

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM



28 July 2009

The Secretary  
Senate Community Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Re: *Inquiry into the National Registration and Accreditation Scheme for Doctors and Other Health Workers*

The Australian Peak Nursing and Midwifery Forum welcomes the opportunity to contribute our further comments to the Senate Community Affairs Legislation Committee Inquiry into the National Registration and Accreditation Scheme for Doctors and Other Health Workers. The comments included in this submission are in response to the recent exposure draft of the *Health Practitioner Regulation National Law 2009 (Bill B)*.

The APNMF identifies areas of common interest and concern relating to nursing and midwifery and attempts to work towards a position of consensus. The APNMF also takes joint action in areas of importance to nursing and midwifery and develops joint position statements which provide recommended policy directions for government and other relevant stakeholders.

The APNMF is comprised of the:

- Australian Nursing and Midwifery Council;
- Congress of Aboriginal and Torres Strait Islander Nurses;
- Australian Nursing Federation;
- Royal College of Nursing, Australia;
- Council of Deans of Nursing and Midwifery;
- Australian College of Midwives; and
- Coalition of National Nursing Organisations.

## Principles

The commitment of the APNMF to national regulation has been consistently contingent on the proposed scheme ensuring the protection of the public and maintenance of the highest standards of nursing and midwifery care to the Australian community through a system of regulation which supports health professionals. This includes a commitment to ensuring that the scheme developed is best practice in terms of protection of the public and is implemented carefully, thoughtfully and transparently.

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

The APNMF was pleased to note that some of the issues raised in its submission to the Senate Community Affairs Legislation Committee had been addressed in the draft **Health Practitioner Regulation National Law 2009** (Bill B). However, the APNMF is alarmed that additions to the proposed legislation, which had not been flagged prior or consulted upon, have suddenly appeared in this draft of the proposed legislation. APNMF will therefore comment on both those issues raised in the original submission to the Senate Committee that have not been addressed and those issues that have arisen in the draft legislation about which no previous consultation was undertaken.

## **Independence of the National Board**

The APNMF remains of the view that the most effective and independent structure for the regulation of nursing and midwifery is for the National Board to be established as a statutory authority, with perpetual succession, a common seal, the capacity to sue and be sued in its corporate name, the power to enter into contracts, acquire, hold, deal with and dispose of property, conduct general banking and make financial investments.

## **Membership and Representation of the National Board**

APNMF emphasises again the need for a board structure which supports good governance, which includes individuals with appropriate skills, has adequate representative numbers of practitioner members and includes four community members.

s45(5) *Health Practitioner Regulation National Law Bill 2009* (Bill B) refers to a requirement for individual representatives from each of the larger states and one representative for the combined smaller states and territories of Northern Territory, Tasmania and the Australian Capital Territory. APNMF does not believe that this composition supports adequate representation of the jurisdictions and is therefore unacceptable. APNMF has sought an amendment to the Bill to include eight practitioner members, one from each participating State and Territory, and four community members. This Board of 12 members meets the requirements of s 45(4).

As nursing and midwifery is the largest professional group covered by the scheme it is important that every state and territory is represented on the Board. Furthermore, the volume of registrants means that the professions can sustain a board of this size in terms of associated costs such as sitting fees.

## **Financial Independence of the Board**

As indicated in its submission to the Senate Community Affairs Legislation Committee APNMF maintains that the financial independence of the National Board is essential to enable the Board to undertake its function effectively.

APNMF has previously expressed the view of nurses and midwives that there must be no cross subsidisation of other professions in the scheme from the nursing and midwifery professions. Any such cross subsidisation would not be accepted by the APNMF.

APNMF is pleased to note that s23(d), s24(1)(b), s49(f), s256(3) of *Health Practitioner Regulation National Law 2009* (Bill B) go to the financial independence of the Board. We particularly note s24(1)(b) which now includes the word **must** rather than **may** in reference to agreement between the National Agency and the National Boards on the Health Professions Agreement.

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

APNMF note that s254(2), s254(5), s255(1)(a) through to (g) and s255(2), s256(1)(b) ensure that there is no cross subsidisation of professions and that each professions assets are used only for that profession.

APNMF also strongly believes that effective and independent function of the National Board is dependent on the Board having access to appropriate professional expertise through the employment of nurses and midwives and are seeking that s 24(1) (c ) include reference to professional staff.

## **Independence of the accreditation functions of the professions**

Throughout the consultation period APNMF has insisted that the accreditation functions of the professions must be independent of the Ministerial Council. This is recognised as accepted international best practice and articulated by the World Health Organisation.

