



NEW SOUTH WALES NURSES' ASSOCIATION

In association with the Australian Nursing Federation

ABN 63 398 164 405

In reply please quote: BH:ML

25 November 2005

Mr Russell Keith
Committee Manager
Legislative Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000



Dear Mr Keith

NSWNA Response to Discussion Paper on *The Right to Silence*

The NSW Nurses' Association (NSWNA) appreciates the opportunity to comment on this Discussion Paper on *The Right to Silence*.

Please find attached our detailed response and answers to the questions posed in the Discussion Paper. We would like to be kept informed of any progress of the Discussion Paper.

If any further information is needed please do not hesitate to contact Mary Lovelock (Legal Officer) at this office.

Yours sincerely

BRETT HOLMES
General Secretary

INTRODUCTION

This response to the Legislative Review Committee is submitted on behalf of the members of the NSW Nurses' Association (NSWNA). The Association is the professional and industrial body which represents over 51,000 nurses in NSW. The membership of the Association comprises all those who perform nursing work, including Assistants in Nursing, Enrolled Nurses, and Registered Nurses at all levels, including management and education. The members of the NSWNA are also members of the Australian Nursing Federation (ANF), a federally registered industrial organisation, and form the NSW Branch of the ANF. The opportunity for comment on these issues is appreciated.

GENERAL COMMENTS

There are a number of areas in which the right to silence is relevant for nurses in their professional practice. The two most prominent are where a nurse is the subject of an investigation by the Health Care Complaints Commission (HCCC), and where a nurse is required to appear in matters before the Coroner. Both jurisdictions have legislation which specifically addresses the question of self incrimination. Both are jurisdictions where the right to silence is over ruled on the basis of being in the public's interest.

Nurses appear in these two forums, not as civilian witnesses, but as health professionals. As a consequence of their professional status they are under greater scrutiny. Both forums erode the traditional "right to silence" hopefully always and only in the public's interest.

Under s. 34A of the Health Care Complaints Act 1993 the Commission can compel a nurse to provide evidence, and failure to do so may constitute unsatisfactory professional conduct. A protection from incrimination is provided by s.37A however, this protection is only relevant for any subsequent civil or criminal proceeding. It does not offer any protection for a disciplinary matter which may result from the investigation. The protection from incrimination arises if either the person objects at the time, or the person was not warned that they may

object. The Association's view is that while the right to silence is over ruled, the legislation offers adequate protection by offering a protection from incrimination in other forums. The HCCC is a public interest body and unless health professionals provide information the Commission would be stymied in conducting investigations.

Nurses appearing in the Coroner's Court can also be compelled to give evidence however s.33AA allows for the giving of a certificate in circumstances where the nurse's evidence may tend to prove that the nurse has committed an offence or is liable for a civil penalty. The certificate provides immunity to the nurse in respect of that evidence in subsequent proceedings. The evidence the subject of the certificate is inadmissible in any proceedings in a New South Wales court (within the meaning of the Evidence Act). It does not provide immunity in respect of any disciplinary proceedings. The inquisitorial nature of an inquest relies on all the willingness of parties to provide information to the court.

Again, the Association's view is that although both jurisdictions have the power to compel a witness, there are adequate safeguards within the legislation. The issue for nurses is one that must be balanced with public safety.

The comments below relate specifically to matters touching on the provisions of the Coroner's Act and the Health Care Complaints Act.

Question 1.

To what extent, if any, should information obtained in breach of the privilege against self incrimination be subject to an immunity from use in proceedings relating to the imposition of a civil penalty or civil, administrative or disciplinary proceedings?

The current provisions do not provide immunity in respect of subsequent disciplinary proceedings for nurses. We strongly support the continuation of immunity from civil proceedings.

Question 2.

To what extent, if any, should evidence derived from information obtained in breach of the privilege against self incrimination should be subject to an immunity from use in proceedings against the person compelled to provide the information?

Agree with proposed principles.

Question 3.

What obligations, if any, should be placed on officials to inform persons compelled to provide information of their rights?

While s.37A of the Health Care Complaints Act provides immunity if either the person objects, or was not warned that they may object, the Coroner's Act does not. Under s.33AA the person must first object to giving the evidence before a certificate giving immunity can be addressed. We suggest that the Coroner's Act should mirror the provisions of s.37A of the Health Care Complaints Act.

Question 4.

Should a person be required to object to providing an answer in order to have immunity on the use of that answer?

It should not be incumbent upon the person giving evidence to object. As outlined above s.37A (2) (b) of the Health Care Complaints Act requires the person to be warned if an objection is not raised. An unrepresented party may be severely prejudiced by not being aware of their right to object to giving self-incriminating evidence.

Question 5.

What procedural safeguards, if any, should be provided where officials have power to compel the provision of self-incriminating information?

Agree with proposed principles.

Question 6.

Are the outlined principles appropriate when considering whether bills unduly trespass on the right to silence?

- (i) Nature of the right to silence**
- (ii) Justifications for abrogation**
- (iii) Future use of information obtained under compulsion**

Agree with proposed principles.