

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE
TRIBUNALS IN NSW**

Organisation: NSW Nurses' Association

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Supplementary Submission of the NSW Nurses' Association

to the

Inquiry into Opportunities to Consolidate Tribunals in NSW

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1. Introduction

On 23 January 2012 Brett Holmes, the General Secretary of the New South Wales Nurses' Association (the Association) together with Officers of the Association, Linda Alexander (Legal Officer) and Stephen Hurley Smith (Industrial Officer) gave evidence before the Inquiry into Opportunities to Consolidate Tribunals in New South Wales (the Inquiry).

During the Inquiry one of the Committee Members, Mr David Shoebridge raised questions about the effectiveness of appeals of the decisions of the Nursing and Midwifery of New South Wales (the Tribunal).¹

The Association would like to make the following submissions with regard to propositions made by Mr Shoebridge.²

2. Current Situation

The Tribunal together with the other health professional tribunals operate under the provisions of the *Health Practitioner Regulation National Law* (NSW) No. 86a (the Act).

Section 162 of the Act provides that an appeal against the decision of the tribunal is to be made to the Supreme Court of New South Wales and can only be made on a point of law or in relation to the exercise of the powers of the tribunal under Division 3, Subdivision 6 of the Act (s149 -149D).

These powers can only be exercised by the Tribunal in the event that the complaint is found to be proven or the practitioner admits the complaint in writing to the Tribunal.

There is currently no legislative provision for a merits appeal of a decision from the Tribunal to the Supreme Court or any other Tribunal.

3. Problems With Current Situation

There are many problems with operation of the current situation, most of which relate to a reduced access to justice or avenue of appeal for the practitioners due to the narrow provisions of the Act and the costs associated with appealing to the Supreme Court of NSW.

We submit that the decisions against nurses are generally harsher than other practitioners and that is due to the intimate nature of their role and the role of the Tribunal to protect the public and the integrity of the profession.

¹ Transcript (23/01/2012) Pages 36-37

² Transcript (23/01/2012) Page 37

Generally any adverse decision made against a nurse or midwife in the Tribunal will result in their removal from the register. This means that they are no longer able to work in a their trained field and can leave them in a position where they have a very poor quality of life due to emotional and financial hardship which occurs when they are removed from the register. This is why it is necessary for them to have access to an avenue of appeal that does not involve the Supreme Court.

Merits Review

There is no opportunity for practitioners who come before the Tribunal to appeal an adverse finding of the Tribunal on the merits of the case.

We submit that this is necessary for the application of natural justice. In many circumstances, practitioners, particularly nurses and midwives, find themselves before the Tribunal in situations where there are mitigating factors which should be taken into account by Tribunal in making their decision and any subsequent orders.

In many situations, the mitigating factors are significant. However, these are not usually given a great deal of weight by the Tribunal due to the very high standards that are applied by the Tribunal in making its determination. Therefore there is a great need for the option of an appeal from the Tribunal on the merits of the case.

Costs

The risk of costs associated with an appeal to the Supreme Court is a concern for nurses who wish to appeal an adverse decision of the Tribunal.

Nurses and midwives make up the highest proportion of registered health practitioners in NSW. They also earn significantly less than other health professionals.

In addition, women with children or women nearing retirement make up a very large portion of those practitioners and many of those women work part-time.

Many nurses and midwives would not be in a financial position to retain their own legal representation for a tribunal hearing and that it is why it is one of the services that the Association provides to its members.

With the introduction of the Act in 2010, any nurse or midwife who appears before the Tribunal may have a costs order made against them.³

In circumstances where a practitioner has an adverse finding made by the Tribunal, they likely would also have an order for costs made against them.

As a result, some nurses have already elected to relinquish their registration because they cannot risk the chance of having an order for costs being made against them.

³ Schedule 5D ss13 Health Practitioner Regulation National Law (NSW) No. 86a

If they were to appeal to the Supreme Court, not only would they have to possibly engage legal representation (if not represented by the Association) but they would risk the possibility of a costs order being made against them by the Supreme Court.

Any costs order made by the Supreme Court would likely be significant as there are usually two defendants to the proceedings, the first being the Tribunal and the second the Health Care Complaints Commission.

When a practitioner comes before the Tribunal, they often do not have gainful employment as a result of the circumstances of the complaint or other personal circumstances.

This means that they are not in a position to pay any costs order made against them, especially an order for costs as a result of an unsuccessful Supreme Court appeal.

Delay

When a practitioner wishes to appeal the decision of the Tribunal, the Act provides that any such application be made within 28 days of the date of the decision.⁴

However, the Supreme Court process can take years before a decision is made. In some circumstances, practitioners may be suspended or have conditions on their registration pending the outcome of a decision by the Tribunal and the delays involved appealing the matter to the Supreme Court can significantly impede their ability to work and provide for their families.

Already, the length of time between the date of the allegation and the Tribunal hearing can be up to 5 years (and sometimes longer). This delay is often due to the time it takes the Health Care Complaints Commission to assess, investigate and file the complaint.

Lack of Expertise

At present the Tribunal is made up of two nurse members who impart their knowledge and expertise on the chair and the lay member of the Tribunal to assist them in making a decision which has regard to facets particular to nursing.

When appeals are heard by the Supreme Court, this expertise and knowledge is not present in the decision making process.

⁴ Section 162 *Health Practitioner Regulation National Law (NSW)* No. 86a

4. Recommendations

If the Committee wishes to make a recommendation, as proposed in the transcript,⁵ that the health professional tribunals be consolidated; we would submit that there would be a need to ensure that each tribunal be comprised in the current fashion, containing at least two members who are registered practitioners in the profession of the practitioner.

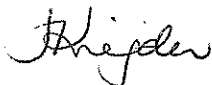
We submit that the Committee consider the possibility of making recommendations for amendments to the Act that would provide for an appeal from the Tribunal to be made to a higher tribunal, rather than the Supreme Court. We submit that any such appeal tribunal should contain members who are registered in the practitioner's profession.

We submit that due consideration be given to the issue of costs in any such tribunal and would submit that if a provision for the award of costs is required then either:

- a) a separate provision be made for practitioners who registered as a nurse or midwife; and/or
- b) any award of costs in such a tribunal be means tested with particular regard to the current employment situation of the appellant.

We wish to thank the Committee for their suggestions and invitation to provide further submissions on this topic.

Yours sincerely



JUDITH KIEDJA
Acting General Secretary

⁵ Transcript (23/01/2012) Page 37