Submission No 46

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: NSW Nurses' Association

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Submission of the NSW Nurses' Association

to the

Inquiry into Opportunities to Consolidate Tribunals in NSW

November 2011

1. Introduction

The NSW Nurses' Association (the Association) is a union which represents nurses, midwives and nursing assistants in both the public and private sectors across New South Wales. Currently we have approximately 54,000 members.

The Association represents both the industrial and professional interests of its members. In particular, among other federal tribunals and courts, the Association regularly appears before the Industrial Relations Commission of NSW (IRCNSW), the Industrial Court of NSW (the Industrial Court), the Administrative Decisions Tribunal (ADT) and the Nursing and Midwifery Tribunal. Whilst the Association frequently represents individual members before such forums, we also often appear as a party in our own right before the IRCNSW and the Industrial Court.

2. Paramount Considerations

The Association notes that the Inquiry into Opportunities to Consolidate Tribunals in NSW (the Inquiry) is considering a range of options which may involve the consolidation of the IRCNSW, the Industrial Court, the ADT and the Nursing and Midwifery Tribunal.

In relation to the proposal to consolidate the IRCNSW and the Industrial Court with other tribunals, the Association urges the Committee to consider the following matters as paramount;

- It is crucial that the state of New South Wales continues to have a strong, independent and effective tribunal which acts as the conciliator and arbiter of industrial relations matters within the scope of the existing jurisdiction.

- The tribunal which acts as the conciliator and arbiter of industrial relations matters in New South Wales should inspire public confidence and respect. It should have the authority and reputation commensurate with the important work that it performs.

- Consolidation should not result in any new tribunal having less powers or functions than those of the present IRCNSW or Industrial Court (save for those embodied in section 146C of the *Industrial Relations Act 1996* (NSW) which the Association believes should be repealed for its manifest unfairness). Indeed,

the Association is generally in favour of a strengthening of the powers and functions of the industrial umpire.

- The ability of trade unions to appear both as a party and a representative in industrial relations matters should be unaffected by any consolidation.

- The specialised industrial relations knowledge of the judges, non-judicial members and commissioners of the IRCNSW and Industrial Court is a valuable resource for the people of New South Wales which should not be lost or derogated from. Indeed, it is a resource that should be used to the maximum extent possible.

- Those hearing industrial relations matters before any consolidated tribunal should possess specialised industrial relations knowledge. As such, industrial relations matters after any consolidation should continue to be heard by the commissioners, non-judicial members and judges of the current IRCNSW and Industrial Court.

In relation to health professional disciplinary tribunals the *Review of Tribunals in New South Wales Issues Paper* (the Issues Paper) does not address how any consolidation would interact with the existing state and federal regulatory regime. In 2009 the New South Wales Parliament passed the *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) which gave effect in this state to the National Registration Scheme for health practitioners. On 1 July 2010, the *Health Practitioner Regulation National Law (NSW) No. 86a* commenced and introduced the regulation of ten health professionals (including nurses) by nationally consistent legislation. In short, the New South Wales Government implemented a co-regulatory model for the regulation of registered health professionals employed in this state by adopting the parts of the National Law that deal with registration and accreditation and maintaining existing New South Wales legislation for complaints handling.

Consequently, in relation to the proposal to consolidate health professional disciplinary tribunals, the Association urges the Committee to consider the following matters as paramount

- The purpose, functions and powers of health professional disciplinary tribunals are entirely different to those of the IRCNSW, the Industrial Court and the other tribunals being considered as part of this Inquiry. In particular, a uniform

national approach to health professional regulation has been adopted in New South Wales.

- Any consolidation should not disturb the existing system of health professional regulation in New South Wales.

- Any future health professional disciplinary tribunal should inspire confidence and respect. It should have the authority and reputation commensurate with the important work that it performs.

- Health professional disciplinary matters should be dealt with separately from industrial relations matters. It is the Association's view that this must be the case in order for New South Wales to continue to deal with such matters in a manner which is consistent with the *Health Practitioner Regulation National Law (NSW) No. 86a.*

3. The Options

Putting to one side the question of whether consolidation is necessary or desirable, the Association urges the Committee to recommend that any consolidation of tribunals be structured in a manner which is consistent with the considerations set out above.