Whilst this draft of the Bill does not include a requirement for direct Ministerial approval of accreditation standards there is still a degree of unacceptable control of standards by the Ministerial Council through:

1. the appointment of the accreditation authority s60(1);
2. control of the approval of registration standards s11; and
3. the ability to influence under conditions outlined in s10(3)(d) and 10(4).

APNMF is opposed to any provision allowing the Ministerial Council to initiate a change to an existing accreditation standard or give direction to boards regarding such standards or have a right of veto over board decisions regarding such standards and is seeking the removal of this provision from the Bill.

APNMF is also opposed to the reference in s10(4) to 'substantive and negative impact on the recruitment or supply of health practitioners to the workforce'. The purpose of regulation of the health professions is protection of the public. Any Ministerial influence on accreditation standards driven by a workforce supply focus is inappropriate. APNMF requires that this terminology be changed to reflect the focus of protection of the public.

In addition the APNMF notes s56 part 5 should read:

- (a) develop standards for courses leading to registration and endorsement
- (b) develop and approve codes and guidelines which protect the public

APNMF also suggests s57 (1) should read:

If a national board develops a registration standard or code applying to courses leading to registration or endorsement.

APNMF notes that the appointment of the accreditation body by the Ministerial Council, s60(1), whilst being the more independent of the pathways for accreditation of standards, continues to raise the issue of Ministerial influence through that appointment.

The Accreditation Committee pathway s62 part 6 division 2 is the least independent of the two pathways for accreditation of standards as the committee is appointed by the National Board and is directly responsible to the Board. Potentially any division within the Board regarding the appointment of the committee or related to the proposed accreditation standards could impact

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

directly on the function of the accreditation committee and subsequently place the accreditation process at risk.

As a result of the concerns expressed above, APNMF now seeks the removal of the Accreditation Committee pathway as a pathway for management of accreditation functions from the Bill.

APNMF notes that s71 refers to an examination for the purpose of s69(1)(b)(ii) as being conducted by the accreditation authority for the profession unless the Board decides otherwise. The section does not state who is responsible for developing the examination standards. This function should sit with the accreditation authority.

APNMF submits that the definition of accreditation standards used in the Bill is not satisfactory. The current definition reflects a competency standard. We submit that the definition should be as follows:

“a standard used by an accreditation authority to assess whether a program of study for the health profession and the institution that offers the program, provide graduates with the necessary knowledge, skills and professional attributes to practice the profession in Australia safely and effectively both on graduation and throughout their professional careers; and to guide continuous improvement of the program.”

The word ‘approve’ currently used in s65(2)(a) and (b) should also be changed to ‘endorse’ thus reinforcing the independence of the accreditation function.

APNMF would like it to be noted that the nursing and midwifery professions, through the Australian Nursing and Midwifery Council (ANMC) have already developed a national framework, standards and criteria for the accreditation of courses leading to registration, enrolment, endorsement and authorisation in Australia. The framework, standards and criteria were developed for each of the Registered Nurse, Enrolled Nurse, Nurse Practitioner and Midwife in consultation with the respective professions and other key stakeholders through extensive public consultation. The Accreditation Framework was completed in 2007.

The National Accreditation Standards and Criteria for these courses were completed in 2009. Both the Accreditation Framework and the Standards and Criteria are available at: [http://www.anmc.org.au/professional\\_standards/index.php](http://www.anmc.org.au/professional_standards/index.php).

The APNMF will be recommending that the Nursing and Midwifery Board of Australia endorse and implement these standards together with other standards which comprise the Professional Practice Framework for nurses and midwives in Australia. The APNMF therefore supports the adoption of these standards and the criteria as the initial standards suitable for nursing and midwifery under the national scheme.

## **Independence of Registration function of the Board**

APNMF is very concerned that the Ministerial Council control of the approval of registration standards under provision of s11 will impact the independence of the Board.

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

## **Requirements for Registration and Renewal of Registration**

APNMF is very concerned there is no requirement in Part 7 of the Bill for applicants for registration to demonstrate to Boards English language proficiency. As this is an essential part of competence to practise for health practitioners APNMF seeks its inclusion.

## **Renewal of registration or endorsement**

APNMF members have made several submissions in response to the consultation paper on registration arrangements. We note that s122(3) allows for a period of three months after the annual renewal date for practitioners to practise without renewing their registration or endorsement. Such a 'grace period' results in an additional administrative burden for the Boards and a concomitant increase in costs to registrants with no discernable benefit to the public in terms of protection. This needs to be remedied.

