



NEW SOUTH WALES NURSES' ASSOCIATION

In association with the Australian Nursing Federation

ABN 63 398 164 405

In reply please quote: BH:ABU

29 March 2010

The Committee Manager
Committee on the Health Care Complaints Commission
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Keenan,

Inquiry into the Operation of the Health Care Complaints Act 1993

Thank you again for the opportunity to contribute to the Inquiry into the Operation of the Health Care Complaints Act 1993 and to provide evidence at the public hearing of the Inquiry on 4 March 2010. We welcome the opportunity to provide further information by responding to the Committee's additional questions as outlined below.

- 1. Could you please explain to the Committee what, if any, input the NSW Nurses Association had in the development of the national scheme of healthcare accreditation and regulation? Do you have any view of the effectiveness of the consultation process, and what is your opinion of the model finally proposed?*

The NSWNA is committed to the scheme for national registration of health professionals. We look forward to the improvements that will be delivered by the scheme both for the public and health professionals, such as improved consistency in practice and education standards across the country, greater safeguards for the public, improved mobility of health professionals, and better promotion of sustainability within the health workforce.

The commitment of NSWNA, and the professions of nursing and midwifery, to national regulation is based on ensuring the protection of the public and on maintaining the highest standards of nursing and midwifery care to the Australian community. This includes a commitment to ensuring that the scheme is implemented carefully, thoughtfully and transparently.

NSWNA has therefore participated in all relevant consultation processes involved in the development of the scheme, at both state and national levels, in cooperation with other key organisations and stakeholders including the Australian Nursing Federation (ANF) Federal Office, and all other ANF Branches, and the Australian Peak Nursing and Midwifery Forum, to represent the interests of nurses and midwives in NSW.

During these consultations and working with the scheme's national project implementation team as well as NSW Health's Legal Branch and Health Ministers, considerable progress towards the development of a scheme which achieves the purpose of protection of public safety while preserving health professions' integrity has been achieved. We are satisfied that this has been maintained by the final model proposed for the scheme.

Most significantly from a NSW perspective has been the previous Health Minister's success in securing the continuation of the Health Care Complaints Commission (HCCC) and the current model for complaints handling in NSW and an associated fee rebate for NSW registrants. Preservation of the independence and integrity of the investigative process in complaints handling is of critical importance to all health professions in NSW.

While the national law will result in some differences in how registration processes are managed for nurses and midwives in NSW, the NSWNA is largely satisfied with the standards that will be provided by the national law, with NSW participating as a co-regulatory jurisdiction with respect to complaints handling.

We are pleased that the national law provides for the development of profession specific standards by national boards and we have worked with the Nursing and Midwifery Board of Australia in developing these standards.

NSWNA does, however, have some concerns regarding the extent of the powers of the Ministerial Council provided for by the national law. We appreciate that regulation of nurses and midwives in NSW has been subject to Ministerial control under the Nurses and Midwives Act 1991. However, this control has been judiciously employed ensuring that the professions of nursing and midwifery have guided regulatory standards for nurses and midwives in NSW.

We will therefore be seeking a similar judicious approach to matters related to registration and accreditation for health professionals from future Health Ministers. We welcome the national law's increased limits to the powers of the Ministerial Council's intervention in these matters that were agreed upon during the consultation process. However, Health Ministers must guarantee that any direction given by the Council in this regard will ensure optimum safety and quality of health care.

2. *In its original submission, the Nurses Association suggested that s 20 of the Act should be amended to make clear that assessment is required to determine that the complaint is not "malicious or vexatious". Do you consider that this has been a problem for your members, and if so, to what extent?*

The NSWNA's principle concern with respect to this issue is related to the timing of notifications to employers regarding complaints against our members. We would reiterate the importance of assessment occurring prior to notification to the employer to determine whether the allegation made is malicious or vexatious.

It has been our experience that in a number of cases the employer acts upon the notification by sanctioning the member or even dismissing them which, as it ultimately turns out has been unwarranted and unnecessary. This problem for our members could be avoided by the HCCC withholding notification until such time as the allegation has been found to have merit.