Subject to this, the Association believes that Option 1 (the establishment of an Employment and Professional Services Commission) set out in the Issues Paper is the best option, of those presented, for the people of New South Wales. We have formed this view for the following reasons;

- Option 1 should ensure that New South Wales continues to have a strong, independent and effective tribunal which acts as the conciliator and arbiter of industrial relations matters.

- A dedicated employment specific tribunal is more likely to inspire public confidence and respect. It is also more likely to have the authority and reputation commensurate with the importance of the work it would perform.

- Option 1 is more likely to ensure that the specialised industrial relations knowledge of judges, non-judicial members and commissioners of the IRCNSW and Industrial Court continues to be utilised in an industrial relations setting to the maximum extent possible.

- The Association is not opposed to considering how discrimination matters in the workplace can be harmonised with other industrial matters.

However, any future Employment and Professional Services Commission should have separate divisions or lists which ensure that industrial relations matters are dealt with separately from professional disciplinary matters. Reference is made in the Issues Paper to the 'super tribunal' created in Queensland. However, it is worth noting in Queensland that industrial relations matters continue to be dealt with separately by the Queensland Industrial Relations Commission, whilst health professional disciplinary matters are dealt with by the Queensland Civil and Administrative Tribunal. It is the Association's view that this kind of separation is desirable.

The Association notes the disadvantages of Option 1 as listed on page 8 of the Issues Paper. In particular, we note the concern regarding the under-utilisation of judicial members of the Commission. In this regard we propose that the part of any Employment and Professional Services Commission comprising judicial members be made an eligible State or Territory court for the purposes of the *Fair Work Act 2009* (Cth).

If the Committee were not to recommend Option 1, the Association's second preference would be Option 2A. The Association is concerned however that the operation of any employment list in the Supreme Court would involve additional cost and complexity. This would erode some of the distinct advantages of the Industrial Court for employees, employers and unions. The Association is opposed to any measures which impede access to justice in industrial relations matters. Accordingly, if Option 2A (or Option 2B) is ultimately adopted, the Association urges the Committee to recommend that proceedings in any employment list in the Supreme Court be conducted without any additional complexity or cost.

Option 2B is not favoured by the Association because, in our view, industrial relations and professional disciplinary matters should be dealt with separately.

Finally, the Association is opposed to Option 3, the creation of a comprehensive Civil and Administrative Tribunal, for the following reasons;

- Both the employment division and the professional disciplinary division of any such tribunal are at risk of being overshadowed and subsumed in such a structure. This would adversely impact upon the authority and reputation of both the industrial relations 'umpire' and the professional disciplinary arbiter in this state.

- There is a lack of synergy between both disciplinary and industrial relations matters and many of the other matters dealt with by those tribunals proposed to be consolidated into Option 3.

- There is a greater risk of the specialised knowledge of judges, non-judicial members and commissioners of the IRCNSW and Industrial Court being lost in such a structure, depending upon the way in which work is allocated.

Another option for the Committee would be to recommend that the IRCNSW and the Industrial Court remain in their present form but share their administrative resources and premises with other tribunals. This would provide savings through economies of scale without eroding the independence or identity of these industrial forums.

4. Lack of Detail

Whilst the Association acknowledges the details provided in the Issues Paper, we believe it does not comprehensively deal with all of the issues which arise from consolidations of the kinds proposed. In particular, the Issues Paper does not detail the following;

- how the proposed consolidations would interact with the *Health Practitioner Regulation National Law (NSW) No. 86a*

- how the proposed consolidations would be supported by legislation

- whether the government is seriously considering consolidating the Workers Compensation Commission (WCC) with other tribunals (page 2 of the Issues Paper mentions the WCC but fails to refer to it again)

Accordingly, we urge the Committee to recommend that stakeholders be provided with further opportunities to provide input into this Inquiry as well as any recommendations and/or reforms by government.

We thank the Committee for the opportunity to make a submission to this Inquiry.

Brett Holmes
General Secretary