## **Recency of Practice Requirement**

S97(1)(c)(i) and (ii) requires if an applicant's qualifications were obtained more than three years before the day the application is made an entity nominated by the applicant provide evidence that the applicant has practised the profession within the three years before the day the application is made and give information about the applicants practice. Currently this requirement for nurses and midwives across most jurisdictions is five years.

APNMF is concerned about the impact of this on nurses and midwives continued participation in the professions. The majority of nurses and midwives are female and most will choose to take time for family commitments during their career. The imposition of a requirement to practice within a three year period or attend unpaid return to practice or supervised practice programs before they can return to work will act as a disincentive for nurses and midwives to return to practice after parenting. This requirement also has implications for workforce supply and costs related to the increased demand this requirement will place on return to practice and supervised practice programs.

APNMF requires the period be extended to five years for nurses and midwives.

## **Separate Register for Nurses and Midwives**

APNMF is pleased to note that s269(b) includes a requirement for separate registers for nurses and midwives as requested in our previous submissions. However an inconsistency is noted and requires correction in the Bill under s269 on page 127 which includes a Register of nurses that lists Division 1 and Division 2 in brackets after Registered Nurse and Enrolled Nurse. This is incongruent with the table under s129 *Restriction on use of titles* and should be removed from the legislation because the recognised terms in seven out of the eight states and territories (as we have stated in our previous submissions) are Registered Nurse and Enrolled Nurse.

## **Professional Indemnity Insurance**

APNMF is pleased to note the Federal Government's budget initiative to support a professional indemnity insurance scheme for Medicare eligible midwives in private practice.

APNMF remains concerned, however, that the Federal Government's legislation on professional indemnity does not propose to cover private midwives' practice where women elect to labour and birth at home. This means that the safety of the public will be gravely compromised by the

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

application on s101(a)ii to midwives when they are unable to purchase professional indemnity insurance to cover care of women who choose to labour and give birth at home.

It is clear that, although currently in Australia only a small minority of women choose homebirth, women will continue to make this choice. Application of an insurance requirement that cannot be met by a midwife is likely to result in women giving birth without a registered midwife in attendance. Unregulated birth attendants, without accountability to professional standards of competence, ethics and conduct, and without obligations regarding maintaining emergency skills, are likely to fill the vacuum created by the forced withdrawal of registered midwives from homebirth. This will make homebirth very dangerous, even for low risk, healthy women for whom homebirth is currently a safe option.

We further note the ANF South Australian Branch has proposed a commonwealth supported no fault insurance scheme for privately practicing midwives similar to the scheme introduced in New Zealand in 2001. The APNMF supports such a scheme being introduced and as such supports the ANF South Australian Branch submission in this matter.

APNMF is seeking to have this situation remedied immediately. APNMF proposes that Bill B be amended to allow an exemption in the instance where a health professional is, through no fault of their own, unable to access a professional indemnity policy from an APRA regulated insurer because no such policy is available in the market. Failing this, it is essential that state and federal health ministers identify and agree on ways to extend vicarious liability cover to midwives who are eligible to provide care for women choosing homebirth. It is unacceptable to propose the implementation of a regulatory system that has the effect of excluding an important part of the health workforce.

The APNMF is also concerned that in a sector such as nursing where 99% of practising registrants are employees, the legislation needs to be clear as to whether the intent is to ensure the individual practitioner is insured or whether each employer of practitioners has adequate coverage for all practitioners in their employ. It is not currently clear in the legislation or from consultation meetings whether the obligation to ensure insurance protection will be on the employer or on the registrant.

In some states of Australia it has been found that vicarious liability is not afforded automatically to employees. This discovery (only recently) is particularly problematic to nurses and midwives who may believe they have insurance coverage through their employer and find once the insurance is required the employer withdraws their support. Given that s69(d) includes arrangements made by the individual's employer it is imperative that we quickly move to clarify the extent of the liability that will be provided in all situations.

## **Privacy and Information Sharing**

APNMF is disappointed that provision for the collection of workforce data s263(3) from registered practitioners is not compulsory and reiterates the value of accurate data available in a timely manner in the assessment of workforce needs for the health professions. Information collected must be released further than merely the ministerial council/governmental institutions. The APNMF has asked that it be a requirement as recommended in the 2002 'Our Duty of Care' report that all workforce data be publically available.

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

## **Publicly available information**

The APNMF continues to support the provision of a registrant's employer postcode on the public register. The APNMF is very disappointed to note that s271(2)(b) and s272(2)(b) requires the publication of the suburb and postcode of mailing address. The APNMF does not, for reasons of privacy, agree with residential postcodes being provided as this may result in a registrant being identified and traced by a complainant or other person with intent to cause harm. This is particularly the case in rural areas.