3. *I note also that s 27(1) of the Health Care Complaints Act provides that the Commission may discontinue dealing with a complaint that is "frivolous, vexatious or not made in good faith". Are you suggesting that the Commission has not in fact been doing this?*

Apart from a handful of cases, our experience has been that the HCCC does terminate complaints appropriately on discovering that they have not been made in good faith. However, in three cases this did not occur and caused significant concern for our members involved in those instances.

4. *The Association's submission also suggests an investigation by the HCCC commences from the point of assuming merit in the complaint-and the guilt of the health practitioner. This suggestion has been rejected by the Commission. Do you maintain that this is the experience - or at least the perception - of your membership, and if so, on what evidence do you base this?*

We maintain that this is our experience. This is with particular respect to the processes of peer review. The HCCC investigates on the basis that the complaint/allegations are true and it does not, in most cases conduct an independent investigation as to the merits of the matter. The peer reviewer is required to comment on the allegations made as being true and correct.

5. *You note in your submission that it is the Association's experience that there has been a continual rise in the number of complaints made against nurses, (specifically registered nurses, registered midwives and enrolled nurses). To what would you attribute this increase, and do you consider that the processes of the health care complaints system in NSW contributes to this?*

This is not just in the NSWNA's experience but also as documented in the Committee's discussion paper on the Operation of the Health Care Complaints Act 1993. There are a number of factors which may be contributing to this rise:

- Efforts by NSW Health towards a more open and less blame orientated environment are assumed to have resulted in a culture which is more comfortable with making complaints, however, this has not necessarily resulted in an equivalent rise in complaints against other health professionals;
- Increased numbers of nurses and midwives working increased numbers of hours; and,
- A more litigious community with increasingly unreasonable expectations of the health system.

Unfortunately and also more significantly for our members, we also believe that there is on occasion a propensity for health providers to apportion blame for an incident to an individual rather than acknowledge the systems failures that are in fact responsible. We have the experience of this occurring to our members. We believe that the HCCC has contributed to this issue by not ensuring that thorough assessments of the complaint to determine whether the issue was caused by a system rather than individual failure have been undertaken.

6. *Could you outline for the Committee the Association's concerns with the Health Care Complaints Commission's process of peer review.*

As we have explained in our previous submissions, the NSWNA has a number of key concerns with the HCCC's process of peer review:

- The peer reviewer is required to assume that the complaint is factually valid, which detracts from the objectivity of the reviewer's report;
- The request occurs prior to the completion of the investigation;
- The broad definition of 'expert' in the Act has resulted in the relevance of the 'expertise' being questionable;
- The HCCC appears to regularly use the same 'experts' regardless of the area of practice of the health practitioner, which can result in an inappropriate and/or subjective rather than objective appraisal of the complaint.

7. **Question Taken on Notice**

With respect to the NSW Department of Health's Service Check Register, does the Association support the possibility of an independent review of entries to the Register, if a practitioner disputes the entry?

The NSWNA would support an independent review of entries to the Register in this instance subject to being provided with more information on how the independent review will be conducted.

Apart from circumstances where entries are disputed we have general concerns about the Service Check Register (**the Register**) which we addressed in our submission to the NSW Department of Health on 8 December 2008.

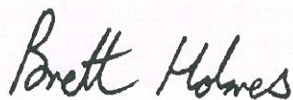
One of our concerns, relevant to the question above, is that in our experience the conduct of the disciplinary process itself is often lacking in procedural and substantive fairness. Too often matters, which have the potential to have significant impact on the lives of health practitioners, are based on decisions made by personnel without legal experience or a sound knowledge of the principles of natural justice.

These personnel are frequently acting on an imperative to eliminate conflict in the workplace and maintain the authority of management structures at the expense of achieving a just outcome. This can render decisions made at the level of disciplinary procedures unsafe to be used as a basis for ongoing assessment of employees and can lead to serious injustice including an adverse impact on the future employment prospects of health practitioners who find themselves on the Register.

We would therefore welcome the opportunity for an independent review of entries to the Register subject to the provision of more information on this process.

Thank you again for the opportunity to contribute to the Inquiry into the Operation of the Health Care Complaints Act 1993. If you have any queries regarding this response, please do not hesitate to contact me at this office.

Yours sincerely



BRETT HOLMES
General Secretary