather a statement of encouragement.

Apart from the difficulty of paragraph 3 not being a 'requirement', the paragraph is both confusing and unfair. It begins with an assertion, as the ANF has pointed out, of mixed fact and law of dubious veracity. It then, having created uncertainty, casts the responsibility on nurses and midwives to understand their cover and rather unhelpfully identifies three factors of concern. Paragraph 6 lists a further eight factors that nurses and midwives are encouraged to consider. It must be said that the document is unhelpful in any practical sense.

The proposed amendment to the definition of professional indemnity insurance arrangements to refer to the 'practitioner's professional practice' partially meets prior criticism. However, the definition of 'run-off cover' and 'retroactive cover' refer to:

- 'Insurance that protects a practitioner... when he or she was conducting that practice...'; and
- 'arrangements that cover the insured... in the course of the practitioner's professional practice'.

These definitions re-introduce the confusion relating to the distinction between cover for the practitioner or the insured and cover for the practitioner's professional practice. This confusion arises particularly in circumstances where Requirement 3 now obliges nurses and midwives to consider run-off and retroactive cover as elements of professional indemnity arrangements.

The most critical 'Requirement' imposed by the Standard, is that identified in Requirement 1. That is, that 'appropriate PII arrangements are, or will be, in place while they practice nursing or midwifery'. The rest of the Standard then essentially leaves it to the nurse or

midwife to decide what is and is not 'appropriate'. Requirement 3 imposes a responsibility 'to understand the nature of the cover under which they are practising' but does not go beyond that. Requirement 6 simply provides a list of matters nurses are encouraged to consider in assessing whether they have 'appropriate' professional indemnity insurance in place. As a 'Standard' it avoids establishing any PII standard at all, beyond that which is 'appropriate'.

It is the view of the ANF that the proposed Standard places an obligation upon nurses and midwives to make an assessment with reference to the factors identified in paragraph 6, which they may not be equipped to make. In many States and Territories the legal profession does not place the onus upon lawyers and barristers to make such complex assessment as to what constitutes insurance 'arrangements' appropriate to their practice - it designates approved insurance providers. If the legal profession has determined lawyers should not make their own assessments, the question must be asked, why the NMBA thinks that nurses and midwives are any better equipped to do so. The ANF contends that this would undoubtedly lead to many nurses and midwives under insuring. The consequence of this would undermine the public policy objective of the Standard and the objective in Section 129 of the *National Law*.

Thus, in essence, the draft proposed Standard remains confusing, unhelpful and unfair to those to whom it applies - nurses and midwives.

Draft Guidelines: Professional Indemnity Insurance for Midwives

General comment:

The Guidelines, for the most part, have potential to provide useful guidance for midwives in respect of their practice, employment, scope, reporting and ongoing professional development requirements.

Specific comment:

It is difficult to provide specific comment about the draft Guidelines until the issues the ANF has raised regarding the Standard have been addressed.

However, the following points are made in relation to Figure 1 on page 3:

- the first comment included in the right column refers to '...a jurisdiction where the National Registration and Accreditation Scheme (NRAS) has commenced'. This needs to reflect the fact that all States and Territories have now adopted the *National Law*;
- the fourth statement in the left column states 'Generally employer obliged to provide PII coverage for employees for practice under the terms of the employment contract - doctrine of vicarious liability'. It is the ANF's distinct understanding that employers, in fact, provide vicarious liability cover and not PII as has been asserted in this statement.

- Likewise the fifth statement in the left column states 'Midwife does not need to purchase if appropriate PII is provided by employer' which the ANF considers to be incorrect.

Following amendment of the revised Standard and subsequently the Guidelines, the ANF wishes to again review the draft Guidelines: Professional Indemnity Insurance for Midwives.

Quantum of Cover for Midwives

The ANF supports Approach 2 - that the Board does not specify a minimum amount of cover for professional indemnity.

As is the case for other health professional Boards, the ANF does not consider it is an appropriate role for the NMBA to stipulate a minimum dollar value PII quantum of cover for nurses and midwives. Treating midwives wishing to practice independently in a different manner from other health professionals would appear to be discriminatory.

The ANF submits that this would be an actuarial assessment undertaken by the indemnity insurer to gauge the degree of risk for each individual midwife. This assessment would take into consideration issues such as the midwives' practice, employment status, scope, experience and history of previous claims.

As stated previously, midwives are not generally equipped to make their own assessment to determine how much insurance cover is sufficient to manage risk. The ANF does not support a recommendation by the NMBA for indemnity insurance self assessment by the midwife.

Conclusion

The Australian Nursing Federation welcomes the opportunity to provide a submission to the consultation on revision of the Professional Indemnity Insurance Arrangements Registration Standard; and newly developed Guidelines: Professional Indemnity Insurance for Midwives, and the possible inclusion of a minimum dollar value of quantum of cover for midwives, by the Nursing and Midwifery Board of Australia.

The ANF Federal Office, in consultation with the ANF State and Territory Branches, has considered the proposed amendments and has had extensive discussion and has taken legal advice on this matter.

Given the concerns outlined in our submission, the ANF requests that the issues identified with the Standard are addressed and that the accompanying Guidelines document for midwives is amended accordingly.

As stated, the ANF wishes to be given the opportunity to provide further feedback on the redrafted Standards and Guidelines prior to finalisation of these documents.