Therefore the APNMF requests that private mailing addresses of registrants kept on the register are not available to the public but specified as only accessible by the board.

The APNMF believes that the previous names of registrants should also be included on the register.

APNMF opposes requirement under s266(1)(a)(b) and (c), to publish details of decisions made by the Board and under s271(j)(ii) to publish details of conditions imposed on a practitioners registration. APNMF believes that it is sufficient for a notation to show in the public register that conditions apply to the practitioner's registration and for further details the enquirer should be referred to the appropriate board. The board must then make a decision whether it is a legitimate enquiry and necessitates further details being released.

APNMF notes that the requirement to enter details of conditions into the register under s271(j)(ii) provides for exceptions under s272(1) enabling a National Board to decide not to include certain information related to conditions imposed.

APNMF is also seeking change to the wording of s266(2) from 'A National Board may decide not to publish information under subsection (1) about a particular decision if the Board reasonably considers it is in the public interest not to publish the information' to '... if a Board reasonably considers it not to be in the public interest'

## **Information sharing**

S265 does not indicate that information passed to other Commonwealth, State and Territory entities cannot be passed to a third party by the recipient organisation. The APNMF maintains that information exchanged to a third party must be used specifically for the purposes of registration and held securely following exchange.

The APNMF is concerned that the arrangements and connection between the registrants and the e-health arrangements remains unclear and believes that more information relating to this arrangement is required.

## **Division 4s35 – 37 Public interest assessor (PIA)**

APNMF is supportive of transparency and greater access to complaints process for consumers; however, we find the introduction of the PIA at this late stage without consultation to be unacceptable. The sudden introduction of the PIA does not engender any faith in the nursing and midwifery professions that further changes will not be introduced without broad consultation including the professions. Furthermore the introduction of the PIA also suggests no faith or trust in the national board.

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

It is the position of the APNMF that the regulatory system, including processes and procedures of the national board, should be sufficiently robust and accountable to ensure the public interest is served. The public interest is not served by imposing external analysis of every single complaint.

The APNMF strongly rejects the introduction of the PIA in its current form as it will:

- drive the cost of complaints up and therefore registration fees;
- subject registrants to the most severe test, despite appropriate action otherwise being determined by the board;
- be of questionable independence given the position remain under the control of the Ministerial Council; and
- add an additional layer, leading to further significant delays in the complaints process.

The APNMF therefore seeks to have the proposed introduction of the PIA in its current form be removed from the legislation.

## **The National Boards Powers of Immediate Suspension or Imposition of Conditions**

APNMF strongly argues that section 168(1)(a) dealing with the Board's powers of immediate suspension or imposition of condition, must include a provision for immediate suspension or imposition of conditions for reasons of impairment or a health related matter in the interest of public safety.

S148 relates to persons directing or inciting unprofessional conduct or professional conduct and associated penalties; however s148(2) exempts owners or operators of facilities from these penalties. APNMF believe that these penalties must apply to anyone who directs or incites unprofessional conduct or professional misconduct regardless of their status and requires that the provisions be amended to reflect this. It is important to note that the majority of nurses and midwives are employed by services providers and are not independent practitioners.

Regulation of services providers was briefly considered at the beginning of the NRAIP team's consultation process in 2008, however in hindsight it would appear that there was little or no consideration of the associated benefits to inform stakeholders so they could provide an informed judgement on such a proposal. Regulation of Service Providers as outlined in the *Nursing and Midwifery Practice Act (2008)* (South Australia) is considered an administratively efficient process designed to prevent unethical and unprofessional actions by services providers for the delivery of professional services. It would appear that no other legislation is available that provides a mechanism to ensure that service providers maintain high standards of nursing and midwifery care in the interest of the public and so the APNMF would seek inclusion of this in s148. APNMF recommends that consideration be given to making clear that s148 does not apply to consumers of healthcare.

## **Complaints Handling**

APNMF seek immediate remedy to the issue raised initially in the communiqué of the 8 May 2009 allowing the Minister of each state and territory to determine the complaint handling mechanism that is implemented in each jurisdiction. We note this is an improvement from previous proposals however; it has been the APNMF position for some time that the National Board in co-operation with the state and territory boards rather than the Minister that should have the authority to determine the most suitable mechanism for complaints handling.



# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

APNMF note at s184(1) that a health practitioner may bring a legal representative with them to the Professional Conduct panel but there is no entitlement to be represented before the panel. This is the only time in the exposure draft that representation of any description is mentioned. We therefore assume that representation of any other form is allowed and as such we require clarification regarding this issue.

The APNMF supports the right of health practitioners to access representation. To disallow this right would be a denial of natural justice and is unacceptable.

Presently many state and territory regulatory bodies deal with minor competency, health and conduct matters by way of informal monitoring processes. There seems to be a limited scope under the present draft Bill for these informal complaint handling processes to continue. The APNMF supports the ability of the National Board to engage in informal resolution of minor competency, health and conduct matters by way of inviting the health practitioner to enter into an undertaking to allow the Board to assess the health practitioner for an agreed period of time.

Further, the Bill seems to confuse the purpose of 'undertaking' arrangements. Sections 109, 198 and 209 provide that an action available is to 'require' a health practitioner to enter into an undertaking. The mandatory nature of this action essentially means it is the same as imposing a condition on registration. In the APNMF's view, Boards and Panels should have a less punitive power available to them. Boards should be able to invite health practitioners to enter into a period of monitoring by way of an undertaking.

## **Division 4 - Dealing with Complaints**

This division is inconsistent in the management of students. s155 outlines two grounds for complaint about a student, indictable offence or impairment, however s168 provides the Board with the power to suspend or impose conditions on a student where the student has, or may have, behaved in a way that constitutes unsatisfactory professional performance, unprofessional conduct or professional misconduct. Furthermore, s174 does not appear to provide the Boards with powers in relation to students; however, s178 refers to students. Serious conduct matters can and have arisen with students on clinical placements and so the APNMF submits this division needs to be revised to ensure consistency in regulation of students.

## **Area of Need**

The APNMF rejects any provision that provides capacity for Ministers to direct a Board to consider area of need applications for nursing and midwifery. We acknowledge that theoretically a Board could reject an application; however, they are still required to consider it within the directions of the Minister. APNMF consider that such a provision would greatly undermine the safe provision of care to the public and that the current broad geographical spread of practising nurses and midwives render such a provision unnecessary. This provision remains completely unacceptable to APNMF and as such we seek that nursing and midwifery are immediately excluded from the area of need provisions.

## **Consultation about registration standards, codes and guidelines**

The APNMF notes at s57 the requirement for consultation. However, s57 (2) indicates that if consultation as described at s57(1) does not occur that will not invalidate the standard or code. It seems completely incongruous to the APNMF that these two sections effectively negate the

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM

requirement for consultation. APNMF are seeking immediate amendment that provides at s57(2) that contravention of s57(1) will invalidate a registration code or standard.

## **Criminal History Checks**

APNMF note that in the draft legislation it is possible that a registrant will require more than one criminal history check. This cost will be prohibitive to many registrants and APNMF seeks some clarification of how this situation can be avoided by registrants.

Of further concern is the issue of spent convictions. In the State of Victoria there is no legislation which deals with the issue of spent convictions and therefore some registrants may have convictions recorded from many years or decades prior. These may be spent convictions, unrelated to the registrant's professional employment may still be used in the regulatory process.

## **Conclusion**

The draft *Health Practitioner Regulation National Law 2009 (Bill B)* has serious inconsistencies and newly introduced additions which have not previously been consulted upon with stakeholders. As previously stated the introduction at this late stage, without consultation, of the Public Interest Assessor does not engender any faith that further changes will not be introduced without broad consultation including the professions.

APNMF is very concerned that there will not be another opportunity to review the next draft of the legislation prior to its introduction into the Queensland Parliament. Of critical importance is the recognition that if the legislation is flawed the system will fail the community it seeks to serve. If insufficient time is allowed for legislative drafting and consultation with stakeholders on the development of the scheme this will be the case.

APNMF again seeks your support to ensure that the national registration and accreditation scheme developed is best practice in terms of protection of the public and regulation of health professionals and is implemented carefully, thoughtfully and transparently.

Yours sincerely



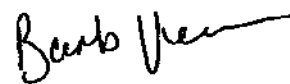
**KAREN COOK**  
Chief Executive Officer  
Australian Nursing and Midwifery Council



**GED KEARNEY**  
Federal Secretary  
Australian Nursing Federation



**SALLY GOOLD**  
Chair  
Congress of Aboriginal and Torres Strait  
Islander Nurses



**BARBARA VERNON**  
Executive Officer  
Australian Council of Midwives

# AUSTRALIAN PEAK NURSING and MIDWIFERY FORUM



**JOHN DALY**  
Chair  
Council of Deans of Nursing and Midwifery



**DEBRA CERASA**  
Chief Executive Officer  
Royal College of Nursing Australia



**KIM RYAN**  
Chair  
Coalition of National Nursing Organisations